



CONTINUING LEGAL EDUCATION (“CLE”) SEMINAR

New York, by Zoom Webinar

\$25 for DANY members, \$50 for non-members

Defense Association of New York (“DANY”) has been granted CLE accreditation by the New York Office of Court Administration, and will provide the following program:

Coverage Developments for the Insurance Defense Attorney

Appropriate for both experienced and newly admitted attorneys.

Thursday, September 23, 2021

5:30 p.m. - 7:30 p.m.

Presented By:

- **Julian D. Ehrlich**, DANY Past President, Senior VP Claims / Construction Services Group, AON
- **Darrell John**, Managing Partner, Conway Farrell Curtin & Kelly P.C.
- **Jennifer A. Ehman**, Senior Litigation Manager, Merchants Mutual Ins. Co.
- **Rona L. Platt**, US General Counsel and Head of Compliance, Accelerant

Subject Matter:

- The difference between insurance & indemnity, conflicts with insurers / insureds and ethics challenges (30 minutes)
- The continued struggle to interpret *Burlington*, anti-subrogation and duty to defend, and increased challenges re Insurance Law 3420(d) (30 minutes)
- Tendering and tenders - timeliness, contractual risk transfer and additional insured coverage (30 minutes)
- Q & A (10 minutes)

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DANY President-Elect: Claire F. Rush

CLE Committee: Teresa A. Klaum and Bradley J. Corsair, Chairs;
Steven R. Dyki, Heather Wiltshire Clement and Eileen E. Buholtz

Two CLE Credits will be granted in Professional Practice to New York attorneys who attend the entire presentation and state the announced course codes in an affirmation (see link below) submitted by e-mail to danyexecdir@gmail.com. http://ww2.nycourts.gov/attorneys/cle/affirmation_sample.pdf.

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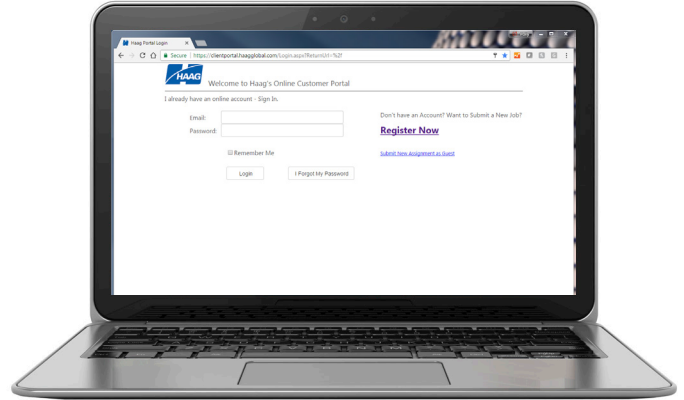


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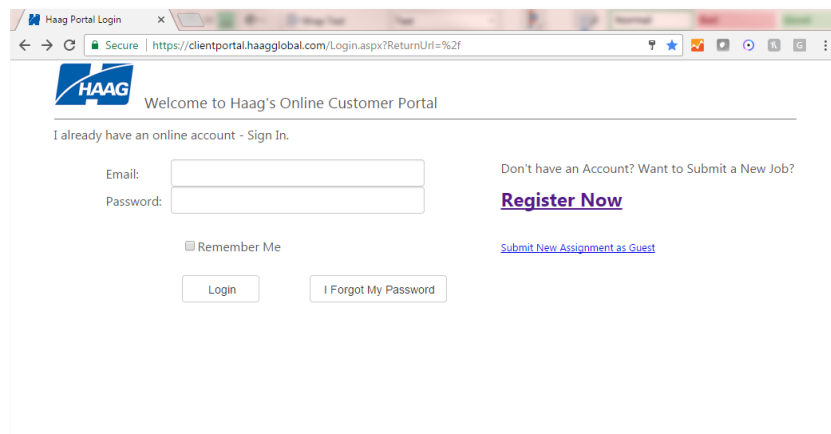


