Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Insurance & Reinsurance 2024

Definitive global law guides offering comparative analysis from top-ranked lawyers

USA – New York: Trends & Developments

Bradley Nash, Joshua Blosveren and Dorothea Regal
Hoguet Newman Regal & Kenney, LLP

USA - NEW YORK

Trends and Developments

Contributed by:
Bradley Nash, Joshua Blosveren and Dorothea Regal
Hoguet Newman Regal & Kenney, LLP

Hoguet Newman Regal & Kenney, LLP (HNRK) is one of the largest women-owned law firms in the State of New York, and represents policyholders only. Beyond that, the firm places no limits on its leading insurance practice, which has secured hundreds of millions of dollars for its clients. HNRK is regularly sought out by corporate and individual policyholders to advise and represent them in complex and valuable insurance coverage disputes. The firm is known for its ability to aggressively and creatively develop solutions to maximise its clients' insurance recoveries. HNRK serves as coverage counsel for a number of companies across a broad range of industries – including the world's largest agrochemicals company, Syngenta, and the communications, media and automotive conglomerate, Cox – regularly advising and representing them in connection with securing coverage for large losses and claims implicating numerous different types of coverage.

Authors

Bradley Nash is a partner at HNRK. He advises policyholders in insurance coverage disputes, including representing insureds seeking coverage under directors and officers insurance policies for the defence of civil lawsuits and criminal prosecutions. Brad's notable victories include: obtaining a preliminary injunction directing excess insurers for the Platinum Partners hedge fund to advance USD15 million in defence costs for a federal criminal prosecution, and obtaining a preliminary injunction from the Northern District of California, directing Clear Blue Specialty Insurance Company to advance defence costs to the CEO of Ozy Media, Inc., in connection with a high-profile criminal prosecution in the Eastern District of New York; and winning summary judgment on behalf of a romaine lettuce producer seeking coverage under a product contamination policy for losses arising from E. coli outbreaks.

Contributed by: Bradley Nash, Joshua Blosveren and Dorothea Regal, **Hoguet Newman Regal & Kenney, LLP**

Joshua Blosveren is a partner at HNRK. His insurance recovery practice encompasses a wide range of industries and coverages. Josh recently secured a trial win for Syngenta Crop Protection, LLC over Zurich American Insurance Company in a case implicating hundreds of millions of dollars of losses arising from thousands of claims concerning personal injuries allegedly caused by exposure to Syngenta's herbicide product, as well as a complete victory in the Second Circuit Court of Appeals on behalf of apparel manufacturer Fabrique Innovations, Inc. in connection with its claim for coverage under a cargo insurance policy after the loss of its merchandise.

Dorothea Regal is a partner at HNRK. She has nearly 40 years of experience in successfully representing and counselling corporate policyholders. She has helped policyholders recover hundreds of millions of dollars from insurers under liability, property, and other specialised insurance policies including recoveries for environmental liabilities and long-tail claims. As one example, she and her team won a groundbreaking ruling for Syngenta in a USD170 million insurance coverage dispute against more than 50 insurers over product liability claims involving the company's herbicide. At issue was insurance coverage for defence costs and a settlement in a nationwide class action brought by water systems claiming decades-old contamination.

Hoguet Newman Regal & Kenney, LLP

One Grand Central Place
60 East 42nd Street
48th Floor
New York
NY 10165
USA

Tel: +212 689 8808
Fax: +212 689 5101
Email: dregal@hnrklaw.com
Web: www.hnrklaw.com

Introduction

As a large and diverse state that serves as an international hub of business and finance, New York is a frequent venue for high-stakes insurance coverage disputes. The past year was certainly no exception in this regard. Although 2023 did not see any watershed insurance law decisions from New York's highest court, New York state and federal courts continued to grapple with a number of cutting-edge issues. Some of the important New York insurance litigation trends we have been following include:

- first-impression issues concerning the allocation of defence and indemnity coverage for long-tail asbestos claims, which were certified for interlocutory appeal to the Second Circuit by the United States District Court for the Western District of New York;
- a pair of decisions from the United States Bankruptcy Court for the Southern District of New York concerning the impact of the named insured's bankruptcy on the distribution of directors and officers (D&O) policy proceeds;
- a split of authority in the Appellate Divisions of the New York State Supreme Court on an insurer's right to recoup defence costs for non-covered claims – an issue that has seen important decisions from across the country in recent years; and
- decisions regarding an insured's right to recover attorneys' fees incurred in insurance coverage litigation.

