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ARE YOU COVERED YET?

Steven Verveniotis, Esq.
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This article demystifies the concept of insurance coverage and the duties and obligations of both sides of the insurance contract. Starting from the beginning, with the application for insurance and the quote from the insurer which result in a "meeting of the minds" in the form of a binder that is later documented in a policy of insurance, insurance is a matter of contract. The starting place to answer the question "Are You Covered Yet?" is to read your policy, and this article will help you understand the various policy provisions - coverage part, exclusions, conditions and notice - and what the law of the state of New York requires of the insured, insurer and attorneys in the context.

A. BASIC PRINCIPLES UNDERLYING ALL COVERAGE DISPUTES

An insurance policy is a contract whereby parties transfer the risk of certain defined uncertainties. The insured pays a premium in exchange for the agreement of the insurance company to pay indemnity and/or defend claims that fall within the parameters and under the conditions of the insurance purchased. Thus, the basic dispute in all coverage litigation is the disagreement of the parties (and claimants) as to what the parties agreed and whether the claim presented falls within the contract of insurance.

Indemnity

The indemnity portion of the coverage clause typically delineates the obligation of the insurer to pay (or indemnify) as to a loss or judgment covered by the policy.

Issues to consider as to indemnity include:

- Loss, damages or judgment
- Insured Premises/Wrongdoing/Professional Services
- Policy Period
- Occurrence/Claims Made Coverage– retroactive date?
- Limits of Liability - aggregate limits - one or separate claims?
- Deductible / Retention of Risk
- Primary/Excess/Umbrella

Defense

The defense obligation is the duty of the insurer to defend lawsuits brought against the insured as to matters covered under the policy. The defense obligation is broader than the duty to indemnify such that if there are covered and uncovered claims, the insurer owes a defense as to all claims, not merely the covered claims.

Issues to consider in terms of defense include:

- Insurer's control of the defense.

- Defense as contrasted to the right to associate.
- Defense within Limits of Liability or outside the Limits of Liability.
- Deductible – one claim or separate claims?
- Appeal costs included?
- Right to separate counsel in case of a conflict of defense counsel.
- Defense costs in the context of coverage litigation where insured placed in a defensive posture.

1. The Coverage Clause

The coverage clause is the starting point for deciphering the agreement between insurer and insured, but the policy has to be read as a whole in order to determine the coverage afforded. The insured has the burden of proving coverage of a claim or loss.

The coverage clause will tell you, usually in general terms, the type of insurance purchased. The coverage clause will state whether it is a life insurance policy, an auto insurance policy, a first-party policy for coverage of property damage to one's home, a third-party liability policy, a professional malpractice policy, a directors and officers errors and omissions policy or some other form of insurance.

The coverage clause may speak as to claims, damages, or losses and may relate them to an occurrence or wrongdoing as well as a policy period or policy territory. The terms referenced in the coverage clause are typically defined in the policy and therefore a review of the definitions is necessary in order to understand the coverage clause.

Example :

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any

claim or "suit" that may result but our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

This insurance applies to "bodily Injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and
(2) The "bodily injury" or "property damage" occur during the policy period.

Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury."

a. <u>Who is an Insured / Certificates of Insurance</u>

Read the policy provision – different policies define insured differently.

<u>Example from an Auto Policy:</u>

Section II- Liability Coverage
A. Coverage
1. Who Is An Insured
The following are "insured":
a. You for any covered "auto".
b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:

(1) The owner or anyone else from whom you hire or borrow a covered "auto". This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

(2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.

(3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.

(4) Anyone other than you "employee", partners (if you are a partnership), members (if you are a limited liability company), or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".

(5) A partner (if you are a partnership), or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.

A certificate of insurance is not a contract to insure nor is it conclusive proof, standing alone, that such a contract exists. American Motorist Insurance Co. v. Superior Acoustics, Inc., 277 A.D.2d 97, 716 N.Y.S.2d 389, 390 (1st Dep't 2000); St. George v. W.J. Barney Corp., 270 A.D.2d 171, 706 N.Y.S.2d 24 (1st Dep't 2000); Buccini v. 1568 Broadway Assocs., 250 A.D.2d 466, 469, 673 N.Y.S.2d 398 (1st Dep't 1998); American Ref-Fuel Co. of Hempstead v. Resource Recycling, 248 A.D.2d 420, 423, 671 N.Y.S.2d 93 (2d Dep't 1998); McGill v. Polytechnic University, 235 A.D.2d 400, 402, 651 N.Y.S.2d 992, 994 (2d Dep't 1997).

Where a broker issued a certificate of insurance, it was not considered binding on the insurer because an insurance broker is the agent of the insured. See Progressive Casualty Ins. Co. v. Yodice, 276 A.D.2d 540, at 542, 714 N.Y.S.2d 715, at 717 (2nd Dep't 2000).

b. What Did You Buy Insurance For?

New York Courts have consistently ruled that "[c]overage cannot be afforded on liability for which insurance was not purchased." Holman v. Transamerica Ins. Co., 183 A.D.2d 589, 591, 584 N.Y.S.2d 23, 25 (1st Dept. 1992). See also Lionel Freedmen, Inc. v. Glens Falls Ins. Co., 27 N.Y.2d 364, 369, 267 N.E.2d 93, 95, 318 N.Y.S.2d 303, 306 (1971) (holding that the allegations asserted in a complaint will not crate a duty to defend beyond that which the insurer could have anticipated when it issued the policy); George Muhlstock & Co. v. American Home Assuarance Co., 117 A.D.2d 117, 123-24, 502 N.Y.S.2d 174, 179 (1st Dept 1986) (ruling that the policy language only covered the insured for liability for breach of duty as an accountant and not for acting as a broker for a commission); Ducks Hockey Club, Inc. v. Mount Vernon Fire Ins.