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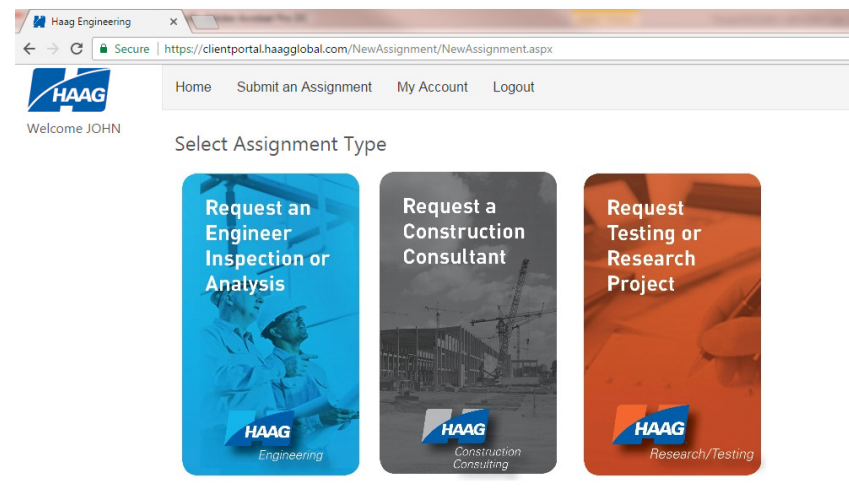
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Rona Platt is the General Counsel for Accelerant Group's US operations. Ms. Platt's experience includes holding similar positions at StarStone US, including StarStone National Insurance Company and StarStone Specialty Insurance Company, as well as at The Wright Insurance Group, including WRM America Indemnity Company and Wright National Flood Insurance Company, along with her experience as Associate Corporate Counsel, Head of US Licensing and Compliance at the Enstar US, which included not only the StarStone companies but also Clarendon National Insurance Company, Providence Washington Insurance Company, Sussex Insurance Company, Pavonia Life Insurance Company and Pavonia Life Insurance Company of New York. Ms. Platt began her career as a coverage litigator at Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, beginning as a summer associate and ultimately leading the Insurance Law Group as a partner at the firm before going in-house. She has regularly lectured on insurance coverage issues for the New York State Bar Association.





Darrell John

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Darrell John is a trial attorney and managing partner at Conway, Farrell, Curtin & Kelly, P.C. Darrell focuses his practice on the defense of business entities against commercial, construction accident, construction defect, design defect, environmental, personal injury, products liability, and property damage claims. In addition to his trial practice, Darrell has prosecuted and defended coverage actions and appeals on behalf of insurers and insureds in New York since 2001.

Prior to joining the firm, Darrell practiced in Boston, MA focusing on matters of insurance coverage, reinsurance, surety bonds and fidelity bonds.

EDUCATION

- Boston University School of Law, Boston, Massachusetts, J.D.
 - Editor Boston University Law Review, Edward F. Hennessey Scholar
- State University of New York at Stony Brook, Stony Brook, New York, B.A.

Jennifer Ehman

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Jennifer Ehman is a Senior Litigation Manager at Merchants Mutual Insurance Company where she oversees construction defect, third-party property litigation and New York Labor Law claims. Prior to joining Merchants, she was a member of Hurwitz & Fine, P.C. located in Buffalo, New York, where she specialized in insurance coverage matters representing insurers in both federal and state court.



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Responsibilities

Julian is part of the Aon National Claims Leadership and has direct responsibility for the claims practice for the Greater New York Metro Region. His team of professionals advocate for clients on issues ranging from accurate reserving, proper resolution strategies, best practices, an expanded carrier view of coverage, to making clients better insureds and providing superior service throughout the claims and litigation processes.

