NEW YORK INSURANCE COVERAGE LAW UPDATE

2022 COMPILATION

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New York Insurance Coverage Law Update 2022 Compilation

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ADDITIONAL AND NAMED INSUREDS/PRIORITY

Fourth Department Holds Landlord Covered As Additional Insured Under Tenant's Policy For Accident On Driveway Of Leased Premises

Technology Insurance Company, as the liability insurer for a landlord, filed a declaratory judgment action against Main Street America Assurance Company, as the liability insurer for the landlord's tenant, seeking a declaration that Main Street had a duty to defend and to indemnify the landlord as an additional insured in an underlying personal injury action filed by a patron of the leased premises, a barbershop. In the underlying action, the patron alleged that he tripped and fell on a snow-covered hole in the driveway of the premises while walking from the barbershop to his vehicle. The New York Supreme Court, Appellate Division, Fourth De-partment, held that the landlord was entitled to a defense and indemnity under the tenant's policy, which provided additional insured coverage to the landlord for "liability arising out of the ownership, maintenance or use of that part of the premises leased to" the tenant. The court stressed that the driveway was "necessarily used for access in and out of" the barbershop and, therefore, was "included in the scope of the leased premises." The court also rejected Main Street's argument that its policy is "excess" to other insurance that insures for "direct physical loss or damage." The court found that this "other insurance" provision refers to property damage claims, not bodily injury claims like those at issue. [*Technology Ins. Co., Inc. v. Main St. Am. Assur. Co.*, 202 A.D.3d 1506 (4th Dep't 2022).]

District Court Holds That Putative Additional Insureds' Third-Party Complaint And Crossclaims Against Named Insured Did Not Trigger Additional Insured Coverage

A claimant sued Old Slip Property, LLC for injuries she suffered when a glass panel detached and fell on her while she was cleaning a revolving glass door on the 15th floor of a building owned by Old Slip (owner). The owner brought a third-party action against claimant's employer, PBM, alleging that PBM negligently caused the accident. The owner also brought a third-party action against the tenant of the 15th floor, which cross-claimed against PBM. The owner and tenant both sought additional insured coverage under PBM's policy, which covered them as additional insureds for liability "caused, in whole or in part, by" PBM's "acts or omissions." They argued that the tenant's crossclaims and owner's third-party complaint against PBM triggered a duty to defend because they allege that PBM negligently caused the accident in that claimant failed to look for defects or was cleaning the door in an unsafe manner. The United States District Court for the Southern District of New York noted that "[i]t is true that 'a duty to defend has been based on … allegations in third party complaints alleging negligence and seeking indemnification and contribution from the named insured.'" However, the court concluded that the claims at issue did not give rise to a duty to defend because when "peel[ed] back" the "pleadings simply show that PBM, at most, 'merely furnished the occasion for the injury.'" [*LM Ins. Corp. v. Fed. Ins. Co.,* 585 F. Supp. 3d 493 (S.D.N.Y. 2022).]

Second Department Holds Landlord Covered As Additional Insured Under Tenant's Policy Where Tenant's Employee Injured In Freight Elevator Used By Tenant

Bed Bath & Beyond leased third-floor retail and office space at a shopping center in Queens, and its employee was injured while using a freight elevator during his employment. The employee sued the own-er of the shopping center, which sought additional insured coverage under Bed Bath & Beyond's policy with Safety National Casualty. The policy provided additional insured coverage to the owner for liability arising out of the ownership, maintenance or use of the leased premises. The New York Appellate Division, Second De-partment, held that Safety National Casualty must defend and indemnify the owner as an additional insured, reasoning that the leased premises necessarily "included the elevator in question, which was used by Bed Bath & Beyond in the course of its business to provide it with access to the leased premises." [*Alexander's Rego Shopping Ctr., Inc. v. Safety Nat'l Cas. Corp*., 202 A.D.3d 721 (2d Dep't 2022).]

District Court Holds That Subcontractor's Insurer Not Obligated To Provide Additional Insured Coverage To General Contractor For Accident Involving Subcontractor's Employee

Hanjo Construction, a general contractor (GC), subcontracted with Manhattan Steel Design (Sub), which added the GC as an additional insured under its policy with United Specialty for liability for bodily injury "caused, in whole or in part, by" the acts or omissions of the Sub or those acting on the Sub's behalf. The Sub's employee was injured while working on a construction project, and he sued the GC. His complaint alleged that he was injured while employed by the Sub when he was struck by an object that fell from an elevated work site and that the GC was negligent and violated New York's Labor Law. United Specialty denied the GC's claim for additional insured coverage under the Sub's policy, and the GC and its insurer filed a declaratory judgment action against United Specialty in the United States District Court for the Southern District of New York. The GC argued that because the complaint and bill of particulars in the underlying action specify that the claimant was injured "while performing his job duties" for the Sub, the complaint creates a reasonable possibility that the accident was proximately caused by the Sub's acts or omissions, triggering United Specialty's duty to defend. The court rejected this argument and held that the GC was not entitled to additional insured coverage, agreeing with United Specialty that "the fact of employing" the injured claimant is not sufficient to establish the possibility that the employer

proximately caused the injury, further explaining that there was no allegation that the Sub created the conditions that led to the injury or that the Sub was negligent or otherwise responsible for the injury. [*Southwest Marine & Gen. Ins. Co. v. United Specialty Ins. Co.*, 2022 U.S. Dist. LEXIS 110910 (S.D.N.Y. June 22, 2022).]