Co., 39 A.D.2d 568, 568, 331 N.Y.S.2d 743, 744 (2d Dep't 1972) (finding that the ice skating injuries of a participant was not a risk encompassed in the policy, which included only liability resulting from spectators being present). "[I]f the allegations, on their face, do not bring the case within the coverage of the policy, there is no duty to defend or indemnify." Tartaglia v. Home Ins. Co., 240 A.D.2d 396, 397, 658 N.Y.S.2d 388, 390 (2d Dep't 1997). See also Gottlieb v. New York Central Mutual Fire Ins. Co., 235 A.D.2d 394, 395, 652 N.Y.S.2d 79, 80 (2d Dep't 1997).

c. Was There A Misrepresentation To The Insurer?

A factual misrepresentation may serve to void an insurance contract if "'knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.' Insurance Law § 3105(b))." (Abulaynain v. New York Merchant Bankers Mut. Fire Ins. Co., 128 A.D.2d 575, 576, 513 N.Y.S.2d 5; see also, Kulikowski v. Roslyn Savings Bank, 121 A.D.2d 603, 503 N.Y.S.2d 863, app. dsmd., 69 N.Y.2d 705, 512 N.Y.S.2d 364, 504 N.E.2d 691, rearg. denied, 69 N.Y.2d 900, 514 N.Y.S.2d 1029, 507 N.E.2d 1092).

2. The Exclusions

Exclusions remove enumerated types of claims from the coverage afforded by the policy. While it is the burden of the insured to prove that a claim falls within the coverage of the policy, but if the insurer counters that the claims is otherwise removed from coverage by way of an exclusion, the insurer bears the burden to prove that the exclusion applies.

Examples:

Intentional Acts exclusions

Most policies specifically delineate intentional acts and fraudulent or dishonest conduct as excluded from coverage. Some policies, however, provide "Innocent Insured" coverage for those insured that are not actively involved in the intentional or fraudulent conduct.

Many policies, however, specifically acknowledge the obligation to defend, although not indemnify, even as to insureds alleged to have acted intentionally, dishonestly or in perpetration of a fraud. See Rooney v Chicago Insurance Co., 26 Fed.Appx. 53, 2001 WL 1486527 (2nd Cir.(N.Y.)); Admiral Insurance Company v Weitz & Luxenberg, P.C., 202 WL 31409450 (S.D.N.Y. 2002)

Exclusion of fraudulent, criminal or intentional conduct, of course, are enforceable. See Seskin & Sassone v Liberty International Underwriters, 306 A.D.2d 520, 761 N.Y.S.2d 679 (2d Dep't 2003)(Legal malpractice policy did not cover claims against insured for fraud, negligent representation, and deceptive trade practices while acting in his capacity as president of medical equipment manufacturer.); Tartaglia v Home Insurance Co., 240 A.D. 2d 396, 658 N.Y.S. 2d 388 (2d Dep't 1997)(Attorney who devised a scheme to fraud his client's creditors was not covered by professional liability policy and claims were excluded by the dishonest, deliberately fraudulent criminal acts or deliberately wrongful acts exclusion); see also Chicago Ins. Co. v Borsody, 165 F.Supp.2d 592 (S.D.N.Y. 2001)(Attorney misrepresentations to health insurers was not a negligent act and was excluded by fraud and dishonest acts exclusion).

Assault and Battery exclusions

Claims arising from assault and battery are excluded from coverage. Mount Vernon Fire Ins. Co. v. Creative Housing Ltd., 88 N.Y.2d 347, 350, 645 N.Y.S.2d 433, 434 (1996); U.S. Underwriters Ins. Co. v. Val-Blue Corp., 85 N.Y.2d 821, 823, 623 N.Y.S.2d 834, 835 (1995).

Employee exclusion

New York courts, including the New York Court of Appeals and the Appellate Division, Second Department, have upheld exclusions barring coverage for claims

premised on injury to employees of the insured or employees of contractors. See Commissioners of the State Ins. Fund v. Insurance Co. of N. Am., 80 N.Y.2d 992 (1992); White Plains City Sch. Dist. Bd. of Ed., 225 A.D.2d 541 (2d Dep't 1996); McGurran v. DiCanio Planned Dev. Corp., 216 A.D.2d 538 (2d Dep't 1995); Board of Ed. of the E. Syracuse-Minoa Cent. Sch. Dist.v. Continental Ins. Co., 198 A.D.2d 816 (4th Dep't 1993); Village of Potsdam v. Home Indemnity Co., 52 A.D.2d 278 (3d Dep't 1976). In Commissioners of the State Insurance Fund, the New York Court of Appeals held that the employee exclusion clause applied, thereby precluding coverage, where an employee of the insured was injured in an industrial accident while at work. 80 N.Y.2d at 994. "The unambiguous language ma[de] the exclusion applicable to any claim arising from bodily injury [of an employee], whether in contribution or indemnity . . . ." Id. Likewise, in Milbin Printing, Inc., the court ruled that the plain meaning of the employee exclusion relieved the insurer of liability when its insured was sued for damages arising out of an injury to its employee in the course of employment. 724 N.Y.S.2d at 466. Furthermore, in Village of Potsdam, the court precluded coverage by applying a similar exclusionary clause for an accident where an employee was severely burned while in the course of his employment. 52 A.D.2d at 279. The court held that the provision "excludes from coverage the risk of injuries to a specified class of persons: employees in the course of their employment." Id. at 280. The court reasoned that "[t]o hold the insurance company liable here would be in effect to rewrite the contract of the parties and expose the [insurance company] to a risk not contemplated by the parties and for which the [insurance company] has not received a premium." Id.