Allocation Issues in Long-Tail Claims

In November 2023, the court in American Precision Industries, Inc. v. Federal Insurance Co., 2023 WL 8014382 (W.D.N.Y. 2023), granted the defendant insurers' motions to certify two allocation-related questions for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In a prior ruling, the court had held that the primary policies issued by the insurers required them to defend the insured against various asbestos bodily injury claims on an all sums (ie, joint and several) basis but that pro rata allocation was applicable to the insurers' indemnity obligations. In its November 2023 decision, the court found that all elements of § 1292(b) were met, including its second element; ie, the requirement that its prior order involved a controlling question of law about which there was substantial ground for difference of opinion.

With respect to the allocation of defence costs, the court's prior ruling was premised on the language in the policies requiring the insurers to pay all costs and expenses arising from the defence of any claim or suit seeking damages on account of a covered occurrence (id. at *2). The court declined to follow what it termed the "inapt" conclusion of the court in Danaher Corp. v. Travelers Indemnity Co., 414 F. Supp. 3d 436 (S.D.N.Y.), which had held to the contrary (American Precision, 2023 WL 8014832, at *2). With respect to the allocation of indemnity, the court, in its prior ruling, rejected the insured's argument that the inclusion of the phrase "death at any time" in the policies' definitions of "bodily injury" meant that the policies contemplated that multiple successive insurance policies could indemnify the insured for the same loss of occurrence – the standard set forth by the New York Court of Appeals in In re Viking Pump, Inc., 27 N.Y.3d 244 (2016) (American Precision, 2023 WL 8014832, at *2).

In connection with their motion, the insurers argued that New York courts do not require insurers to pay defence costs for occurrences that took place outside of their policy periods. In response, the insured asserted that many of the cases relied on by the insurers did not actu-

ally address the allocation of defence costs but focused their analysis on allocation of indemnity. The insured further pointed out the duty to defend is broader than the duty to indemnify and argued that the policy language did not state that the insurers will only defend "that portion" of a claim to which the insurance applies. The court concluded that while it agreed with the insured that there was no controlling precedent in conflict with its prior order, there was conflicting authority on the issue; it was a question of first impression in the Western District of New York, and there was a paucity of relevant caselaw outside the district (id. at 5).

As to indemnity, the insured argued that the court had incorrectly restricted application of the principles of Viking Pump and that the "death at any time" language would be rendered surplusage under pro rata allocation, as subsequent deaths would be allocated to the policy period in which they occurred. The insured cites two cases applying New York law – one issued by a California court and the other by a federal district court in California – that reached the conclusion that the "death at any time" language was inconsistent with pro rata allocation in the wake of Viking Pump. In response, the insurers cited Liberty Mutual Fire Insurance Co. v. J&S Supply Corp., 2017 WL 4351523 (S.D.N.Y. Sept. 29, 2017), which they argued stands for the proposition that pro rata allocation is appropriate notwithstanding the presence of the "death at any time" language, even though that decision does not address that specific language. The court concluded that the second element of § 1292(b) had been met, finding the existence of conflicting authority on the issue. The court also noted that the issue was one of special consequence because the "death at any time" language was standard in comprehensive general liability policies for decades, and "a determination that such language forecloses the application of pro rata allocation would essentially preclude pro rata allocation in all long-tail claims applying New York law going forward" (American Precision, 2023 WL 8014832, at *6).

We will be closely following the appeal should the Second Circuit grant the pending petition for an interlocutory appeal.

The Impact of Bankruptcy on the Distribution of D&O Policy Proceeds

The past year saw high-profile bankruptcies in New York that implicated access to and allocation of the proceeds of a bankrupt insured's insurance policy. In two decisions – one involving Silicon Valley Bank and the other the cryptocurrency lending company Celsius Network – Bankruptcy Judge Martin Glenn granted motions by corporate directors, officers, and employees to lift the automatic stay in order to enable the debtors' insurers to advance defence costs under D&O insurance policies. The Court imposed certain quarterly reporting requirements on payments made under the policies, but declined to impose a cap on payments or to allocate the proceeds among the individual insureds.