Court Finds That Named Insured "Executed" Contract With Additional Insured, Triggering Duty To Defend

Stoncor, a flooring systems manufacturer, sent Surfacesys a proposed Master Installation Agreement to become an exclusive floor installation contractor. The Agreement required that Surfacesys list Stoncor as an insured on its insurance. The Agreement was returned to Stoncor via fax purportedly signed by "Jeffrey Caswell." In turn, Surfacesys became an approved Stoncor installer and performed 300 installation projects, including the in-stallation of a kitchen floor at the Grand Hyatt Hotel in Manhattan. A Grand Hyatt employee slipped and fell on the floor, and he sued both Stoncor and Surfacesys. Surfacesys's insurance policy with Peerless Insurance Company provided additional insured coverage to anyone Surfacesys agreed to add as an insured "in writing in a contract [or] agreement" that is "executed prior to the [injury]." Peerless would not defend Stoncor as an additional insured because the "Jeffrey Caswell" signature was not personally affixed by Mr. Caswell. The United States District Court for the Southern District of New York held a trial and found that the policy requirements were satisfied. The court stressed that Stoncor received a signature-bearing copy of the Agreement via fax, and Mr. Caswell testified that he could not recall whether he had authorized someone else to sign on his behalf. In addition, Surfacesys identified the Agree-ment as the contract governing its relationship with Stoncor in connection with the Grand Hyatt project and did not deny the validity of the signature. The court also rejected Peerless's argument that it had no duty to defend Surfacesys because the policy only extended additional insured coverage to "ongoing operations," finding that the allegations of the underlying complaint gave rise to at least the possibility of coverage. [*Stoncor Grp., Inc. v. Peerless Ins. Co.,* 2022 U.S. Dist. LEXIS 154184 (S.D.N.Y. Aug. 26, 2022).]

Eastern District Finds Duty To Defend Additional Insureds Under Policy Issued to Injured Claimant's Employer

A construction worker was allegedly injured at a construction project and sued the owner, general contractor (GC), and subcontractor (which was dismissed after the Workers' Compensation Board found that the subcontractor was the worker's employer). The owner and GC sought coverage as additional insureds under the subcontractor's policy issued by Hudson Excess Insurance Company. The United States District Court for the Eastern District of New York held that Hudson had a duty to defend the owner and GC because of the possibility that the accident was caused at least in part by the employer. The court pointed to allegations that the worker "tripped and fell on debris/construction material" and that his employer "was to provide site safety management" and was negligent, as well as evidence that the employer's work included cleaning. [*United States Specialty Ins. Co. v. Hudson Excess Ins. Co.*, 2022 U.S. Dist. LEXIS 180013 (E.D.N.Y. Sept. 30, 2022).]

CONDITIONS PRECEDENT/LATE NOTICE

Northern District Holds That Late Notice Bars Coverage Under Property Policy

In late 2016, a roofing contractor stepped through the insured's roof resulting in damage to the roof and internal water damage. The insured did not file a claim with its property insurer until early 2018, more than a year later. The insurer, Acadia Insurance Company, reserved rights, investigated and then disclaimed based on late notice under the policy, which required prompt notice of a loss. The United States District Court for the Northern District of New York granted summary judgment to the insurer declaring that the insured's late notice precluded coverage under the property policy, regardless of whether the insurer was prejudiced. The court found that the insurer did not waive its late notice defense because it reserved rights and then disclaimed. As such, "no reasonable jury could conclude" that the insurer "voluntarily and intentionally relinquished its late notice argument." The court also found that the insured's belief that the loss would not exceed its deductible was not a reasonable excuse because the policy required that "all losses are to be reported as soon as practicable if they are to become the basis of a claim" and, regardless, notice was late because the insured waited ten months to provide notice even after it knew the deductible would be exhausted. [*13 State St. LLC v. Acadia Ins. Co.*, 2022 U.S. Dist. LEXIS 83013 (N.D.N.Y. May 9, 2022).]

Second Circuit Finds That Insured's Claims For Coverage And For Breach Of Implied Covenant Of Good Faith Both Time-Barred By Policy's Limitations Provision

In January 2016, an insured discovered that its CFO was embezzling from the company. The insured submitted a claim under its policy with Hanover Insurance Company because it believed the embezzlement was a covered loss, but Hanover denied the claim. In turn, the insured obtained a judgment against the CFO and submitted a second claim to Hanover that was again denied. The insured sued Hanover in 2020 for breach of both the express terms of the policy and the implied covenant of good faith and fair dealing. The United States Court of Appeals for the Second Circuit held that both claims were time-barred under the policy's contractual limitations period that required the insured to bring any action "involving loss" within two years "from the date … [it] 'discovered' the loss" and defined "discovered" as when the insured "first become[s] aware of facts which would cause a reasonable person to assume that a loss of the type covered by this policy has or will be incurred." The court rejected the insured's argument that the term "loss" is ambiguous as to

Hanover's breach of the implied covenant of good faith because "[e]ven adopting [the insured's] proffered meaning of loss*", i.e.,* the loss for which the insured seeks coverage, the implied covenant claim is still time-barred. [*Sportsinsurance.com, Inc. v. Hanover Ins. Co*., 2022 U.S. App. LEXIS 30669 (2d Cir. Nov. 4, 2022).]