Courts have also applied this type of exclusionary clause very broadly. In White Plains City School District Board of Education, the court ruled that a claim by a husband of a deceased teacher, that his wife had contracted cancer from exposure to asbestos while teaching in the school system, fell under the employee exclusionary clause in the school district's insurance policy and denied the school district coverage. 225 A.D.2d at 542-43. Likewise, in Board of Education of the

East Syracuse-Minoa Central School District, the court held that coverage was barred under the employee exclusion when a principal committed alleged acts of sexual harassment against a teacher. 198 A.D.2d at 817. Even the "fact that the principal committed some of the alleged acts of sexual harassment away from the school [did] not alter th[e] result." Id.

Contractual Liability exclusion

b. Contractual Liability

> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.

Policies may exclude coverage for breach of contract, but cover claims arising from "insured contracts" defined in the policy.

State of New York v. U.W. Marx, Inc., 209A.D.2d 784 (3rd Dep't 1994); see also American Home Assur. Co. v. Diamond Tours & Travel, Inc., 78 A.D.2d 801, 433 N.Y.S.2d 116 (1st Dep't 1980)(no duty to defend where claims alleging breach of contract were willful, fraudulent acts within exclusionary clause); Green Chimneys School for Little Folk v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 244 A.D.2d 387, 664 N.Y.S.2d 320 (2d Dep't 1997); see, also Pavarini Constr. Co., Inc. v. Continental Ins. Co., 304 A.D.2d 501, 759 N.Y.S.2d 56, 2003 N.Y. Slip Op. 13406 (1st Dep't 2003)(breach of contract not an occurrence, defined as accident); Baker Residential Ltd. Partnership v. Travelers Ins. Co., 10 A.D.3d 586, 782 N.Y.S.2d 249 (2d Dep't 2004)(same); Jakobson

Shipyard, Inc. v. Aetna Cas. and Sur. Co., 961 F.2d 387 (2d Cir. 1992)("occurrence" defined as "accident," did not encompass damage to product resulting from product's failure to perform according to contract specifications); J.Z.G. Resources v. King, 987 F.2d 98, 102-03 (2d Cir. 1993), cert. denied, 510 U.S. 993, 114 S. Ct. 553, 126 L.Ed.2d 454 (1993).

Professional Liability Exclusion in General Liability Policy

Under the one New York case that has discussed this exclusion, its applicability is essentially fact-driven. In Reliance Insurance Company v. National Union Fire Insurance Company of Pittsbirgh, PA, 262 A.D.2d 64, 691 N.Y.S.2d 458 (1st Dept. 1999), the Court dealt with the issue of whether a commercial general liability policy or professional malpractice policy applied to a tort claim against an engineer accused of negligent inspection and failure to ensure that a site contractor remained in compliance with its contract and relevant safety laws. The Court held that the professional liability exclusion did not apply because the services to be performed "did not require [the insured's] engineering acumen, but rather normal powers of supervision and observation".

3. The Conditions and Other Terms

Conditions and other terms of the policy further delineate the terms of the parties' agreement.

Cooperation

Insured's refusal to cooperate with insurer is grounds for the declination of coverage. See Buongiovanni v Allstate, 240 A.D.2d 455, 658 N.Y.S.2d 431 (2d Dep't 1997); 232 Broadway Corp. v. New York Prop. Ins. Under. Assoc., 206 A.D.2d 419, 615 N.Y.S.2d 42 (2d Dep't 1994); Davis v Allstate, 204 A.D.2d 592, 612 N.Y.S.2d 195 (2d Dep't 1994); State Farm v Imeri, 182 A.D.2d 683, 582

N.Y.S.2d 463 (2d Dep't 1992); see also Shaw v Bronfman, 284 A.D,2d 267, 727 N.Y.S.2d 428 (1st Dep't 2001); Nationwide v Graham, 275 A.D.2d 1012, 713 N.Y.S.2d 602 (4th Dep't 2000); Levy v Chubb Ins., 240 A.D.2d 336, 659 N.Y.S.2d 266 (1st Dep't 1997); Utica Mutual v Gruzlewski, 217 A.D.2d 903, 630 N.Y.s.2d 826 (4th Dep't 1995).

Heavy burden on insurer. See Thrasher v. USLIC, 19 N.Y.2d 159, 225 N.E.2d 503(1967).

Cancellation

An insurer effectively cancels a policy by mailing a notice of cancellation to the address shown on the policy and providing sufficient proof of such mailing. See M. Grabie, 249 A.D.2d at 280, 671 N.Y.S.2d at 287; Hugson v. National Grange Mutual Ins. Co., 110 A.D.2d 1072, 1073, 488 N.Y.S.2d 930, 931 (4th Dep't 1985).

