RIKER DANZIG SCHERER HYLAND PERRETTI LLP

NY and NJ Appellate Courts Address Hot Button Insurance Issues

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Appellate courts in New Jersey and New York issued several noteworthy opinions this week, which may impact insurance carriers' coverage obligations in each state.

NY Court of Appeals Enforces Contractual Privity Requirement in Additional Insured Endorsement

In a 5-2 decision, New York's highest court ruled that a construction manager was not an additional insured under a contractor's policy because there was no written contract between the parties. Gilbane Bldg. Co./TDX Constr. Corp., et al. v. St. Paul Fire and Marine Ins. Co., et al., 2018 NY Slip Op 02117 (Mar. 27, 2018). The endorsement at issue provided additional insured status to "any person or organization with whom you [the named insured] have agreed to add as an additional insured by written contract." The Court of Appeals held that such language unambiguously requires a written contract between the named insured and the other party in order to confer additional insured status on the other party. Note, however, that the Court focused its analysis on the provision's use of the phrase "with whom," and did not answer the question of whether privity of contract is required absent such express language.

A copy of the decision is available here.

NY Court of Appeals Rejects the "Unavailability Rule" in Long-Tail Claims

In Keyspan Gas East Corp. v. Munich Reinsurance America, Inc., 2018 N.Y. Slip Op 02116 (Mar. 27, 2018), the Court of Appeals addressed an issue of first impression and unanimously held that the pro rata time-on-the-risk method of allocating long-tail insurance claims includes years where there was no applicable insurance coverage

available on the market. The policy at issue in Keyspan limited the insurer's liability to losses and occurrences "during the policy period." While agreeing that New York courts interpret such policy language to require pro rata calculation of an insurer's liability for long-tail claims, the insured argued that New York should adopt an "unavailability rule," whereby the pro rata calculation would exclude years where there was no applicable insurance coverage available. The Court found that the "unavailability rule" was inconsistent with the policy language at issue, and held that the pro rata calculation includes both years where the insured voluntarily self-insured and years where insurance was not available. Keyspan thus confirms that the insurer's obligations under a "time-on-the-risk" analysis do not extend beyond the policy period where the policy's language so provides.

A copy of the decision is available here.

NY Appellate Division Applies Burlington to Find No Duty to Defend or Indemnify

In Hanover Ins. Co., et al. v. Philadelphia Indem. Ins. Co., 2018 NY Slip Op 02121 (N.Y. App. Div. 1st Dept. Mar. 27, 2018), the First Department examined an insurance company's duty to defend and indemnify an additional insured in the aftermath of Burlington Ins. Co. v. NYC Transit Auth., 29 N.Y.3d. 313 (2017). The Hanover court found that an insurance company is not required to defend or indemnify an additional insured in an underlying action that does not involve damages proximately caused by the named insured.

In this case, Hanover Insurance Company sought defense and indemnity for its own insured, the Manhattan School of Music, as an additional insured under a policy issued by Philadelphia Indemnity Insurance Company to a third party, Protection Plus Security Corporation. The underlying personal injury action involved claims by a Protection Plus employee who sustained injuries while working at the Manhattan School of Music when he slipped and fell on a wet floor that had been mopped by the school's maintenance staff.

The policy issued by Philadelphia to Protection Plus included the same operative language at issue in Burlington, which provides additional insured coverage "only with respect to liability for 'bodily injury' . . . caused, in whole or in part" by the acts or omissions of the named insured. Under this language, the Hanover court found that Philadelphia did not have a duty to defend or indemnify the additional insured because Philadelphia's named insured, Protection Plus, had not proximately caused the employee's injury.

The decision is favorable for insurers facing additional insured claims, as it supports the proposition that when the causal nexus required to trigger additional insured coverage is missing, there is no duty to defend or indemnify a putative additional insured – even when the underlying plaintiff is an employee of the named insured.

A copy of the decision is available here.

Precedential Ruling by NJ Appellate Court Holds that Insurer Cannot be Estopped from Denying Coverage for Failure to Secure Insured's Express Consent to a Defense under Reservation

The New Jersey Appellate Division issued a published opinion this week holding that an insurer is not automatically estopped from denying coverage where it assumes a defense under a reservation of rights without first notifying the insured of its right to reject the offer. In Northfield Insurance Co. v. Mt. Hawley Insurance Co., et al., __ N.J. Super. __, No. A-1771-16T4 (App. Div. Mar. 27, 2018), the Court found that the insurer should not be estopped simply because it failed to use "certain magic words" in communicating its reservation of rights to its insured. The Court further refused to impose estoppel because the actions did not prejudice the insured.

Northfield involved a dispute over coverage for an underlying lawsuit by a property owner alleging construction defect losses against CDA Roofing Consultants, LLC, an insured of Northfield Insurance Company. Northfield had denied any obligation to indemnify CDA Roofing for the alleged losses but agreed that it was "willing to provide [CDA Roofing] with a courtesy defense for the lawsuit" under a reservation of rights. In the subsequent coverage action between Northfield and the property owner's insurer, Mt. Hawley Insurance Company, Mt. Hawley moved for summary judgment on grounds that Northfield was estopped from denying coverage for the claims against CDA Roofing because Northfield had not expressly requested CDA's consent to Northfield's control of the defense, in violation of Merchants Indemnity Corp. v. Eggleston, 37 N.J. 114 (1962).

The Northfield court rejected this argument. It held that Northfield's agreement to provide a "courtesy defense" to CDA Roofing could reasonably be interpreted as an offer, and not as insistence on control of the defense, and that CDA Roofing's silence in response could reasonably be interpreted as acquiescence in Northfield's control of the defense.

While refusing to estop Northfield from denying coverage for its failure to provide an explicit notice that the insured may reject the offer of a defense, the Court nevertheless held that expressly seeking the insured's consent is the preferable course of action. The Court also found that estoppel does not immediately attach when an insurer assumes control of the defense without first obtaining consent. The Court held that the party seeking estoppel must still demonstrate detrimental reliance by the insured, a required element of estoppel. The Northfield decision is thus a favorable ruling for insurers, which confirms that the failure to obtain the insured's consent to a defense under a reservation of rights does not automatically estop an insurer from denying coverage.

A copy of the decision is available here.

Feel free to call any member of our team if you have questions concerning the above cases or their effects on your New York or New Jersey claims.

Attorneys:

Brian E. O'Donnell · Lance J. Kalik · Glenn D. Curving · Michael P. O'Mullan · Caroline Brizzolara · Anthony J. Zarillo, Jr. · Tracey K. Wishert · Michael J. Rossignol · Maura C. Smith · Anne M. Mohan · Marcia Miller Wefelmeier · Jeffrey M. Beyer · Lisa M. Jarmicki · Peter M. Perkowski, Jr. · Margriet A. Schaberg

Practice:

Insurance and Reinsurance Law