Experience

Prior to joining Aon in September 2008, Julian was Claims Counsel for AIG's Construction Risk Division, after serving as a member of their in-house defense firm and in private practice for more than 16 years.

He is known for his "4Cs" approach to claims management – client service, communication, competency and compliance. He is also recognized for his unparalleled expertise in scaffold statute litigation having authored the Labor Law § 240 section in the New York State Bar Association treatise "Construction Site Personal Injury Litigation."

Julian has written for the *New York Law Journal's* Outside Counsel and Expert Commentary columns regularly for over 20 years. He has authored over 50 articles on insurance, coverage, tort liability trends and emerging issues in numerous trade, industry and law journals. He has been quoted in *Crain's New York Business*, *Claims Journal*, *ENR (Engineering News-Record)*, and *Business Insurance*.

Julian has presented at programs for the American Bar Association, New York State Bar Association, IRMI (International Risk Management Risk Institute), the Defense Research Institute (DRI), the Defense Association of New York (DANY), the Alpha Construction Conference, New York RIMS and for other many bar and trade associations.

He served as President the Defense Association of New York (DANY) from 2010 to 2011 for which he received the Defense Research Institute (DRI) Exceptional Performance Citation Award. He has also served on numerous committees of DRI.

Expertise

Julian brings key constituencies together to work towards successful resolutions. He is adept at negotiating claims disputes and developing proactive preemptive solutions leveraging internal resources. He is the author of numerous published opinions and articles, and is a frequent lecturer at legal and industry conferences.

Education

Julian graduated from Pace University School of Law and is licensed to practice in State and Federal Court, New York and Connecticut.

Last Updated [04.21]



THIRD ANNUAL* COVERAGE DEVELOPMENTS FOR THE INSURANCE DEFENSE ATTORNEY

SEPTEMBER 23, 2021

Panelists:

Darrell John, Managing Partner, Conway Farrell Curtin & Kelly P.C.

Jennifer A. Ehman, Sr, Litigation Manager, Merchants Mutual Ins. Co.

Julian D. Ehrlich, DANY Past President, Senior VP Claims/Construction Group, AON

Moderated by Rona L. Platt, US General Counsel and Head of Compliance,
Accelerant



Then

- ▶ The Jets couldn't play football to save their lives
- ▶ The Mets were 80-73
- ▶ Bill DeBlasio was mayor of New York City

Now

- ▶ The Jets can't play football to save their lives
- ▶ The Mets are 73-77
- ▶ Bill DeBlasio is mayor of New York City

SOME THINGS HAVE STAYED THE SAME



Then

- ▶ We were in person
- ▶ Andy Zajac was actively litigating cases
- ▶ Jennifer was in private practice
- ▶ Rona had brown hair
- ▶ No one knew how Burlington would be applied

Now

- ▶ We are on Zoom
- ▶ Andy Zajac is reaping the rewards of retirement
- ▶ Jennifer moved in house
- ▶ Rona has grey hair
- ▶ Burlington's application is clear as...

AND SOME THINGS HAVE CHANGED



What are we going to cover?

- The differences between Additional Insured coverage and Contractual Indemnity
- Additional Insured Coverage
- Anti-Subrogation
- Limitations on N.Y. Ins. Law § 3420(d)
- Tenders



**ADDITIONAL INSURED COVERAGE
VS.
CONTRACTUAL INDEMNITY**

PRESENTED BY DARRELL JOHN



UNDERLYING CONCEPTS

▶ **Additional Insured Coverage:**

▶ The additional insured is an insured on a policy of general liability insurance that is entitled to the same rights and protections as the named insured. Pecker Iron Works of New York, Inc. v. Traveler's Ins. Co., 99 N.Y.2d 391, 393 (2003). The additional insured is obligated to comply with policy conditions (notice/cooperation) as an insured.