To prove mailing of a cancellation notice, a "certificate of mailing [is] sufficient to establish, prima facie, that [] notice was indeed actually mailed." Hantman v. Helsmoortel-Thornton Agency, Inc., 224 A.D.2d 752, 636 N.Y.S.2d 934 (3d Dep't 1996); see also Pressman v. Warwick Ins. Co., 213 A.D.2d 386, 623 N.Y.S.2d 306 (2d Dep't 1995) (insurer submitted sufficient proof, in the form of a certified mail receipt, to establish that it mailed notice); 18th Avenue Realty Corp. v. Aetna Cas. and Surety Co., 240 A.D.2d 287, 659 N.Y.S.2d 17 (1st Dep't 1997); Allstate Ins. co. v. Peruche, 100 A.D.2d 935, 474 N.Y.S.2d 845 (2d Dep't 1984).

Anti-Stacking

Hiraldo v Allstate 2005 WL 2759234 (2005).
The Court of Appeals upheld an anti-stacking provision in the context of lead paint claims that related to exposure over several policy periods. The Court noted that the appellate courts have disagreed as to whether, in the absence of an anti-

stacking provision, policies can be stacked in the context of lead claims. The Court also acknowledge that it did not have to decide that issue at this time in that the case before the Court involved a clear anti-stacking provision limiting the exposure "regardless of the number of policies issued by that insurer" and the Court applied that policy provision to limit the exposure to one policy limit, even though several policies were triggered by the lead claims against insured..

4. The Insurance Law – Including Notice Issues

Statutory and case law adds a further dimension to the agreement between the insurer and the insured in terms notice obligations and waiver or estoppel. The Insurance Law governs the conduct and regulation of "admitted insurers" as well as excess line brokers who obtain policies from "non-admitted insurers." The policy terms, provision, and notifications are regulated and insurers are held to statutory requirements for cancellation for notifications, renewal, non-renewals and cancellation of policies.

Notice regarding occurrences, claims and lawsuits is a hotly litigated issue in New York in that by operation of statute, policy language and case law, the insured owes a reasonable obligation to provide timely notice of an occurrence claim or lawsuit to the insurer. Similarly, the insurer owes an obligation to provide timely notice of its position as to coverage. The insurer's duty is elevated in the context of "bodily injury" claims, where special rules apply that, if not followed by the insurer, could work an estoppel and bar the insurer from denying coverage even if by the terms of the policy; this is contrasted to the common law standards, where prejudice must be proven in order to work an estoppel.

The Notice Statute

New York's Insurance Law § 3420 provides that in bodily injury claims:

A. Insurers can require insureds to provide notice "as soon as practicable."

B. Claimants can provide notice to the insurer in the place of the insured.

C. Insurers have to communicate coverage position "as soon as is reasonably possible" to insured and claimant.

D. An injured person can sue a tortfeasor's insurer to satisfy a judgment obtained against the tortfeasor. See Lang v. Hanover Ins. Co., 3 N.Y.3d 350, 787 N.Y.S.2d 211 (2004).

New York's Insurance Law §3420 does not apply to property damage.

Estoppel issues can also apply by common law, which requires a prejudice showing.

By its terms, Section 3420(d) does not apply to claims for legal malpractice. See Vecchiarelli v. Continental Ins. Co., 277 A.D.2d 992, 716 N.Y.S.2d 524 (4th Dept.2000); Incorporated Village of Pleasantville v. Calvert Ins. Co., 204 A.D.2d 689, 612 N.Y.S.2d 441, 443 (2d Dept.1994). Common law applies.

No Prejudice Required To Disclaim For Late Notice

The standard provision in a contract of primary liability insurance requiring the insured to give the insurer prompt notice of a potential claim operates as a condition precedent; thus, for failure to give timely notice, the primary insurer "need not show prejudice before it can assert the defense of noncompliance." See Security Mutual v Acker-Fitzsimons Corp, 31 N.Y.2d 436 (1972); Argo Corp. v. Greater N.Y. Mut. Ins. Co., 4 N.Y.3d 332, 339, 794 N.Y.S.2d 704 (2005).

Excess insurers "are entitled to assert a defense based on the late notice, even if they are unable to demonstrate that they are actually prejudiced by the delay." See American Home Assur. Co. v. International Ins. Co., 90 N.Y.2d 433 (1996).

Under New York law, it is the insured's duty to notify both the primary and excess liability carriers of a reasonable possibility of claims under various policies accrued at time insured became aware of occurrence, especially when those potential claims are of sufficient magnitude to involve both their primary and their excess insurance carriers. See Olin Corp. v. Insurance Co. of North America, 743 F. Supp. 1044 (S.D.N.Y. 1990); see also Monarch Cortland v Columbia Casualty Co., 224 A.D.2d 135, 646 N.Y.S.2d 904 (3rd Dept. 1996).

Prejudice Required For Late Notice of Suit In SUM Context

Insurers relying on the "late notice of legal action" defense to claim for supplementary uninsured motorists were required to demonstrate prejudice in order to deny coverage on late notice. See In re Brandon, 97 N.Y.2d 491 (2002)

Who Provides Notice To The Insurer?

New York's Insurance Law, section 3420, and policy provides that notice can be provided to insurance company by or on behalf of an insured or a claimant. Other insurance companies, brokers, attorneys can be "on behalf" but their notice has to comply with statute and the policy provisions. See Metropolitan Casualty Ins. Co. v. Travelers Ins. Co., 21 A.D.3d 457, 800 N.Y.S.2d 448 (2d Dep't 2005), where the Second Department held that a primary insurer's facsimile to an excess insurer was insufficient notice in that it did not include the lawsuit papers and, therefore, the time period for the excess insurer to issue a disclaimer did not run from that facsimile notice.

