QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC

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ADDITIONAL INSURED COVERAGE

Cincinnati Ins. Co. v. Harleysville Ins. Co., 2017 WL 4417604 (2d Cir., October 4, 2017). Cincinnati Insurance Company commenced a declaratory judgment action seeking a declaration that Harleysville Insurance Company was obligated to provide additional insured coverage to University of Rochester Medical Center and LeChase Construction Corp. in connection with the underlying lawsuit. The district court found that Harleysville had a duty to defend and indemnify the University of Rochester, but not LeChase. The plaintiff in the underlying lawsuit was an employee of The Kimmell Company who was allegedly injured while repairing a HVAC system at a building owned by the University of Rochester. LeChase was the general contractor for the HVAC repair project and J.T. Mauro Co., Inc. was LeChase's subcontractor for the project. Mauro then subcontracted with Kimmell which is the named insured under the Harleysville policy. Cincinnati alleges that the Mauro-Kimmel subcontract required Kimmel to add Mauro, the University of Rochester and LeChase as "additional insureds" under the Harleysville policy which included Endorsement CG 20 33 (the "Privity Endorsement"). The Second Circuit found that the Privity Endorsement does not confer additional insured status on either the University of Rochester or LeChase because the endorsement requires contractual privity and Kimmel did not enter into a contract with either the university of Rochester or LeChase. The Second Circuit relied upon New York case law holding that the Privity Endorsement requires that "there must be a written agreement between the insured and the organization seeking coverage to add that organization as an additional insured." The district court ruled contrary to this settled interpretation by holding that the Privity Endorsement conferred "additional insured" status on the University of Rochester because "[a] plain reading of the [Mauro-]Kimmel subcontract reveals that Kimmerl agreed to name…[the University of Rochester] as an additional insured." The Second Circuit reversed the district court's holding by finding that even if the Mauro-Kimmel subcontract could give rise to a breach of contract claim, the validity of such a claim does not modify the insurance policy to say something that it does not." Moreover, the Second Circuit held that even if a party were found to be a third-party beneficiary of a contract requiring the procurement of insurance coverage, that would simply mean that the party has standing to sue for breach of the provision of that contract and not that the insurance policy should be rewritten to name that entity as an additional insured.

TIMELINESS OF DISCLAIMER CLAIM BETWEEN CO-INSURERS

Zurich American Ins. Co. v. Liberty Mut. Ins. Co., 2017 WL 4422506 (2d Cir., October 5, 2017). Zurich instituted a declaratory judgment action seeking reimbursement for defense costs incurred in connection with the underlying lawsuit. Brooks Shopping Centers, LLC owns the Cross County Shopping Center which was operated by Macerich Management Company. In 2008, Brooks contracted with Whiting-Turner Contracting Company to serve as the general contractor for a construction project at the Shopping Center and pursuant to the contract, Whiting-Turner was required to procure insurance for itself, its subcontractors and their employees against claims arising out of the work. Whiting-Turner obtained such insurance from Zurich which also provided additional insured coverage to Brooks and Macerich. The Zurich policy contained a $500,000 deductible. Whiting-Turner entered into a subcontract for the work at the Shopping Center with Montesano Brothers, Inc. The subcontract required Montesano to carry general liability insurance and name Whiting-Turner as an additional insured. Montesano purchased an insurance policy from Wausau Business Insurance Company which provided additional insured coverage to any organization to whom Montesano was obligated by written agreement to procure such coverage for bodily injury caused by your acts or omissions or those acting on your behalf in the performance of your ongoing operations. The Wausau Policy also contained an exclusion (the "Construction Exclusion") providing that "[t]his insurance does not apply to…[a]ny construction, renovation, demolition or installation operations performed by or on behalf of you, or those operating on your behalf." The underlying lawsuit was filed by the plaintiff against Brooks and Macerich in which she claimed to have been injured while walking through the construction site at the Shopping Center. Although Whiting-Turner and Montesano were not named in the underlying lawsuit, Whiting-Turner reported the claim to Zurich which then demanded that Montesano and Wausau provide a defense and indemnity to Brooks and Macerich. As Wausau failed to accept the tender, Zurich ultimately retained counsel for Brooks and Macerich and a third-party complaint was instituted against Montesano. Although the underlying lawsuit was eventually dismissed by the court, by way of the declaratory judgment action, Zurich sought reimbursement for the defense costs. On appeal, Zurich did not contest that the claims asserted in the underlying lawsuit fell within the Wausau Policy's Construction Exclusion, instead it argued that under New York Insurance Law 3420(d)(2) Wausau waived the applicability of the exclusion on account of its nearly three-year delay in disclaiming coverage. The Second Circuit found that Zurich had given no reason to depart from the litany of New York cases holding that 3420(d)(2) does not apply to claims between insures (even though the Zurich policy has a $500,000 deductible). As such, the Second Circuit held that the district court did not err in concluding that Wausau's disclaimer of coverage under the Construction Exclusion was timely vis-à-vis Zurich.