COVERAGE GRANT

Court Holds That Claims For Faulty Workmanship Did Not Allege A Covered "Occurrence"

The owner of a brownstone townhouse in a New York City Landmarks Preservation district in Brooklyn contracted with Vema-P to restore the building's façade consistent with the standards of the New York City Landmark Preservation Commission (Commission) and Department of Building (DOB). The Commission's work permit prohibited the use of any coating on the building's façade. Vema-P violated the prohibition by applying coating to the façade. Vema-P attempted to remove the coating, but it resulted in a non-uniform façade, additional construction, the presence of scaffolding allegedly diminishing the rental values, and the hiring of another contractor to return the façade to a Landmark approved condition. The owner sued and obtained a default judgment against Vema-P and then sued Vema-P's insurer for coverage. The court granted the insurer's motion to dismiss, reasoning that it is "well-settled" that "occurrence"-based commercial general liability policies do "not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product." Although the owner alleged that it was damaged by Vema-P's negligent work, the court found that the "the sum and substance" of the dispute is the owner's contention that Vema-P failed to perform the renovation work in accordance with the required standards as promised and that a "contract default under a construction contract is not transformed" into a covered "occurrence", i.e., accident, by alleging negligent performance or construction. The court concluded that even if there was a covered "occurrence", various uncontested exclusions would apply. [*589 7th St. LLC v. Certain Underwriters at Lloyd's*, 2021 N.Y. Slip Op. 32792 (Sup. Ct. N.Y. Cnty Dec. 21, 2021).]

Southern District Finds No Coverage Under Homeowners Policy Because Premises Was More Than A "Four-Family Dwelling"

The insured, an owner of a multi-unit building in Brooklyn, sued his homeowners insurer, Nationwide, after it denied coverage for losses the insured incurred as a result of a fire in the building. The policy covered the "residence premises," defined as the "one, two, three or four-family dwelling" at "the address shown on the Declarations." However, the building contained at least six apartment units. The United States District Court for the Southern District of New York granted summary judgment to the insurer, reasoning that six-family dwellings are not covered under the policy. The court rejected the insured's "hair-splitting" argument that the language of the policy was ambiguous because it uses the phrase "family dwelling" instead of "unit building". The court also rejected the insured's argument that Nationwide should have inspected the property before issuing the policy. [*Koczwara v. Nationwide Gen. Ins. Co.*, 2022 U.S. Dist. LEXIS 84485 (S.D.N.Y. May 10, 2022).]

Southern District Holds That Claim For Unjust Enrichment Not Covered Claim For "Property Damage"

The owners of a Manhattan apartment hired Zale Contracting to renovate their apart-ment. After the apartment's sprinkler system failed, Zale, with the owners' consent, allegedly repaired the damage caused by the failure and purchased and installed new materials, resulting in additional costs of $280,000. When the owners refused to pay, Zale sued them for "unjust enrichment." The owners tendered the suit to their homeowners insurer, Executive Risk Indemnity, which disclaimed, and the owners filed a declaratory judgment action. The United States District Court for the Southern District of New York upheld the insurer's disclaimer, agreeing that the suit was not for covered "property damage." Although the apartment was damaged by the sprinkler failure, the court opined that Zale did not seek to hold the owners liable for that property damage. Instead, Zale's complaint sounded exclusively in unjust enrichment, alleging that the owners were liable for the cost of the additional labor and materials needed after the sprinkler failure. The court also found that even if Zale did allege property damage, the exclusion for "property damage to property owned by any covered person" would apply to bar coverage. [*Godfrey v. Executive Risk Indem. Inc.,* 2022 U.S. Dist. LEXIS 118004 (S.D.N.Y. July 5, 2022).]

First Department Finds That Excess Policy May (Or May Not) Be Triggered Before Primary Policy In Another Year

Burlington Insurance Company issued primary policies to a contractor in 2013-14 and 2014-15, and Century was the excess insurer for 2013-14. The contractor was sued for property damage resulting from its construction work during an unspecified time, and Burlington filed a declaratory judgment action as to the availability of coverage. The trial court granted Century's motion to dismiss, finding that its excess policy is necessarily triggered after Burlington's primary policies, but the Appellate Division, First Department, reversed. The court reasoned that the Century excess policy states that it is excess to "the available limits of 'controlling underlying insurance'", *i.e.,* only Bur-lington's 2013-14 policy, and that Century's excess "other insurance" clause applies "only when two or more policies provide coverage during the same period". The court also found that Century did not present documentary evidence supporting its contention that coverage will be allocated on a pro rata basis among available policies, resulting in all primary

policies being exhausted before Century's policy is reached. As to Century's argument that case law addressing other "long-tail" claims support its argument, the court opined that Century had not established that the underlying property damage would present similar difficulties in allocating the damage to particular policy periods. [*Burlington Ins. Co. v. New York Constr. & Renovation, Inc.*, 2022 N.Y. Slip Op. 06742 (1st Dep't Nov. 29, 2022).]