Notice by one insured can affect the notice provided by another insured. See City v. Continential, - A.D.2d - , 805 N.Y.S.2d 391 (1st Dep't 2005). In City v. Continential, an employee of Welbach Electric Corp., the named insured on Continental's policy, was injured while repairing the City's utility poles. The

City was an additional insured on a policy issued by Continental to Welbach Electric Corp. Welbach was sued in November 2002, and Continental was notified and defended Welbach. The City was sued in December 2002 but did not get around to sending notice to Continental until April 2003. The First Department found that where the insurer knew of the lawsuit and in fact was defending Welbach already, the case was more analogous to Matter of Brandon, 97 N.Y.2d 491, 743 N.Y.S. 2d 53 (2002) (requiring prejudice to enforce a disclaimer for late notice of lawsuit where the insurer had prior notice of occurrence and claim) than Argo Corp. v. Greater N.Y. Mutual Ins. Co., 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005) (enforcing a late notice disclaimer without the requirement of prejudice where there was late notice of lawsuit and no prior notice of occurrence or claim).

Notice to broker of insured contrasted with notice to agent of insurance company. See Gershow Recycling Corp. v. Transcontinental Ins. Co., 22 A.D.3d 460, 801 N.Y.S.2d 832 (2d Dep't 2005) citing Security Mut. Ins. Co. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436; Matter of First Cent. Ins. Co., 3 A.D.3d 494, 771 N.Y.S.2d 141; Bennion v. Allstate Ins. Co., 284 A.D.2d 924, 727 N.Y.S.2d 222; Travelers Indem. Co. v. Worthy**,** 281 A.D.2d 411, 721 N.Y.S.2d 400; Serravillo v. Sterling Ins. Co**.,** 261 A.D.2d 384, at 385, 689 N.Y.S.2d 521; Shaw Temple A.M.E. Zion Church v. Mount Vernon Fire Ins. Co., 199 A.D.2d 374, 605 N.Y.S.2d 370; Universal Underwriters Ins. Co. v. Patriot Ambulette, 149 A.D.2d 500, 539 N.Y.S.2d 981.

Insurer's Duty To Provide Notice of Coverage Position

New York's Insurance Law, section 3420, requires an insurance company to issue coverage position "as soon as is reasonably possible" to insured and claimant regarding a bodily injury claim or else such disclaimer will be deemed untimely and the insurance company will be estopped from denying coverage for the claim. See also First Financial Ins. Co. v. Jetco Contracting Corp., 1 N.Y.3d 64, 769

N.Y.S.2d 459 (2003); Hartford Ins. Co. v. County of Nassau, 46 N.Y.2d 1028, (1979).

Thirty days to disclaim was upheld as unreasonable in West 16th Street Tenants Corp. v. Public Service Mutual Insurance Company, 290 A.D.2d 278, 736 N.Y.S.2d 34 (1st Dep't 2002).

New York's Insurance Law, section 3420, does not apply, however, and an insurance company need not timely disclaim coverage pursuant to Insurance Law § 3420(d), when "the insurance policy does not contemplate coverage in the first instance...." See Progressive Northeastern Ins. Co. v. The American Ins. Co**.,** 2001 WL 959183 (S.D.N.Y. 2001) (quoting Worcester Ins. Co. v. Bettenhauser, 95 N.Y.2d 185 (2000)).

Insurance Law, section 3420, disclaimer letter must address notice provided by the claimant if the first notice to the insurer was by claimant. If first notice from or on behalf of claimant is untimely, insurer must address the untimeliness of the claimant's notice, not just insured's failure to give notice, in the disclaimer letter. General Accident v Cirucci, 46 N.Y.2d 862, 387 N.E.2d 223, 414 N.Y.S.2d 512 (1979).

Bovis v. Royal Surplus Lines Ins. Co., 2005 WL 3435238 (N.Y.A.D. 1 Dep't. 2005).

National Union Fire Insurance Company of Pittsburgh, PA ("National Union") tendered a claim against Bovis to Royal Surplus Lines Ins. Co. ("Royal"), and Royal delayed a period of two an done half months to reject the tender. The First Department held that Insurance Law 3420 cannot be used by one insurer against another insurer, and therefore, the delay in rejecting the tender did not constitute waiver or estoppel. However, since Royal also delayed in disclaiming to Bovis, Bovis could assert the delay to estop Royal from denying coverage to Bovis.

B. "CLAIMS MADE" DISTINGUISHED FROM "OCCURRENCE" COVERAGE

General liability policies, which afford insurance coverage for claims asserted by third-parties, are written on an "occurrence" basis, which means that if the occurrence is within the policy period and the claim falls within the coverage afforded by the policy, then the policy affords indemnity and/or defense for a lawsuit whenever that lawsuit is brought. If a policy is terminated or cancelled before the end of the policy period, a new policy has to be obtained in order to avoid a "gap in coverage." If there is a "gap in coverage," there is potential that a lawsuit may arise in the future from an occurrence during the gap period, which would not be covered by any policy.

Claims made policies cover only claims first made and first reported during the policy period. Accordingly, claims made prior to the policy's inception date or reported to a prior insurer are not covered under the policy. See Rosenbaum v. Chicago Insurance Co., 306 A.D.2d 29, 761 N.Y.S.2d 637 (1st Dep't 2003).

The key is whether the claim is for the "wrongful act" or "professional services" covered by the policy.