▶ **Contractual Indemnity:**

▶ A contractual promise by one party to indemnify another party from liability/judgment arising out of a contract to supply goods or perform services. The cause of action on the promise is complete the moment the judgment is recovered, and an action for damages may be immediately maintained against the promisor although the judgment has not been paid by the promisee; the promisor was not a party to the underlying action, nor had notice thereof. Conner v. Reeves, 103 N.Y. 527, 529–30 (1886).

▶



Fact Pattern: Insurance provision

ISO 20 10 11 85

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – (FORM B)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

Name of Person or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.



Fact Pattern: Indemnity provision

To the fullest extent permitted by law, you (Contractor) agree to hold the Owner harmless from any liability for death, injury, property damage or other loss arising out of the performance of work by you or your subcontractor under this contract. In the event that a claim/suit is made/filed against the Owner, you will defend the Owner, and reimburse the Owner for attorneys' fees and expenses incurred.



FACT PATTERN

▶ **PROPER PROPERTY OWNER LLC** entered into a construction agreement with **CONSISTENT CONTRACTORS INC.** for the renovation of its commercial building. Under the agreement, CONSISTENT was responsible for all necessary construction work at the project other than the upgrade of existing fire protection. In order to save some money, PROPER entered into a separate agreement with **PUNY PIPING CORP.** for the fire sprinkler work.

▶ **PETER PIPER** sustained serious injuries during the course of his employment with PUNY when he tripped over debris from other trades. He filed a lawsuit against PROPER alleging violations of New York Labor Law §§ 240(1), 241(6), 200 and common law negligence.

▶ YOU have been retained to represent PROPER in the lawsuit by CONSISTENT'S general liability carrier, **INSISTENT INSURANCE COMPANY**. INSISTENT has agreed to provide coverage to PROPER as an additional insured up to the limits of its \$1 Million policy. INSISTENT also tendered the defense and indemnification of PROPER to PUNY's general liability carrier, **INERTIA INSURANCE CO.**, as an additional insured on INERTIA's \$1 Million limit policy.

▶ INSISTENT has directed you to file a third-party action against PUNY for contractual indemnity



Additional Insured Coverage

Pros

Provides liability risk transfer independent of contractor's status

Provides liability risk transfer without establishing contractor's liability

Provides protection for liability exposure without regard to owner's negligence

Owner entitled to an immediate defense from contractor's carrier

Privity with contractor's carrier includes the right to sue the carrier

PROPER

**INERTIA
INSURANCE**



Additional Insured Coverage

Cons

Protection from liability exposure limited by primary policy limits

Protection subject to policy conditions (notice/cooperation)

Protection limited by policy exclusions

Owner loses control of litigation defense to contractor's carrier

PROPER



**INERTIA
INSURANCE**

Contractual Indemnity

Pros

Provides protection for liability exposure over primary policy limits

Provides liability risk transfer independent of policy provisions

Owner retains control of litigation defense

Notice of the indemnity claim is not required

Recovery of attorneys' fees before date of tender

PROPER

PUNY



Contractual Indemnity

Cons

Indemnity obligation is tied to the contractor's viability

Indemnity obligation may be limited by anti-indemnity statutes (GOL 5-322.1) requiring an analysis of partial indemnification.

Brown v. Two Exch. Plaza Partners, 76 N.Y.2d 172, 173 (1990)

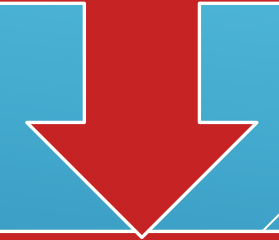
Indemnity obligation is triggered only after contractor's liability is established

The contractual obligation may not provide for recovery of attorney's fees.

Coverage for assumed contractual liability other than an "insured contract" is generally excluded by general liability policies.