DUTY TO DEFEND/INDEMNIFY

Second Circuit Finds That Liability Limits In Facultative Reinsurance Certificates Did Not Cap Reinsurer's Obligation To Pay Defense Costs

Global Reinsurance issued facultative reinsurance certificates to Century Indemnity under which Global agreed to indemnify Century for losses and litigation expenses Century might incur in connection with commercial liability policies issued by Century to Caterpillar Tractor Company. Century sought reinsurance payments from Global for amounts paid by Century under the Caterpillar policies, and Global sought a declaration that the policy limits of the reinsurance certificates capped Global's reinsurance obligations as to both indemnity and defense costs. By way of certification, the Second Circuit asked the New York Court of Appeals whether "New York law imposed a rule of construction or a strong presumption that a reinsurance certificate's liability limit caps the reinsurer's liability with respect to both indemnity and defense costs regardless of whether the underlying policy is understood to cover defense costs in excess of the policy's liability limit," and the New York Court of Appeals answered "no". On remand, the district court held that the reinsurance certificates did not cap Global's obligation to pay its proportionate share of Century's defense costs, and the Second Circuit affirmed. The Second Circuit explained that its decision was based on the unambiguous "follow form" clauses in the reinsurance certificates, which made Global's reinsurance subject to the same terms and conditions of the underlying Century policies, as well as the testimony of Century's experts confirming that a strong presumption of concurrency prevailed in the reinsurance market at the time the certificates were issued. [*Global Reins. Corp. of Am. v. Century Indem. Co.*, 22 F.4th 83 (2d Cir. 2021).]

First Department Holds Insured Entitled to Coverage Under Fidelity Bonds for Loss Incurred Due to Broker

Commodity futures broker MF Global used an outside broker that traded commodities futures on the Chicago Mercantile Exchange (CME) in excess of his available margin credit. As a Clearing Member of the CME, MF Global was obligated to meet the payment obligations of the broker and recorded the loss on its books as a bad debt. In turn, MF Global sought coverage under its fidelity bond insurance policy and excess bonds, which covered MF Global's "direct" financial loss as the result of any theft, fraudulent act or malicious act committed by "any other person" and excluded contractual liability loss. MF Global sued its insurers for coverage, and the New York Appellate Division, First Department, found that MF Global was covered because, among other things, MF Global's loss was "direct" and cannot be fairly viewed as simply satisfying a contractual liability to the CME. [New Hampshire Ins. Co. v. MF Global Fin. USA Inc., 204 A.D.3d 141 (1st Dep't 2022).]

Court Issues Jury Instructions For Environmental Coverage Trial

The Supreme Court of New York for New York County issued jury instructions in a two-decades-old coverage litigation as to whether Century Indemnity must cover Brooklyn Union's environmental remediation costs under excess policies issued by Century from 1941 to 1969. The policies covered the costs only if Brooklyn Union proved that the environmental damage was accidental, rather than expected or intended by Brooklyn Union. As to the point in time for assessing whether the damage was accidental, the court decided to instruct the jury that the inquiry turns on what Brooklyn Union knew or did not know at the time of the acts causing the damage as opposed to what it knew or did not know at the start date of each policy. As to how to instruct the jury on whether Brooklyn Union had proven that the damage was accidental (rather than expected or intended), the court rejected the insurer's proposal to include a sentence that "if the operator of the plant was aware of a substantial probability of damage", the jury may find that the damage was not accidental. *[Century Indem. Co. v. Brooklyn Union Gas Co.*, 75 Misc. 3d 1205 (A) (Sup. Ct. N.Y. Cnty 2022).]

Southern District Finds Insurer Not Entitled To Discovery As To Duty To Defend

The City of New York filed a coverage action in the United States District Court for the Southern District of New York, seeking a declaration that Harleysville Insurance Company is obligated to defend the City in two underlying personal injury actions. Harleysville sought and the City objected to certain discovery related to the underlying actions. The Magistrate Judge assigned to the dispute found that the issue in the case was whether Harleysville's duty to defend was triggered by the allegations in the complaints filed in the underlying actions, not by the discovery that has been produced in those cases. The Magistrate Judge concluded that the discovery is extrinsic evidence that overlaps with the merits of the underlying actions, which the court will not consider in deciding this declaratory judgment action as to the duty to defend. [*City of New York v. Harleysville Ins. Co.*, 2022 U.S. Dist. LEXIS 143039 (S.D.N.Y. Aug. 10, 2022).]

EXCLUSIONS

District Court Finds That Polar Bear Club Not Covered For Participant's Accident

The Polar Bear Club holds an annual charitable event called the "Polar Bear Plunge" during which thousands of people

enter the ocean in the middle of the winter to raise funds for the Make-A-Wish-Foundation. The Polar Bear Club asks those who wish to participate to register and to submit a Hold Harmless Agreement. The claimant was allegedly injured when he joined others in entering the ocean in Long Beach, New York, and he sued Long Beach and the Polar Bear Club. In turn, they tendered to their insurer, Scottsdale Insurance, which disclaimed coverage on the ground that their policy excluded coverage for bodily injury to a "participant", defined as including any person "taking part in" the event. The Polar Bear Club and Long Beach argued that the exclusion was ambiguous as to who is a "participant" and should not include the claimant who did not formally register for the event or execute a Hold Harmless Agreement. The United States District Court for the Eastern District of New York disagreed, stressing that "a contract is not ambiguous just because one of the parties attaches a different subjective meaning to one of its terms". Instead, to be ambiguous, a policy "must be reasonably interpreted in two conflicting manners when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agree-ment". The court also rejected the argument that the policy was illusory, reasoning that it "provides coverage for some acts and occurrences, namely bodily injury of spectators and attendees of the Polar Bear Plunge", and the fact that there may be "wide exclusions" does not render a policy "illusory". [*Scottsdale Ins. Co. v. Long Beach Polar Bear Club City of Long Beach*, 2022 U.S. Dist. LEXIS 55936 (E.D.N.Y. Mar. 18, 2022).]