In Cohen v. Employers Reinsurance Corporation, 117 A.D.2d 435, 503 N.Y.S.2d 33 (1st Department 1986), the Court held that there was no insurance coverage under a legal malpractice policy for sanctions imposed on an attorney acting as a trustee of a trust created under a will, as follows:

> The Surrogate's opinion in our case very clearly states that the surcharge against plaintiff was imposed solely as a consequence of plaintiff's actions as a co-trustee, to wit, improvidently investing in speculative REITS. Concededly, the circumstances had their origin in plaintiff's actions as a lawyer in drafting Newhoff's will. However, the claim by the beneficiaries in the accounting proceeding related to plaintiff's actions as a trustee only, and not as a lawyer. It is noted that the co-trustee, who is not a lawyer, was similarly surcharged. There is no requirement that a trustee be a lawyer. The policy issued by defendant was to defend and indemnify plaintiff for any liability incurred by him in his capacity

> as a lawyer. Defendant provided that protection by defending plaintiff in the legal malpractice action brought by the trustee beneficiaries.

It is noteworthy that the coverage agreement in Cohen read as follows:

> COVERAGE A--INDIVIDUAL COVERAGE. The Corporation does hereby agree to insure and indemnify the Assured against loss in excess of the Assured's retention and within the limit herein expressed, on account of liability imposed upon the Assured by law for damages caused by any act or omission of the Assured, or of any person for whose acts the Assured is legally liable, and arising out of the performance of professional services for others in the Assured's capacity as a lawyer as respects claims arising out of such acts or omissions occurring during any indemnity period or as respects claims first made against the Assured during any indemnity period and arising out of such acts or omissions occurring prior to the effective date of this policy.

A similar result was reached in Rooney v Chicago Insurance Co., 26 Fed.Appx. 53, 2001 WL 1486527 (2nd Cir.(N.Y.)), where the Second Circuit – albeit in an unpublished decision – held that there was no coverage for litigation costs on sanctions motion; see also Cowan v Codella, 2001 WL 30501 (S.D.N.Y. 2001).

Professional liability policies also may include a "Retroactive Date" which, depending on its wording may preclude coverage for claims arising from conduct prior to a specific date. See Coregis v. Blancato P.C., 75 F.Supp.2d 319 (S.D.N.Y. 1999).

Exclusions may also remove from coverage claims brought by a claimant related to the insured. See Salzman & Salzman v Home (2d Dep't 1999), where the Second Department held that a policy exclusion barred coverage for claim arising from line of credit transaction involving corporation in which insured had an ownership interest, but did not bar coverage for claim arising from a separate loan transaction involving another insured.

The inclusion of covered and un-covered claims may give rise to defense issues. See Rosenberg & Estis P.C. v. Chicago Insurance Company, 2003 WL 21665680 (N.Y. Sup.), 2003 N.Y. Slip Op. 51085(U) (Sup. NY 2003) citing Public Service Mutual v Goldfarb, 53 N.Y.2d 392, 442 N.Y.S.2d 422 (1981.

C. OTHER INSURANCE – PRIMARY AND EXCESS INSURANCE ISSUES

The "other insurance" provisions of a policy expands the coverage dispute beyond the insured and the insurer and brings another insurer or insurers into the equation. The Court is asked to give effect to the "other insurance" provisions of the competing or co-applicable policies and allocate which insurer pays what and who pays in what order. See e.g., Jefferson Ins. Co. v. Travelers Indemnity Co., 92 N.Y.2d 363, 703 N.E.2d 1221, 681 N.Y.S.2d 208 (1998).

Pecker Iron Works v. Travelers, 99 N.Y.2d 391, 756 N.Y.S.2d 822 (2003), holds that where a contact requires that additional insured coverage be provided, the additional insured coverage is primary. See also Tishman Construction Corp. v. American Manu. Mutual Ins. Co., 757 N.Y.S 2d 535 (1st Dept. 2003). In Tishman, the subcontract required that subcontractor provide primary coverage. Policy issued to Tishman stated that it was excess where there was "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement." But see also United States Liability Insurance Company v Mountain Valley Indemn. Co., 371 F.Supp.2d 554 (S.D.N.Y. 2005), where the commercial umbrella insurer for truck lessee brought action against commercial automobile insurer for truck lessor, seeking reimbursement for the amount it paid on behalf of lessee to settle underlying wrongful death action, arising from accident in which truck struck vehicle driven by decedent. The District Court held that the commercial automobile insurer of truck lessor was next layer over the truck lessor's primary policy in that the lease rendered the lessor's commercial automobile policy excess only to lesee's primary automobile policy, and, therefore commercial umbrella insurer of lessee was above lessor's commercial automobile policy.

Example:

> The insurance afforded by this policy shall be excess insurance over all underlying insurance covering a loss covered by this policy whether or not valid and collectible. It shall also be excess insurance over all other valid and collectible insurance (except other insurance purchased specifically to

apply in excess of this insurance) which is available to the Insured, covering a loss also covered by this policy, not described in the Schedule of Underlying Insurance.

Other Issues that Arise with Co-Insurance and Other Insurance:

Anti-Subrogation Rule

The rule applies when two insureds are covered by the same insurance policy, or when they are "insured under two policies covering the same risk, issued simultaneously by the same insurer." North Star Reinsurance Corp. v. Continental Ins. Co., et al., 82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993) ("North Star") An insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered. Id.