Courts interpret "arising out of" triggers more narrowly in the context of contractual indemnity. Loiek v. 1133 Fifth Avenue Corp., 46 A.D.3d 766, 767 (2d Dept. 2007); Shea v. Bloomberg, L.P., 124 A.D.3d 621, 622, 2 N.Y.S.3d 512 (2015)

PROPER



PUNY



RECOVERY OF ATTORNEYS' FEES

▶ Contractual Indemnity

- ▶ Recovery of attorneys' fees is available only when the contract specifically provides for it. Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487 (1989).
- ▶ Recovery is available only when the indemnity obligation is established.
- ▶ Recovery of attorneys' fees incurred before the tender is available. Grimes v. Pyramid Companies of Onondago, 237 A.D.2d 940, 941 (4th Dept 1997).
- ▶ Recovery of attorneys' fees for prosecuting a third-party action for indemnity may be recoverable if the provision provides for recovery of all costs generally. Springstead v. Ciba-Geigy Corp., 27 A.D.3d 720, 722 (2d Dept. 2006) // Fuller-Mosley v. Union Theological Seminary, 47 A.D.3d 487, 488 (1st Dept. 2008)

Recovery of Attorneys' Fees

Additional Insured Coverage

- 1) A defense is available even if not specifically required by contract. Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., 16 N.Y.3d 257, 265 (2011)
- 2) A defense is available immediately and for the entirety of the underlying action even when it appears that the AI policy may not be obligated to pay indemnity. BP Air Conditioning Corp. v. One Beacon Ins. Grp., 8 N.Y.3d 708 (2007); Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., 16 N.Y.3d 257, 265 (2011).
- 3) Under certain circumstances, attorneys' fees incurred in defending an action may be recoverable against the AI policy even after the named insured is cleared of liability. Port Auth. of New York & New Jersey v. Brickman Grp. Ltd., LLC, 181 A.D.3d 1 (1st Dept. 2019).
- 4) Recovery of attorneys' fees incurred before the tender, however, is not available.



Potential Conflict of Interest

- INERTIA waits to accept INSISTENT's tender on behalf of PROPER until after PUNY answers the third-party complaint.
- INERTIA requests PROPER to discontinue the third-party action against PUNY as a condition to coverage, and then asks you to transfer your file to PUNY's attorney for PROPER's continued defense.
- INSISTENT asks you to comply with INERTIA's request to discontinue the third-party action against PUNY, and transfer PROPER's defense to counsel designated by INERTIA.



Practical considerations

What course of action is in the best interest of your client?

- Is there sufficient coverage to protect the client from any personal exposure based on your evaluation of damages?
- Is the client better off prosecuting the third-party action against a named insured earlier than later?
- Keep the client advised of the carrier's request and your recommendations.



So, what else is new?

Jennifer Ehman

- **Additional Insured Coverage**
- **Anti-subrogation**
- **Limitations on New York Ins. Law Section 3420(d)**

ADDITIONAL INSURED COVERAGE

1. *Burlington* update

- Struggles to interpret “caused in whole or in part by” continue

2. Other limitations on additional insured coverage



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

BURLINGTON INS. CO. V. NEW YORK CITY TRANSIT AUTHORITY

- Interpreted “caused in whole or in part by” trigger for additional insured coverage
- Concluded that “caused in whole or in part by” required a showing of proximate cause
- Proximate cause, in turn, refers to a legal cause to which the court has assigned liability

IMPACT ON DEFENSE

- Defense obligation continues to be broadly interpreted
- Courts continue to examine the complaint and other facts within the carrier's knowledge
- Direct allegations against named insured often trigger defense in favor of additional insured



IMPACT ON INDEMNITY

- Often found to be premature
- Relies heavily on findings from underlying action, but those are not necessarily dispositive
 - *WDF, Inc. v. Harleystville Ins. Co.*, 193 AD3d 667 (1st Dept. 2021)
- Challenges establishing coverage under plaintiff's employer's policy
 - *Old Republic General Ins. Corp. v. Consolidation Edison Co. of New York, Inc.*, 193 AD3d 595 (1st Dept.).



