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Insurance Law §3420 Applies Between Insurers

In a case litigated by Lewis Johs' attorney, Elizabeth Fitzpatrick, the Second Circuit in *New York State Insurance Fund v. Mount Vernon Fire Ins. Co.*, 2010 WL 1292305 (2d Cir. 2010) affirmed the decision of the United States District Court for the Southern District of New York holding that under the circumstances presented, a disclaimer of coverage issued by Mount Vernon was subject to New York's timely disclaimer requirement as set forth in Insurance Law §3420(d).

The New York State Insurance Fund satisfied a \$5,300,000 verdict rendered in an underlying action and sought recovery of Mount Vernon's \$1,000,000 policy limit, contending that the disclaimer of coverage issued by Mount Vernon to its insured, a subcontractor at the site, was untimely and therefore invalid. The disclaimer was issued some two years after Mount Vernon was placed on notice of the loss and undertook its insured's unconditional defense and 56 days after the jury rendered a verdict in the underlying bodily injury action. In its attempt to avoid coverage, Mount Vernon cited the independent contractor exclusion to its policy, contending that it only became aware of facts allowing it to rely upon the exclusion following the jury's verdict. Mount Vernon also argued that its insured had engaged in material misrepresentations in its policy application by not

disclosing the existence of a predecessor company to the named insured.

In support of its argument that it was not obligated to adhere to the timely disclaimer requirements of §3420, Mount Vernon contended that the provisions do not apply to disputes between insurers, citing a decision of the First Department entitled *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 AD3d 84 (1st Dept. 2005). The court found Mount Vernon's reliance upon Bovis was misplaced, noting that this was not a dispute between

co-insurers, but rather NYSIF sought contribution from US Liability for its share of the verdict based upon the concept of equitable subrogation. The Second Circuit noted that: "It is so well-settled as not to require discussion that an insurer who pays claims against the insured for damages caused by the default or wrongdoing of a third

"It is so well-settled as not to require discussion that an insurer who pays claims against the insured for damages caused by the default or wrongdoing of a third party is entitled to be subrogated to the rights which the insured would have had against such third party for its default or wrongdoing."

party is entitled to be subrogated to the rights which the insured would have had against such third party for its default or wrongdoing." The court then concluded that NYSIF had a real stake in the outcome so as to invoke the protections of Insurance Law §3420. The Second Circuit also found that Mount Vernon's insured had not engaged in a material misrepresentation so as to void the policy ab initio. ■

Late Notice of Suit

The First Department, in *American Transit Insurance Company v. Hashim*, 2009 NY Slip Opinion 09527 (1st Dep't 2009), held that as the insurer was not prejudiced by late notice of the underlying litigation, it was not entitled to disclaim coverage. In the underlying action, the plaintiff, Hashim, claimed to have sustained permanent injuries in an auto accident. After counsel for Hashim notified plaintiff insurer in writing of his injuries and received no

response, Hashim moved for a default judgment against the insured. Plaintiff American Transit disclaimed coverage as Hashim's motion for a default judgment was the first notification of legal action against its insured. The court held that American Transit had received timely notice of the claim and that it should have appeared, opposed the motion for a default judgment, and filed for leave to file a late answer on behalf of the insured. The court cited its decision in *American Transit Ins. Co. v. B.O. Astra Management Corp.*, 39 AD3d 432 (1st Dep't 2007). ■

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General Business Law

§349 - Punitive Damages

In *Wilner v. Allstate Ins. Co.*, decided by the Second Department on January 12, 2010 and reported at 2010 NY Slip Opinion 00248, the Second Department denied Allstate's motion to dismiss a cause of action alleging a violation of General Business Law §349, which included a claim for punitive damages and attorneys' fees, and granted the plaintiff's motion seeking discovery, directing Allstate to produce hundreds of claim files.