Duties of Primary Insurer and Defense Counsel To Excess Insurer

A primary insurer has a duty of good faith to the insured and the excess insurer to properly investigate, evaluate, and resolve a claim. In Hartford Accident and Indemnity Co. v. Michigan Mutual Ins. Co., 61 N.Y.2d 569, 475 N.Y.S.2d 267 (1984), the Court of Appeals explained:

> Michigan Mutual as the primary liability insurer owed to Hartford as the excess carrier the same duty to act in good faith which Michigan owed to its own insureds, DeFoe and L.A.D. (*St. Paul Fire & Mar. Ins. Co. v. United States Fid. & Guar. Co.,* 43 N.Y.2d 977, 404 N.Y.S.2d 552, 375 N.E.2d 733; see 2 NY PJI 243 [1983 Supp]). Whether Michigan Mutual acted, as it claims, in the interest of protecting its insureds against the harassment of multiple claims, or in its own interest so as to activate Hartford's excess liability without having to share in or substitute for that liability as the insurer under the I(B) coverage of its compensation policy is, therefore, a question to be determined upon trial of the action rather than on motion for summary

> judgment, as also is the question whether Hartford's payment was "voluntary" (cf. *Trojcak v. Wrynn,* 45 A.D.2d 770, 357 N.Y.S.2d 32).

In AAA Sprinkler Corp. v. General Star Nat. Ins. Co., 271 A.D.2d 331, 705 N.Y.S.2d 582 (1st Dept. 2000), the Appellate Division held that "a general liability carrier had not acted in bad faith when it failed to notify the insured or the insured's excess liability carrier of the possibility of a judgment in excess of the primary policy limits.". In so holding the Court noted that it was the insured's obligation to provide notice to the excess carrier and, although aware of the potential for an excess verdict, failed to provide the required notice.

In Monarch Cortland v. Columbia Casualty Company, 224 A.D.2d 135, 646 N.Y.S.2d 904 (3rd Dept. 1996), the issue was whether a primary insurance carrier's failure to notify an insured or its excess carrier of possible exposure to liability in excess of the primary policy's limits constituted a breach of its duty to carry out the insured's defense in good faith. The Court found nothing in the record to indicate that the primary insurer acted deliberately or even recklessly. Further, the primary insurer could not be found to have placed its own interests above its insured's interests, as it had nothing to gain by not informing the insured of the potential for excess liability. Finally, the Court found that the primary insurer kept its insured informed of all relevant facts so that the insured had essentially the same information as the insurer on which to form an opinion as to the need to notify its excess carrier.

While the New York Court of Appeals has not addressed whether an excess insurer has subrogated right to pursue a malpractice claim against defense counsel, such a claim has been approved by the appellate courts. See Hartford Accident and Indem. Co., supra; Great Atlantic Insurance Company v. Weinstein, 125 A.D.2d 214, 509 N.Y.S.2d 325 (1st Dept. 1986)(Appellate Division permits action by excess insurer alleging that counsel for the insured committed malpractice by representing two defendants with adverse interests.); Allstate Ins.

Co. v. Federal Ins. Co. v. American Transit Ins. Co., 977 F.Supp. 197 (E.D.N.Y. 1997)

D. ETHICAL CONSIDERATION FOR COUNSEL INVOLVING INSURANCE

The Appellate Division, Second Department, ruled in the recent case of Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 2006 NY Slip Op 09598, that the Court held that the duty to notify an excess insurer could, under some circumstances, fall upon defense counsel assigned by the primary insurer. In the Shaya B. case, Kazimierz Golebiewski (the "Claimant") was injured on April 1, 2000, while performing work on the premises of Shaya B. Pacific, LLC ("Shaya"). The Claimant filed suit against Shaya, and Shaya's primary insurer retained Wilson, Elser, Moskowitz, Edelman & Dicker, LLP ("WEMED") in July 2000 to defend. In February 2003, the Claimant was awarded summary judgment on the issue of liability, and on April 24, 2003, before the commencement of the trial on the issue of damages, WEMED tendered the case to the excess insurer for defense and indemnification. By letter dated May 14, 2003, the excess insurer declined the tender and disclaimed coverage on the grounds that it had not received timely notice. On or about October 22, 2003, the Claimant obtained a judgment in excess of the policy limits. Shaya commenced a lawsuit against WEMED asserting legal malpractice and breach of contract. The argument was that WEMED had been negligent in failing to advise Shaya, or to notify the excess insurer of the underlying action. WEMED moved to dismiss the complaint, and while the Lower Court granted that motion, the Appellate Division reversed as to the legal malpractice claim, and dismissed as to the breach of contract as a duplicative cause of action. The Appellate Court noted that in order to succeed on the motion to dismiss, the defendant law firm (WEMED) would have had to show that it owed the plaintiff no duty to identify and/or notify potential excess insurers or, alternatively, that any negligence on the defendant's part did not cause the loss of excess coverage. The Court thus deemed determinative the scope of the WEMED's representation of Shaya, but held that based upon the information presented on the motion, the Court could not conclusively determine the scope and limitations of the representation and therefore could not grant WEMED's motion to dismiss on the record presented. In so ruling, the Court held that the question of whether a law firm retained by a primary insurer has any duty to ascertain and/or notify an excess insurer or the claim

depends upon whether the firm was hired to represent the insured as to that aspect. In other words, it may be that in some cases the duty may be shown to fall on defense counsel.

Ethical Considerations / Questions For Discussion:

1. The tri-partite relationship of counsel, insured and insurer;

2. The retainer agreement and terms of engagement; be clear about what you are not going to do for the client. See Shaya B., above;

3. Privately retained counsel as opposed to insurer retained counsel;

4. Payment of legal bills distinguished from attorney's duty to client;

5. Limits on insurer retained defense counsel input on issues of insurance:

    a. Duty of loyalty and confidentiality;

    b. Conflict issues;

    c. What can defense counsel communications with insurer; and

    d. What should defense counsel communications with insured;

6. Are there situations when Separate Counsel is required? Who pays?

7. What if counsel has committed malpractice by not pursuing insurance?

    a. Disclosure of error or omission to client – statute of limitations;

    b. Notice of Occurrence and Lawsuit to malpractice insurer.