TAKEAWAY

- **Less certainty**
- **Increase in the “wait and see” approach**
- **Fewer agreements to defend and indemnify**
- **More demands for independent counsel**
- **Greater importance on retenders**
- **Limited situations where courts will resolve indemnity**

OTHER LIMITATIONS

C. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits Of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable limits of insurance;

whichever is less.

This endorsement shall not increase the applicable limits of insurance.

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

- Amount of coverage limited

- Coverage available to additional insured limited where subcontract required “not less than” \$2 million in commercial general liability coverage
 - *E.E. Cruz & Company, Inc. v. AXIS Surplus Ins. Co.*, 165 AD3d 603 (1st Dept. 2018)

- Scope of coverage limited

- “[i]f coverage to the additional insured is required by a contract...the insurance afforded to such additional insured will not be broader than that which you are required...”
- Negligence trigger can be incorporated
 - *Charter Oak Fire Ins. Co. v. Zurich American Ins Co.*, 462 F.Supp.3d 317 (SDNY 2020)



ANTI-SUBROGATION



What is subrogation?

- Equitable doctrine
- Entitles an insurer to “stand in the shoes” of its insured to seek indemnification from third-party whose wrongdoing caused a loss for which the insurer is bound to reimburse
 - Rooted in the equitable principle that the wrongdoer ought to bear responsibility for the loss
 - An insurer that has paid a claim on behalf of an insured who is only vicariously liable for the loss is entitled to recover the amount paid by way of indemnity from the wrongdoer

Makes sense, right?



Now, what is anti-subrogation?

- Public policy exception to the general rule
- The exception is that “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”

Policy goals

- Stops an insurer from passing loss to its own insured; and
- Avoids conflicts of interest



WHAT IS EVERYONE SO WORRIED ABOUT?

- **Concern is that insurers will fashion the litigation so as to minimize liability on their policy**
- **Classic example:**
 - Plaintiff sustains injury at a construction site which leads to the amputation of his leg;
 - Suit is brought against the owner and the GC based upon NY LL 200, 240 and 241;
 - Contract between GC and plaintiff's employer requires additional insured status;
 - CGL Insurer for employer accepts tender on behalf of the owner and the GC and provides counsel;
 - Counsel, at the request of the employer's CGL carrier, files a third-party action against the employer but only alleges common law negligence.



AUDIENCE POLL #_

Is the anti-subrogation rule implicated where an insurer agrees to defend the additional insured, but reserves on indemnity?

- 1) Yes
- 2) No
- 3) What is anti-subrogation again?



DEFENSE OBLIGATION AND ANTI-SUBROGATION

- ▶ Merely providing a defense does not necessarily carry with it an agreement to indemnify
- ▶ In the absence of proof that the insurer will actually be covering the same risk for both entities, there is no basis at that time to dismiss an indemnification claim based upon anti-subrogation
 - ▶ *Goya v. Longwood Housing Development*, 192 AD3d 581 (1st Dept. 2021)



NEW YORK INS. LAW SECTION 3420(D)



- ▶ “If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.”

NARROWING OF SECTION 3420(D)?

- **Certain insurers are exempt from compliance**
 - Risk Retention Groups
 - *Nadkos, Inc. v. Preferred Contractors Risk Retention Group LLC*, 34 NY3d 1 (2019)
- **Insurer versus insurer litigation**



INSURER V. INSURER LITIGATION

- **Purpose of Section 3420(d)**

- “[T]he notice requirement of § 3420(d) is designed to protect the insured and the injured person or other claimant against the risk, posed by a delay in learning the insurer's position, of expending energy and resources in an ultimately futile attempt to recover damages from an insurer or forgoing alternative methods for recovering damages until it is too late to pursue them successfully.”
 - These are not the risks to which another insurer seeking contribution is subject
- Insurer who brings a declaratory judgment action in its name has not been afforded the ability to rely upon claimed 3420(d) violations
 - Courts have rejected the “stand in the insured’s shoes” argument

TENDERS

Julian D. Ehrlich, Esq.