The coverage dispute originated from claims that an October 8, 2005 storm caused a hillside on the plaintiff's property to collapse, destroying their retaining wall and causing other damages. Allstate had issued a Deluxe Plus Homeowner's policy to the Wilners. The crux of plaintiff's claim under GBL §349 was the policy's inclusion of a subrogation provision which obligated an insured person to protect the insurer's subrogation rights and to "...help us enforce them." The plaintiffs had also served a discovery demand seeking documents referable to other claims filed under the Deluxe Plus Homeowner's policy resulting from the October 2005 storm. In response, the trial court issued an order directing Allstate to produce *in camera* the claim files for all property damage claims under the Allstate Deluxe Plus Homeowner's policy for damages resulting from the storm which occurred on October 8, 2005 in Nassau County, as well as all claims that resulted in litigation, limited to property damage claims between October 7, 2005 and January 7, 2007 in Nassau County.

After discussing the parameters of the court's analysis on a motion to dismiss, the court concluded that, because the subrogation provision is contained in every Allstate Deluxe Plus Homeowner's policy, "any consumer holding this policy, who has losses potentially attributable to a third party, is required to protect the defendant's rights." The court, thus, concluded that the conduct complained of has a broad impact on consumers at large, a requirement under GBL §349. Further, accepting as true, as required on a motion to dismiss, plaintiff's allegation that Allstate, by refusing to reach a timely decision on coverage, compelled the plaintiffs to comply with the subrogation provision causing them to incur the expense of hiring an attorney to prevent forfeiture of coverage for a covered loss, the court determined that the plaintiff properly pled that Allstate had engaged in deceptive acts and practices under the General Business Law, which were misleading in a material way.

With respect to an award of punitive damages, which were sought only on the plaintiff's claim under GBL §349, the court found that the plaintiff's allegation that the defendant intentionally did not reach a final decision on their claim so as to force them to commence suit against The Village, could be considered so flagrant as to transcend mere carelessness,

thereby supporting a claim for punitive damages.

With respect to the breadth of the discovery demand, the court noted that since no objection to the demand was made within 20 days, the court's review was limited to determining whether the requested material was privileged or the demand was palpably improper. The court concluded that the information sought, regarding claims the defendant handled for other insureds, related to the plaintiff's attempt to establish that the defendant engaged in a pattern of deception and thus, the request was proper. 📄

Discovery – Uninsured Motorist Claim

In *the Matter of Government Employees Insurance Company v. Mendoza*, 2010 NY Slip Opinion 00147 (2nd Dep't 2010) involved an insurer's right to a temporary stay of arbitration of an uninsured motorist claim pending receipt of discovery from its insured. Although Geico, the insurer in this case, did not timely seek discovery, it had reason to believe that the tortfeasor in the underlying action was insured by a different insurer which had accepted liability. After receiving a formal request for uninsured motorist arbitration, Geico requested discovery and eventually sought a stay of the arbitration until the discovery was complete. The court held that, because Geico had a justifiable reason for not having sought discovery earlier, the temporary stay of arbitration should be granted. 📄

Rental Vehicle

In *Progressive Cas. Ins. Co v. Harco National Ins. Co.*, 2010 NY Slip Opinion 01282 (4th Dep't. 2010), the 4th Department reversed the trial court, finding that Harco National Insurance Company, the insurer for Burdick Pontiac-GMC, was not obligated to afford primary coverage to the son of a customer who had borrowed a loaner vehicle from Burdick while his own vehicle was being repaired by the car dealership. Harco National had issued a garage liability policy which contained a "no liability clause" which afforded coverage to a customer of its insured only if the customer has no other available insurance, whether primary, excess or contingent, or has other available insurance, whether primary, excess or contingent, which is less than the compulsory or financial responsible law limits where the covered auto is principally garaged.