First Department Holds That Auto Exclusion Does Not Apply

Rodriguez was allegedly injured when he fell in a hole while at premises to make a delivery at a construction project, and he sued the owner and construction manager who sought coverage under a CGL policy. Rodriguez testified that he drove his truck through a plastic curtain at the entrance of the building's interior loading dock where it was offloaded and reloaded with returns. Rodriguez had not yet checked if anything was loose. Instead, he walked from the loading dock to make sure the driveway was clear to exit and to raise the curtain. A plate covering a hole outside the building shifted, and he fell. The Appellate Division, First Department, held that the auto exclusion, which excluded coverage for accidents resulting from the "use" of the auto, did not apply to preclude coverage. The court noted that "use" includes loading and unloading, but concluded that the loading was complete. And even if not complete, the court opined that the exclusion did not apply because "the injury was caused by a defective premises condition, rather than any act or omission related to the use of the automobile". [*Tishman Constr. Corp. v. Zurich Am. Ins. Co*., 204 A.D.3d 623 (1st Dep't 2022).]

Southern District Finds That Business Enterprise Exclusion Precludes Coverage Under Attorneys' Malpractice Policy

Associated Industries Insurance Company filed a declaratory judgment action seeking a declaration that it had no duty to defend or to indemnify a law firm and its former partner in connection with a lawsuit filed by former clients under their malpractice policy, which contained a Business Enterprise Exclusion that precluded coverage for insureds' activities in their capacity as an "officer…of a…business enterprise, other than the" law firm. The former clients alleged that while the partner was simultaneously acting as the clients' attorney and the Executive Vice President of a company formed by the partner, the partner recommended that the clients sell the property to the partner's company; prepared the documentation for the $12 million sale; and structured the deal so his company would pay only $5 million and would owe the rest through an unsecured loan. The United States District Court for the Southern District of New York held that the Business Enterprise Exclusion in the law firm's policy applied to preclude coverage because the former clients would have no claim to pursue against the firm and partner "but for" the partner's "dual roles of providing legal advice to a client, while simultaneously pursuing his own business interests". [*Associated Indus. Ins. Co. v. Wachtel Missry LLP*, 2022 U.S. Dist. LEXIS 162454 (S.D.N.Y. Sept. 8, 2022).]

Eastern District Finds That Jurisdictional Limit Met And That Employer's Liability Exclusion Precludes Coverage

A construction worker was injured, and he sued his alleged employer and the alleged owner and operators of the premises where he was injured in the course of his employment. His employer's insurer filed a declaratory judgment action in the United States District Court for the Eastern District of New York seeking a declaration that it owed no duty to defend or to indemnify the employer or any other party that was sued because the employer's primary and umbrella policies precluded coverage for "bodily injury to any employee of any insured" arising out of or in the course of employment by the insured. The court first found that the $75,000 minimum amount in controversy for federal diversity jurisdiction was met because the "object of the litigation" was the insurer's potential liability under its $2 million primary and $5 million umbrella policies, and there is a "reasonable probability" that the underlying bodily injury action could result in coverage in excess of $75,000. The court then found that the "plain language" of the employer's liability exclusion precluded coverage. [*American European Ins. Co. v. Tri State Plumbing & Heating Inc.*, 2022 U.S. Dist. LEXIS 167154 (E.D.N.Y. Sept. 15, 2022).]

Second Department Finds Coverage For Third-Party Action Against Insured Based on "Insured Contract" Exception To Exclusions

A contractor entered into a contract with the New York City Housing Authority (NYCHA) for construction work and agreed to defend and to indemnify NYCHA for claims arising out of the work. The contractor's employee was injured and sued NYCHA, which filed a third-party action against the contractor for contractual indemnity, among other things.

Peleus Insurance Company disclaimed coverage to the contractor as its named insured and to NYCHA as an additional insured. The Appellate Division, Second Department, held that Peleus had a duty to defend the third-party action against the contractor because the contractual liability and employer's liability exclusions in the policy contained an exception for liability assumed by the insured under an "insured contract." The court also found that another exclusion in the policy for "designated ongoing operations" did not unambiguously apply to the third-party action against the insured for contractual indemnity because it "only expressly and clearly excludes coverage for bodily injury sought by way of a direct claim" by an employee of the insured. However, the court held that the "designated ongoing operations" exclusion precluded coverage for the direct claim against NYCHA, an additional insured. The court concluded that the policy was not rendered ambiguous by the "apparent conflict" between the employer's liability exclusion and the "designated ongoing operations exclusion" because "policy exclusions are to be read *seriatim* and, if any one exclusion applies, there is no coverage, since no one exclusion can be regarded as inconsistent with another." [*Gem-Quality Corp. v. Colony Ins. Co*., 209 A.D.3d 986(2d Dep't 2022).]