SVP Claims

Aon Construction Service Group



Tenders

Polling question:

Do you get involved with tendering downstream?

Yes:

No:



TENDERS

- ▶ By whom?
- ▶ To whom?
- ▶ Contents of tender letter
- ▶ When?
- ▶ Follow up



TENDERS

By whom?

CGL:

SECTION IV COMMERCIAL GENERAL LIABILITY CONDITIONS

(2) Duties In The Event Of Occurrence, Offense, Claim or Suit

(a) You must see to it that we are notified as soon as practicable of an “occurrence” ... which may result in a claim

(b) If a claim is made or “suit” is brought against any insured, you must ... (2) notify us as soon as practicable.



TENDERS

By whom?

- ▶ Putative additional insured?
- ▶ Defense counsel?
- ▶ Adjuster?



TENDERS

By whom?

- ▶ Additional insured?
- ▶ Defense counsel?

- ▶ Adjuster?



Sierra v. 4401 Sunset Park, 24 N.Y.3d 514 (2014); *Valiant Ins. Co. v. Utica First Ins. Co.*, 185 A.D.3d 435 (1st Dept. 2020).

TENDERS

Tender Response to Whom?

- ▶ Additional insured?
- ▶ Defense counsel?
- ▶ Adjuster?



§ 3420(d)(2) requires insurer to provide “written notice as soon as reasonably possible of its disclaimer or denial of ***coverage to the insured & the injured person or any other claimant***” on basis of a policy exclusion and will be estopped from disclaiming liability if it fails to do so

Bottom line: Agree



TENDERS

To whom?

- ▶ Downstream broker?
- ▶ Downstream party?
- ▶ Downstream carrier for additional insured?

TENDERS

To whom?

- ▶ Downstream broker?

“We have long held that a policyholders **timely notice to a broker does not constitute notice** contemplated by the policy since a broker is normally the agent of the insured and notice to the ordinary insurance broker is not notice to the liability carrier.”
Strauss Painting Inc. v. Mt. Hawley Ins. Co., 24 N.Y.3d 578 (2014)



TENDERS

To whom?

- ▶ Downstream broker?
- ▶ Downstream party?
- ▶ Downstream carrier?

TENDERS

Contents

- ▶ Defense
- ▶ Indemnity
- ▶ Specify additional insured status
- ▶ Primary non-contributory basis

- ▶ Attach underlying contract and or certificate?
- ▶ Include contractual indemnity?



TENDERS

When?

Polling question #2:

Is late notice still a concern with AI tender?

Yes:

No:



TENDERS

When?

- ▶ Policy
- ▶ Insurance Law §3420
- ▶ Case law



TENDERS

When?

CGL:

SECTION IV COMMERCIAL GENERAL LIABILITY CONDITIONS

(2) Duties In The Event Of Occurrence, Offense, Claim or Suit

(a) You must see to it that we are notified as soon as practicable of an “occurrence” ... which may result in a claim

(b) If a claim is made or “suit” is brought against any insured, you must ... (2) notify us as soon as practicable.



TENDERS

When?

§ 3420(c)(2)

(A) the burden of proof shall be **on**: (i) the **insurer to prove** that it has been **prejudiced**, if the notice was provided **within 2 years** of the time required under the policy; or (ii) **the insured**, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided **more than 2 years** after the time required under the policy.

(B) Notwithstanding subparagraph (A) of this paragraph, an irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise.



TENDERS

When?

Case Law

“***implied duty***, independent of the named insured’s obligation to provide timely notice”
City of New York v. Investors Ins. Co. of Am., 89 A.D.3d 489 (1st Dept. 2011);

Additional insured may **not** rely on named insured’s timely notice *County of Suffolk v. United State Liab. Ins. Co.*, 192 A.D.3d 755 (2d Dept. 2021);

The **standard** for determining whether an additional insured is entitled to a defense is **the same** as that which is used to determine if a named insured is entitled to a defense.
Mack-Cali Realty Corp. v. NGM Ins. Co., 119 A.D.3d 905 (1st Dept. 2014).