The Progressive policy issued to the Webbs contained an excess clause which stated that any insurance provided for a vehicle other than a covered vehicle would be excess. The court found that under the terms of the Harco policy, a customer was excluded from the definition of an insured unless the customer possessed insufficient insurance to meet New York's minimum

limits. The court found significant the fact that the “no liability” clause expressly provided that other available insurance included both primary and excess coverage. The liability limits contained in Progressive’s policy exceeded the minimum statutory requirements of New York and thus, the court gave effect to the no liability clause contained in the Harco garage policy and found Progressive the primary insurer for the Webbs. The court rejected Progressive’s contention that the “other insurance” clause of the Harco policy rendered Harco liable for coverage and also rejected the argument that Harco was obligated to issue a timely disclaimer of coverage. 📄

Late Notice By Additional Insured

In *Lehigh Constr. Group, Inc. v. Lexington Ins. Co.*, 2010 NY Slip Opinion 01234 (4th Dep’t. 2010), the court reversed the trial court and granted judgment in favor of defendant Lexington Insurance Company declaring that Lexington was not obligated to defend or indemnify plaintiff in the underlying action. In the underlying action, it was alleged that John Sherk was injured in the course of construction work when he fell from a height. Sherk’s employer had been hired by the plaintiff to perform construction/renovation services on a church. Plaintiff was served with Sherk’s summons and complaint on January 12, 2007 and received notice of such service by mail on February 23, 2007. Plaintiff was named as a defendant in the underlying action. The plaintiff sought coverage as an additional insured under a Commercial General Liability Policy issued to plaintiff’s employer by Lexington. The policy contained the condition that plaintiff was to notify Lexington of an occurrence or claim made or suit brought against any insured as soon as practicable. The plaintiff did not notify Lexington of the action until April 17, 2007, which was the first notice to Lexington of both the occurrence and the claim, and plaintiff did not transmit a copy of the complaint to Lexington until May 8, 2007. Lexington disclaimed coverage based upon the failure of plaintiff to provide notice of its receipt of the complaint as soon as practicable through a disclaimer dated May 15, 2007. Lexington argued that notice provided three months after receipt of the complaint was untimely as a matter of law.

While the plaintiff contended that its delay was based upon a reasonable belief in nonliability because it was only a “pass-through defendant in the underlying action,” the court concluded that while a good faith belief in nonliability may excuse a failure to provide timely notice of an occurrence, here, the plaintiffs failed to provide timely notice of the actual commencement of the underlying action. Thus, the court found that plaintiff’s assumption that other parties would bear the ultimate responsibility for Sherk’s injuries was an insufficient excuse for failing to provide Lexington with timely notice of the

commencement of the underlying action. The court further found that Lexington’s disclaimer was timely as it was issued within four weeks of its first notice of Sherk’s accident and the underlying action. 📄

Additional Insured-Priority of Coverage

On March 16, 2010, the Appellate Division, Second Department decided a case litigated by Lewis Johs’ attorney, Elizabeth Fitzpatrick entitled *L&B Estates, LLC v. Allstate Ins. Co.* The Appellate Division reversed the grant of summary judgment issued by the trial court which had directed Allstate to defend and indemnify the plaintiff/landlord as an additional insured on a policy issued by Allstate to Century 21, a tenant at property owned by L&B. The Second Department found that any coverage available to L&B Estates under the Allstate policy was excess to a policy issued by United National Specialty Insurance Company identifying L&B Estates, LLC as a named insured and as such, Allstate was not obligated to defend or indemnify L&B Estates in the underlying action unless the obligation to provide excess coverage was triggered.

Additional insured coverage for the landlord was available only with respect to liability arising out of the ownership, maintenance or use of that part of the premises shown in the declarations as leased to the tenant. The subject accident occurred on the sidewalk in front of the premises. Allstate’s position was that L&B was not an additional insured under the Allstate policy since the claim did not arise out of the ownership, maintenance or use of that part of the premises shown in the declarations as leased to the tenant. Finding that the landlord was entitled to status as an additional insured by virtue of the fact that the Administrative Code of the City of New York imposes liability on owners of commercial property for defects in sidewalks, the court then found that coverage under Allstate’s policy was excess to coverage provided under United National’s policy and therefore there was no obligation to either defend or indemnify the landlord. 📄

SUM Coverage Not Available To Volunteer Firefighter

In *Gallaher v. Republic Franklin Ins. Co.*, 2010 NY Slip Opinion 01143 (4th Dep’t 2010), the court found that Republic Franklin was not obligated to afford plaintiff supplementary uninsured motorist coverage because he was not “you” as defined in the policy and, as he was not “occupying” the motor vehicle at the time of the subject accident. The policy was issued to a volunteer