AUTO/UNINSURED/UNDERINSURED MOTORIST

Court Finds Accident Not Covered Under Auto Policy Because Not Incidental To The Unloading Of The Vehicle

Wesco Insurance Company filed a declaratory judgment action seeking a declaration that it had no duty to defend or to indemnity various defendants in an underlying personal injury action filed by Manuel Velasquez who was allegedly injured while carrying a window panel from his truck to a jobsite when he tripped on an uneven, rutted, pitted, rocky and unstable portion of the ground. The court held that the accident did not result from the ownership, maintenance or use of the truck as necessary to trigger Wesco's auto policy. The court acknowledged that the "use" of a vehicle under an auto policy may include "not only the immediate transference of the goods to or from the vehicle, but the 'completed operation' of transporting the goods between the vehicle and the place from or to which they are being delivered." However, based on the claimant's allegations and testimony, the court determined that the accident related to the condition of the construction site, not any negligence incidental to the unloading process. [*Wesco Ins. Co. v. James River Ins. Co*., 2022 N.Y. Slip Op. 30263 CU (Sup. Ct. N.Y. Cnty Jan. 3, 2022).]

Court Holds That Denial Of No-Fault Claim Based Upon Misrepresentation Is Subject To 30-Day Denial Rule

Liberty Mutual filed a no-fault coverage action against the eligible injured person and his medical provider assignees, seeking a declaration that Liberty Mutual was not obligated to pay no-fault benefits because the eligible person made a material misrepresentation as to where he lived when applying for the insurance. One of the assignees moved for summary judgment, contending that it was entitled to payment of its bills for medical treatment because Liberty Mutual did not timely deny or pay them within 30 days after receiving proof of the assignee's claim, as required by 11 NYCRR 65-3.8 (a) and (c). The Supreme Court, New York County, noted that a narrow exception exists to the preclusion rule for an untimely denial where the ground for denying the claim is based upon a lack of coverage, and that there are strong arguments as to why a material mis-representation denial should be treated as based on a lack of coverage. Nonetheless, the court concluded that it was bound by Second Department authority holding that the time limits applied to a material misrepresentation denial. [*Liberty Mut. Ins. Co. v. Brutus*, 76 Misc. 3d 1201(A) (Sup Ct. N.Y. Cnty 2022).]

Southern District Finds That Insured's Owner And CEO Not Entitled To SUM Coverage Because Not Acting In Scope Of His Duties For Insured

Majestic Rayon Corporation, a family business that manages the family's real estate, obtained an insurance policy from Hartford Accident and Indemnity Company that included supplementary uninsured/ under-insured motorists ("SUM") coverage for any person "while acting in the scope of that person's duties" for Majestic. Majestic's owner and chief executive officer ("CEO") was taking a leisurely walk with his wife when he was hit by a car, and he sought SUM coverage from Hartford. The CEO argued that the family's properties are in use 24 hours a day so he is on-call 24/7 and that he was discussing Majestic's pending litigation with his wife during their walk. The United States District Court for the Southern District of New York rejected the CEO's claim for SUM coverage, reasoning that an employee is generally said to be acting within the scope of employment when the employer is, or could be, exercising control over the employee's activities, and the employee is doing something in furtherance of his duties for his employer. The court noted that an em-ployee cannot constantly be in the scope of employment; and "(m)erely pondering work affairs cannot be said to acting within the scope of employment." As such, the court concluded that the CEO speaking about pending litigation while on a walk with his wife - not with Majestic's counsel - did not render his actions in furtherance of his duties to Majestic. [*Aibel v. Hartford Accident & Indem. Co.*, 2022 U.S. Dist. LEXIS 175355 (S.D.N.Y Sept. 27, 2022).]

FIRST PARTY PROPERTY

Second Circuit Holds That Covid-19 Related Business Losses Not Covered

10012 Holdings, Inc. d/b/a Guy Hepner suspended operations at its art gallery to comply with government restrictions on nonessential businesses due to the COVID-19 pandemic, and then sought coverage for its business losses under its business

property insurance policy with Sentinel Insurance Company. Sentinel denied coverage because the insured did not suffer direct physical loss of or physical damage to its property or property within its vicinity as the policy required. The insured argued that the policy's reference to "physical damage" or "physical loss" included the loss of use of property as a result of the suspension of business operations, but the United States Court of Appeals for the Second Circuit disagreed. In finding that the insured could not recover under its policy, the court stressed that New York courts applying New York law have "soundly rejected the argument that business closures … due to New York State Executive Orders constitute physical loss or damage to property." [*10012 Holdings, Inc. v. Sentinel Ins. Co*., 21 F.4th 216 (2d Cir. 2021).]

First Department Affirms That Business Interruption From COVID-19 Not Covered

The insured purchased a commercial property policy that included business interruption coverage for its restaurants. The restaurants were forced to suspend indoor dining operations because of COVID-19 and lost tens of millions of dollars in revenue. The insured made a claim with its insurance company stating that it suffered a covered "direct physical loss or damage" to its property because the actual or threatened presence of the virus in and on its property (i.e. the ambient air and internal surfaces) eliminated the functionality of the restaurants for their intended purpose. The insurer denied the claim; the insured sued; and the trial court granted the insurer's motion to dismiss. On appeal, addressing this issue of first impression for a New York appellate court, the Appellate Division, First Department, affirmed. The court held that where a policy states that coverage is triggered only where there is "direct physical loss or damage" to the covered property, "the insured's inability to use its premises as intended because of COVID-19, without any actual, discernable, quantifiable change constituting 'physical' difference to the property from what it was before exposure", is not a covered loss. The court found the insured's proposed amended complaint alleging that its property was physically altered by the coronavirus "conclusory" and, therefore, devoid of merit. [*Consolidated Rest. Operations, Inc. v. Westport Ins. Corp*., 205 A.D.3d 76 (1st Dep't, 2022).]