LACK OF COVERAGE FOR BREACH OF CONTRACT CLAIM

J.W. Mays, Inc. v. Liberty Mut. Ins. Co., 153 A.D.3d 1386 (2d Dept., September 27, 2017). J.W. Ways, Inc. commenced a declaratory judgment action seeking a declaration that Liberty Mutual Insurance Company was obligated to defend and indemnify J.W. as an additional insured in connection with an underlying lawsuit brought by D. Owens Electric, Inc. J.W., the owner of a mall, and Owens, a general contractor, entered into several construction contracts, including a contract for the repair to the mall's roof. Owens, in turn, subcontracted the roofing work to PJ Exteriors, Inc., which J.W. alleged performed defective roof repairs and terminated the work before completion. Owens then commenced the underlying lawsuit against J.W. to recover damages for breach of contract and unjust enrichment and to foreclose on mechanic's liens. Pursuant to the construction contracts Owens was required to name J.W. as an additional insured; however, the Liberty policy only provided such coverage "with respect to liability from 'bodily injury,' 'property damage,'…caused in whole or in part by the acts or omissions of the additional insured or those acting on the additional insured's behalf." By affirming the lower court's finding of no additional insured coverage

on J.W.'s behalf, the Second Department stated "[t]he general rule is that a commercial general liability policy does not afford coverage for breach of contract, but rather for bodily injury and property damage." To hold otherwise would render an insurance carrier a surety for the performance of the insured's work. As there is no claim for bodily injury or property damage in the underlying lawsuit, additional insured coverage was not triggered on J.W.'s behalf under the Liberty policy.

BAD FAITH

Sea Tow Services International, Inc. v. St. Paul Fire & Marine Ins. Co., 699 Fed. Appx. 70 (2d Cir., October 27, 2017). Sea Tow Services International, Inc. brought claims for, inter alia, bad faith and unfair and deceptive trade practices against its insurer, St. Paul Fire & Marine Insurance Company in connection with the claims handling of an underlying lawsuit. The underlying lawsuit stems from a boating accident that occurred on board a vessel of one of Sea Tow's franchisees, Triplecheck, Inc. The plaintiff in the underlying lawsuit was an employee of Triplecheck and he sued both Sea Tow and Triplecheck, in part, under the Jones Act. A joint defense was agreed to and both Sea Tow and Triplecheck were in favor of seeking to achieve a global settlement. To the contrary, St. Paul opposed the global settlement strategy and sought to settle the claims against Sea Tow only. Sea Tow objected and claimed that a unilateral settlement would expose it to a cross-claim by Triplecheck for contractual indemnification. Nevertheless, the parties ultimately entered into a global settlement which dismissed all claims as against Sea Tow and Triplecheck. With respect to Sea Tow's claims against Triplecheck, the Second Circuit stated that "[e]stablishing that an insurer acted in bad faith when settling a claim can be a tough rode to hoe under New York law, and [Sea Tow] did not succeed in the undertaking." To prevail, the insured must show that the insurer's conduct constituted a gross disregard of the insured's interests, and that the insured lost an opportunity to settle the claim. There was no lost opportunity to settle the underlying lawsuit and the difference of opinion on pre-settlement strategy between Sea Tow and St. Paul did not, by itself, constitute bad faith.

VOLUNTARY PAYMENT

Ralex Services, Inc. v. Southwest Marine & General Ins. Co., 155 A.D.3d 800 (2d Dept., November 8, 2017). In August 2014, Ralex Services, Inc. entered into stipulations and orders of settlement in connection with an underlying Federal and New York State False Claims Act lawsuit which was filed in the United States District Court for the Eastern District of New York. Then, in September 2014, Ralex informed Southwest Marine & General Insurance Company of the underlying lawsuit for the first time and requested coverage/indemnification under the Health Care Organization Professional Liability, General Liability and Employee Benefits insurance policy Southwest Marine issued to Ralex. In response, Southwest Marine disclaimed coverage and denied any obligation to defend or indemnify Ralex in connection with the underlying lawsuit as well as the resulting settlements. Ralex instituted a declaratory judgment action seeking a declaration that Southwest Marine was obligated to provide coverage to and indemnify Ralex for the claims and the settlement of the underlying lawsuit. The Second Department affirmed the lower court's finding of no coverage. In that regard, the Southwest Marine policy issued to Ralex provided that "[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than that for first aid, without [Southwest Marine's] consent." The Second Department found that the foregoing policy language was unambiguous and in line with the fact that "New York law views an insurer's right to consent to any settlement as a condition precedent to coverage."

SEVERANCE

Isidore Margel Trust Mitzi Zank Trustee v. Mt. Hawley Ins. Co., 155 A.D.3d 618 (2d Dept., November 1, 2017). Isidore Margel Trust Mitzi Zank Trustee is the owner of real property in Brooklyn which it lease to 3720 Nostrand Laundromat, LLC. The Trustee was named as the only defendant in the underlying lawsuit commenced by Ludmila Burtman to recover damages for personal injuries she allegedly sustained when she

tripped on the sidewalk outside the leased premises. The Trust tendered its defense in the underlying lawsuit to Mt. Hawley Insurance Company as an additional insured on an insurance policy issued to the Laundromat. The tender was denied by Mt. Hawley. In response, the Trust commenced a separate lawsuit seeking a declaration that Mt. Hawley was obligated to provide it with a defense and indemnity in the underlying lawsuit and seeking, inter alia, against the Laundromat common law and contractual indemnification or contribution and damages for failure to procure insurance on the Trust's behalf. The Laundromat subsequently moved to sever the causes of action against it from the causes of action asserted against Mt. Hawley. The Second Department affirmed the lower court's denial of the motion. In arguing that the lower court improvidently exercised its discretion in denying the motion, the Laundromat asserted that it is generally recognized that it is prejudicial to have the issue of insurance coverage tried before the same jury that will consider the underlying liability claims. However, the Second Department pointed out that New York courts have recognized such potential for prejudice only where the liability claims are asserted against the party whose insurance coverage is also in question. The Second Department held that those issues were not presented because the liability issues relate to whether the Laundromat was negligent and the insurance coverage issues relate to whether the Trust is covered separately, as an additional insured, under the Mt. Hawley policy.

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