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fire company and at the time of the accident, plaintiff had exited the company truck and was directing traffic away from the scene of a motor vehicle accident. The court concluded that the plaintiff was not insured under the policy which defined an insured as “you”, meaning the named insured and any other person while occupying a motor vehicle insured for SUM under this policy. Occupying was defined as in, upon, entering into or exiting from a motor vehicle. Concluding that “you” in the endorsement referred only to the fire company and not an employee of the company, the court then found that plaintiff’s conduct in directing traffic was unrelated to the truck and was not incidental to his exiting it. Thus, he was not an insured or occupying the truck within the meaning of the policy at the time of the accident. 📄

Untimely Disclaimer

In *Mid City Construction Co., Inc. v. Sirius American Ins. Co.*, 2010 NY Slip Opinion 00935 (2nd Dep’t 2010), the court held that the denial issued by Sirius American Insurance Company 54 days after notice of the incident was provided was untimely as a matter of law where the insurer could not demonstrate it sent any earlier disclaimer of coverage via certified mail, return receipt requested. While noting that proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received, the court further noted the presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to insure that items are properly addressed and mailed. Sirius had offered no evidence as to its standard office practices for mailing disclaimer letters and an affidavit submitted by its claims

representative was insufficient to raise a triable issue of fact since the claims representative did not have personal knowledge of the mailing of the disclaimer letter. The court further stated that the certified mail receipt, standing alone, was insufficient to raise a triable issue of fact as to actual mailing. 📄

Insurance Department Opinion On “Personal Injury”

On January 28, 2010, the Office of General Counsel of the New York State Insurance Department issued an opinion clarifying the term “personal injury” as used in the amendments to New York State Insurance Law §3420. The question posed was whether the term “personal injury” in New York State Insurance Law §3420(a)(6) includes injury arising out of professional liability. This section provides that each insurance policy must include: a provision that, with respect to a claim arising out of death or personal injury of any person, if the insurer disclaims liability or denies coverage based upon the failure to provide timely notice, then the injured person or other claimant may maintain an action directly against said insurer, in which the sole question is the timeliness of the insurer’s disclaimer or denial based upon the failure to provide notice, unless within 60 days following such disclaimer or denial, the insured or the insurer: a) initiates an action to declare the rights of the parties under the insurance policy; and b) names the injured person or other claimant as a party to the action.

The opinion concluded that personal injury encompasses injury arising out of the economic interests of any person as a result of negligence in rendering expert, fiduciary or professional advice, citing to Insurance Law §1113(a)(13). 📄

About Lewis Johs

Lewis Johs Avallone Aviles, LLP is a full service law firm with offices in Melville, Riverhead, and New York City. Founded in 1993, Lewis Johs has grown from four to over fifty attorneys. From its inception, Lewis Johs has steadily gained a reputation as a skilled and dynamic law firm capable of managing the most complex litigation, trial, transactional, trusts and estates, corporate and appellate work. For questions or comments regarding this newsletter, contact editor Elizabeth Fitzpatrick.

I am delighted to serve as chairperson and to lecture at two upcoming seminars sponsored by the New York State Bar Association. Basic Insurance and Tort Practice will be held on May 6 at the Melville Marriott. Mike Colavecchio will address the new Medicare set aside and subrogation law. On June 18th, the seminar, also at the Melville Marriott will focus on insurance coverage issues emerging in the next decade under the Commercial General Liability policy. The programs will be held at 5 venues throughout New York. For further information, you may visit www.nysba.org or you may email me at eafitzpatrick@lewisjohs.com.

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Questions?

If you have questions about anything in this newsletter, want to talk to us, or would prefer to receive this newsletter electronically, please contact Elizabeth Fitzpatrick, eafitzpatrick@lewisjohs.com or call 631.755.0101. We also encourage you to visit our coverage blog: www.coveragelawblog.com

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