Second Department Holds That Limitation In Policy For Damage To Property Used For Business Purpose To Be Construed In Favor Of Insured

After personal property was stolen from the insured's home, he submitted a claim for his loss to his homeowners insurer, Automobile Insurance Company of Hartford, Con-necticut. The insurer limited the insured's recovery for the loss to $12,500 based upon a limitation in the policy for property "used at any time or in any manner for any 'business' purpose." The insured filed a coverage action to recover his full loss, and the trial court granted summary judgment to the insured. On appeal, the Supreme Court of New York, Appellate Division, Second Department, affirmed, reasoning that any ambiguity is to be construed in favor of the insured. The court stated that the policy defined "business," but it did not define the terms "use" or "business purpose," and it "did not make clear whether the phrase 'at any time'" means at any time during the policy period or, as the insurer suggested, broadly covers use at any time during the insured's life, including the distant past. The court concluded that the policy language is reasonably susceptible of an interpretation that would not apply the limitation to the property at issue, which was unique property created by the insured decades earlier and retained as part of a collection. [*Birnkrant v. Automobile Ins. Co. of Hartford, Conn*., 206 A.D.3d 963 (2d Dep't 2022).]

Eastern District Holds That Tear Out Provision In Homeowners Policy Does Not Apply To Insured's Whole Loss

The insured purchased a homeowners policy from State Farm. Water leaked from the base of the toilet on his bathroom floor and damaged his vanity. To remedy the sit-uation, the insured's plumber located and cleared the house's underground sewer trap. The next day, the plumber dug up the trap and determined it was cracked and needed to be replaced. As they kept dig-ging, they found wastewater was rushing from the inside of the house to the outside. They kept excavating for ten more days and found that a sewage pipe was cracked and needed to be replaced. State Farm paid for the damage to the vanity and the cost to detach and reset the toilet, but disclaimed coverage for the costs associated with replacing the sewer pipe. The insured sued State Farm for breach of contract and consequential damages, and the United States District Court for the Eastern District of New York granted summary judgment to State Farm. The court explained that where there is damage to property covered under the policy (here, the vanity), the Tear Out Provision applies to reasonable costs in tearing out "only that particular part" of that "system or appliance" necessary to access the "specific point" of the appliance from which "the water or sewage escaped" (here, the toilet). The court concluded that the provision is inapplicable to any water that leaked from the sewer line because the insured did not demonstrate that covered property was damaged by that water. [*Haas v. State Farm Fire and Cas. Co*., 2022 U.S Dist. LEXIS 198233 (E.D.N.Y. Sept. 24, 2022).]

WAIVER/ESTOPPEL/3420(d)

Second Circuit Holds That Insurer Precluded From Relying On Exclusions Because Unreasonably Delayed Disclaiming While Basis Was, Or Should Have Been, Apparent

In December 2015, Luis Alberto was working on a construction project at a building owned by the insured when a wall collapsed, causing him to fall to his death. In December 2017, Alberto's estate sued the insured whose insurer, Golden Insurance Company, defended the insured under a reservation of rights to disclaim coverage. The insurer's January 2018

letter advised the insured that an exclusion for the insured's work on the exterior of a three-story building "likely barred coverage" but that it was "unknown at th[at] time" whether the insured's work was on the exterior of the building. The letter also noted that another exclusion potentially applied. Over two years later, in February 2020, the insurer filed a declaratory judgment action seeking a declaration of no coverage. The United States Court of Appeals for the Second Circuit upheld summary judgment to the insured on the basis that the insurer did not timely disclaim coverage as required by New York Insurance Law §3420(d), which requires a timely disclaimer for claims involving death and bodily injury claims arising out of New York accidents and brought under New York liability policies. In finding coverage for the insured, the court reasoned that the insurer unreasonably delayed in disclaiming after learning of the underlying lawsuit, even though the basis for the disclaimer was, or should have been, readily apparent. The Second Circuit rejected the insurer's argument that it was uncertain as to whether the accident arose from work on the exterior of the building because the insurer failed to explain "why anything beyond a cursory investigation was necessary to determine" this "crucial – but straightforward – fact." As to the insurer's argument that it was obligated to defend the insured even if an outside investigation supported a disclaimer, the Second Circuit responded that the insurer "fails to sufficiently explain why it could not have brought this declaratory judgment action to disclaim coverage and terminate any duty to defend years earlier." [*Golden Ins. Co. v. Ingrid House LLC*, 2022 U.S. App. LEXIS 16343 (2d Cir. June 14, 2022).]

BAD FAITH/EXTRA-CONTRACTUAL

Northern District Dismisses Bad Faith Claim

State Farm denied its insureds' first-party property claim under their policy, and the insureds sued State Farm for breach of contract, breach of the covenant of good faith and fair dealing ("bad faith"), and punitive damages. The United States District Court for the Northern District of New York granted State Farm's motion to dismiss the bad faith claim, reasoning that "'New York law … does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.'" While the bad faith claim added allegations about the delay in disclaiming and the improper basis for the denial, the court found that it was based on the same decision to deny coverage. And to the extent the insureds' allegations about State Farm's handling of their consumer claim before the State of New York were unnecessary to the contract claim, the court found that the insureds did not allege any harm. The court also dismissed the punitive damages claim, explaining that the alleged breach did not involve "'fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations' [that is] 'aimed at the public generally.'" [*Converse v. State Farm Fire & Cas. Co*., 2022 U.S. Dist. LEXIS 60485 (N.D.N.Y. Mar. 31, 2022).]