TENDERS

When to Tender to Excess?

Case Law

Fact specific consideration of when the underlying case had a **reasonable possibility of exceeding** primary coverage *Martin Assoc. Inc. v. Illinois Nat. Ins. Co.*, 137 A.D.3d 503 (1st Dept. 2016).



TENDERS

Follow Up



- ▶ When?
- ▶ Insurance Law §3420 (d) timely disclaimer
- ▶ Form?
 - ▶ Reminder letter
 - ▶ Threaten DJ
 - ▶ DJ

TENDERS

Timely Tender Denials



- ▶ Insurance Law §3420 (d)

“where an insurer becomes sufficiently aware of facts which would support a disclaimer, **the time to disclaim begins to run...**”

GPH Partners, LLC v. American Home Assur. Co., 929 N.Y.S.2d 131 (1st Dept. 2011).

TENDERS

Timely Tender Denials

- ▶ 8 day delay from tender
- ▶ But → 2 mos from insurer learning facts of accident

= late under Ins. Law § 3420

ADD Plumbing, Inc. v. Burlington Ins. Co., 192 A.D.3d 496 (1st Dept. 2021)



TENDERS

Timely Tender Denials

“[Burlington] was on notice of the underlying accident **several months before it disclaimed coverage** and commenced an investigation with respect to the alleged accident. Therefore, [Burlington] was sufficiently aware of the facts that would support a disclaimer, but waited almost two months before disclaiming.”

... but disclaimer was only 8 days from tender!!

ADD Plumbing, Inc. v. Burlington Ins. Co., 192 A.D.3d 496 (1st Dept. 2021)



TENDERS

Timely Tender Denials



► Insurance Law §3420 (d)(2)

“where the basis for disclaimer is not readily apparent, **the insurer has a duty to promptly and diligently investigate the claim.**” *GPH Partners, LLC v. American Home Assur. Co.*, 929 N.Y.S.2d 131 (1st Dept. 2011).

TENDERS

Follow Up



- ▶ When?
- ▶ Insurance Law §3420 (d) timely disclaimer
- ▶ Form?
 - ▶ Reminder letter
 - ▶ Threaten DJ
 - ▶ DJ

TENDERS

Recap

- ▶ By whom?
- ▶ To whom?
- ▶ Contents of tender letter
- ▶ When?
- ▶ Follow up

TENDER IS THE NIGHT





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The Defense Association of New York Golf Outing

with Installation of Certain Officers and Directors, and Recognition of Past Presidents

Monday, October 18, 2021

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PAST HOST OF THE US OPEN AND PGA CHAMPIONSHIP

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This waterfront oasis is in the “Five Towns” of Long Island’s South Shore, just 20 miles from Manhattan. The challenging links and parkland course has an intriguing mix of trees, fescue, sand, water, breeze and views. See www.inwoodcc.org for directions, photos and other details. Come play the grounds of the historic victories of Bobby Jones and Walter Hagen, and enjoy ceremonious outdoor receptions, with indoor seating available as well.

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- Golf scramble tournament with 11:30 a.m. shotgun start and two carts per foursome
- Barbecue and refreshments on the golf course
- Prize opportunities for longest drive, closest to the pin and hole-in-one
- Cocktail reception at 5 p.m. with open bar
- Ceremony recognizing DANY Past Presidents and swearing-in certain Officers and Directors
- Dinner reception, 6 p.m. - 8 p.m., including skirt steaks, swordfish, chicken, ribs and sundaes

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Additional Outing Information: Contact Brad Corsair, (917) 363-5698, Bradley.Corsair@aig.com