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Steven Verveniotis is a partner at MIRANDA SOKOLOFF SAMBURSKY SLONE VERVENIOTIS LLP. He graduated from New York University in 1982 and obtained his J.D. degree from New York Law School in 1986. He is admitted to practice before New York's State Courts as well as the Eastern and Southern Districts of the United States District Court, as well as the United States Court of Appeals for the Second Circuit. He is a seasoned litigator with proven success at trials, motion practice and appeals in the areas of insurance coverage litigation and professional liability defense. He has successfully represented numerous insurers and a variety of professionals (including attorneys, agents, brokers, accountants and others) before the state and federal courts of New York. He has lectured at several seminars sponsored by the New York State Bar and other groups on insurance and professional liability issues.

Selected reported victories in the area of insurance coverage litigation and professional liability include:

- *Atlantic General Contracting v. U.S. Liability Insurance Group,* 24 A.D.3d 480, 806 N.Y.S.2d 225 (2d Dep't 2006) New York law applies to coverage litigation concerning a New York accident even though the insured was from New Jersey and policy was delivered in New Jersey.
- *Davis v. Oyster Bay-East Norwich School District,* 2006 WL 657038 (E.D.N.Y.) Discrimination claims dismissed on the facts and on the law.
- *Melnitzky v. Owen,* 19 A.D.3d 201, 796 N.Y.S.2d 612 (1st Dep't 2005). Legal malpractice and Judiciary Law claims dismissed based upon documentary evidence showing appropriate conduct by attorney.
- *U.S. Liability Ins. Co. v. Mountain Valley Ins. Co.,* 371 F.Supp.2d 554 (S.D.N.Y. 2005). Policy of insurance to a vehicle lessee is excess above primary policy issued to vehicle lessee and above primary insurance issued to vehicle lessor.
- *Ins. Corp. of NY v U.S. Underwriters Ins. Co.,* 11 A.D.3d 235, 782 N.Y.S.2d 432 (1st Dep't 2004). Certificate of insurance is not, by itself, sufficient to raise a factual issue as to the existence of coverage for purported additional insured.
- *NYCHA v U.S. Underwriters Ins. Co.*, 7 A.D.3d 393, 776 N.Y.S.2d 468 (1st Dep't 2004). Court upheld policy limitation of coverage for particular work at particular job site.
- *Webster v. Mount Vernon Fire Insurance Company,* 368 F.3d 209 (2d Cir. 2004). Notice to insurer by husband does not satisfy the separate notice obligation of the wife.
- *U.S. Liability Ins. Co. v. Winchester Fine Arts Services, Inc.*, 337 F.Supp.2d 435 (S.D.N.Y. 2004). Court upheld excess insurer's disclaimer for late notice in case where claim was known to be serious and above primary's limits from inception of lawsuit.
- *U.S. Underwriters Ins. Co. v. Affordable Housing, Foundation Inc.*, 88 Fed. Appx. 441, 2004 WL 287151 (2nd Cir. (N.Y.)) affirmed 256 F. Supp.2d 176 (SDNY 2003). Trial Court found and Court of Appeals affirmed application of clear and unambiguous independent contractor exclusion.
- *Crown Fire Supply Co., Inc. v. Cronin*, 306 A.D.2d 430,761 N.Y.S.2d 495 (2d Dep't 2003). Defamation case against Fire Chief/Fire Department dismissed on privilege/immunity grounds.
- *DiBlasio v. Chesterton et al*, 302 A.D. 2d 486, 755 N.Y.S. 251 (2d Dep't 2003). Claims by school employee against school for false imprisonment dismissed.
- *Friedman v Clarkstown Central School District ,* 01 Civ. 10646 (SHS), USDC, SDNY, Trial 2002 affirmed 75 Fed. Appx. 815, 2003 WL 22134539 (2nd Cir. (N.Y.)), 181 Ed. Law Rep. 418 (2nd Cir. 2003). On trial for injunctive relief, the District Court upheld the School District's denial of request for exemption from immunization. The Second Circuit affirmed on facts and law.
- *Rachimi v. Robinson et al ,* Index No. 6033868/97. Trial before the Supreme Court, NY County (Justice Jane Solomon) in 2002. Defense verdict in legal malpractice action stemming from commercial litigation.
- *Dweck v Mann*, 283 A.D.2d 292, 727 N.Y.S.2d 58 (1st Dep't 2001).
  Malpractice claims dismissed on showing of reasonable strategy and lack of damages.
- *Haggerty v Burns*, 282 A.D.2d 500, 728 N.Y.S.2d 374 (2d Dep't 2001).
  Sanctions obtained against plaintiff deemed "provident exercise of discretion."
- *Wolkstein v. Morgenstern*, 275 A.D.2d 635, 713 N.Y.S.2d 171 (1st Dep't 2000). Emotional distress and psychological damages are not recoverable in legal malpractice.
- *Polovy v. Duncan*, 269 A.D.2d 111, 702 N.Y.S.2d 61 (1st Dep't 2000).
  Director/President of school had no basis for malpractice claim against school's attorney.
- *Cepeda v. Trolman & Glaser, P.C.*, 259 A.D.2d 355, 687 N.Y.S.2d 67 (1st Dep't 1999). Malpractice claims dismissed upon showing of reasonable attorney judgment at trial.