Second Department Dismisses Claim For Punitive Damages Based On Alleged Bad Faith

After being struck by a vehicle, the insured made a claim under the underinsured motorist provisions in her auto policy with New York Central Mutual Fire Insurance Company and then sued the insurer for punitive damages based on the insurer's alleged bad faith in breaching the insurance contract. The Supreme Court of New York, Appellate Division, Second Department, reversed the trial court's denial of the insurer's motion to dismiss the insured's claim for punitive damages. The court reasoned that there is no separate tort for bad faith refusal to comply with an insurance contract under New York law; and the insured did not allege a claim for bad faith refusal to settle because there was no claim against the insured to be settled. And even assuming the insured stated a cause of action for the independent tort of bad faith refusal to settle, the insured did not allege a cognizable claim for punitive damages, which requires conduct that is both (i) "morally reprehensible and of such wanton dishonesty as to imply a criminal indifference to civil obligations" and (ii) "part of a pattern directed at the public generally." [*Schlusselburg v. N.Y. Cent. Mut. Fire Ins. Co.*, 206 A.D.3d 682 (2d Dep't 2022).]

MISCELLANEOUS

New York Enacts Comprehensive Insurance Disclosure Act

On December 31, 2021, New York's Governor Hochul signed into law the Comprehensive Insurance Disclosure Act, that requires defendants, third-party defendants, and defendants on cross-claims and counterclaims (the "disclosing party") to produce copies of all primary, umbrella and excess insurance policies that may satisfy part or all of a judgment (and certain other insurance information) within 60 days of answering. Any information required by the Act that was not previously provided in pending cases must be provided by March 1, 2022. In addition to policies, the producing party must produce applications, contact information for the person(s) responsible for adjusting the claim, the amounts currently available under the policies, and certain information about erosion of limits. The disclosing party and its counsel must certify as to the accuracy of the information provided, and the disclosing party is obligated to make reasonable efforts to update the information within 30 days of receiving information rendering the prior disclosure inaccurate or incomplete in whole or in part. The details of the Act's current obligations may be found at https://www.nysenate.gov/legislation/bills/2021/s7052. The New York State Legislature is considering an amendment that may narrow the disclosing party's obligations under the Act which may be found at https://nyassembly.gov/leg/?default_fld=& leg_video=&bn=S07882&term=2021&Summary=Y&Text=Y.

Comprehensive Insurance Disclosure Act, C.P.L.R. §§ 3101(f) & 3122-b

United States District Court Holds That Claim Notes Are Discoverable

LM Insurance Corporation moved to compel Cincinnati Insurance Company to produce its non-privileged claim notes, and Cincinnati opposed the motion arguing that the notes were irrelevant to Cincinnati's denial of coverage because LM's insured is not an additional insured under Cincinnati's policy. The United States District Court for the Eastern District of New York held that the notes were discoverable. The court rejected Cincinnati's argument that the notes were irrelevant because the policy language is unambiguous, reasoning that this is a "challenge that goes to admissibility, as opposed to discoverability, particularly where, as here, the district judge has yet to rule on the ambiguity or clarity of the applicable policy language." As such, the court "exercise[d] its broad discretion" and concluded that Cincinnati failed to rebut LM's *prima facie* showing of relevance. [*LM Ins. Corp. v. Safety Nat'l Cas. Corp.*, 2021 U.S. Dist. LEXIS 228040 (E.D.N.Y. Nov. 29, 2021).]

Court Finds That Defense Documents Must Be Produced Because Placed "At Issue" by Late Notice

In this declaratory judgment action, American Empire Surplus Lines Insurance Company sought insurance coverage on behalf of its insured contractor from certain excess insurers. The excess insurers were not placed on notice until six years after the filing of the underlying action and after summary judgment had been entered against the contractor. The excess insurers disclaimed coverage under their policies, which required notice of a claim or suit as soon "as it is reasonably likely to involve the policy." The excess insurers moved to compel the production of evaluations and reports prepared by defense counsel retained by American Empire to defend the underlying action and American Empire's claims notes, which American Empire refused to produce the documents as privileged. The Supreme Court, New York County, granted the motion to compel, reasoning that the "at issue" waiver occurs when "a party has asserted a claim or defense that he or she intends to prove by use of the privileged material." The court explained that "[i]f the documents, particularly the claim notes, show [a] valuation of the case implicated [the] excess policies long before notice was actually given …, then it will undercut [American Empire's] theory that notice was timely." The court concluded that American Empire cannot "simply assert that its notice was timely and then withhold documents in its possession that might aid in" the excess insurers' central coverage defense. [*American Empire Surplus Lines Ins. Co. v. Commerce & Indus. Ins. Co.*, 2022 N.Y. Slip Op. 33049 (U) (Sup. Ct., N.Y. Cnty Sept. 1, 2022).]

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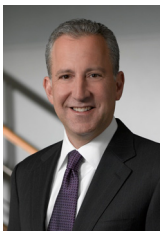

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