A typical D&O policy offers coverage both to the corporation and to its officers and directors, and frequently, other employees. As Judge Glenn explained in In re: SVB Financial Group, 650 B.R. 790 (Bankr. S.D.N.Y. 2023), SVB's insurance programme consisted of 16 so-called "ABC Policies," providing three categories of coverage:

- "Side A" coverage, which is paid directly to directors and officers who are not indemnified by the bank;

- "Side B" coverage, which reimburses the bank for indemnification payments to the directors and officers; and
- "Side C" coverage, which covers the bank's own losses, arising from securities claims.

SVB also had five additional "Side A" only policies, providing additional coverage for individual officers and directors. The ABC Policies are subject to aggregate limits that apply to all three coverages. However, a "Priority of Payments" clause provides that "coverage under this Policy is principally intended to protect and benefit the Insured Persons (ie, the individual officers and directors), and accordingly, claims for "Side A" coverage are to be made first.

Current and former SVB directors and officers moved to lift the automatic stay to permit SVB's D&O insurers to advance their defence costs in underlying lawsuits and investigations. Counsel for the creditors' committee objected to the motion, arguing that the D&O policies are property of the estate and should not be depleted.

Judge Glenn declined to decide whether the ABC Policies were part of the bankruptcy estate, finding that even if they were, the Movants established good cause to lift the stay.

First, the Court held that granting the motion would not interfere with the bankruptcy case. To the contrary, allowing SVB's directors and officers to access D&O coverage would ultimately benefit the bankruptcy estate by facilitating the "vigorous defence" of the underlying litigation (id. at 800). The Court rejected the argument of the creditors' committee that lifting the stay risked depleting the "Side C" coverage that would otherwise be available to SVB, noting that under the Policies' "Priority of Payments" provision the directors and officers claims would have to be paid first, in any event (id..)

Second, the Court found that the balance of harms favours lifting the stay, as "the harm in denying Movants access [to the Policy proceeds] is imminent and significant since there are current lawsuit pending or which the Movants require access to defense funds" (id.). The court noted that the harm to SVB was "merely speculative" as all claims against the bank were subject to the automatic stay (id. at 801). The creditors' committee protested that the directors and officers "are not blameless individuals merely seeking to defend against frivolous litigation", but rather bore responsibility for the "mismanagement" that led "to the collapse of the Bank." However, the Court observed that "directors' and officers' insurance is '[i]n essence and at its core... a safeguard of officer and director interests and not a vehicle for corporate protection' (Ochs v. Lipson (In re First Central Financial Corp.), 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999))" (id.). Thus, "[e]ven if it is true that Directors and Officers do have liability, that is precisely why such insurance exists", and such insureds need not demonstrate that they are "'blameless' to access insurance that is specifically intended to cover their defence costs and liability in these situations" (id.). The fact that the policies are "wasting policies" (ie, "a policy where any proceeds used for defense deplete the proceeds that can be used to settle judgment") did not change the Court's analysis, given the "Priority of Payments" provision, which mandates that the claims of directors/officers be paid first even if they deplete the coverage before any of the bank's potential claims are paid (id. at 801–802).

Finally, the Court imposed two conditions on its order, requiring (i) "quarterly aggregate reporting of free and expenses paid by the D&O Policies";

and (ii) "court approval before paying out a settlement using insurance proceeds" (id. at 802). However, the Court declined to impose any cap on payments, reasoning the debtor would not be harmed by the individual insureds' exhaustion of the policy proceeds because the Priority of Payments provision required the insurers to pay "Side A" claims first.

Less than two months later, Judge Glenn faced a similar motion in In re Celsius Network LLC, 652 B.R. 34, 44–45 (Bankr. S.D.N.Y. 2023), and lifted the stay "for effectively all of the same reasons" underlying his ruling in SVB Financial Group. The Court also imposed quarterly reporting requirements, and required that any Individual Insureds consent to the Bankruptcy Court's jurisdiction "with respect to the Policy" as a condition of receiving D&O policy proceeds (to enable the Debtors and Creditors Committee to pursue potential recoupment claims in the future) (id. at 46–47). Finally, the Court rejected a request to "impose a coverage allocation scheme... to avoid a 'run on the bank' whereby a few parties rush to exhaust the Policy to the exclusion of other Individual Insureds." The Court reasoned that the policy imposes no such condition on payment, and in any event, the apportionment of the policy proceeds among non-debtor individual insureds "does not implicate the scope of the automatic stay as between the debtor and non-debtors, and as a result, there is no ostensible basis for granting this form of relief in the context of a lift stay motion" (id. at 49).

Insurers' Recoupment of Defence Costs for Non-Covered Claims

In 2023, New York trial courts continued to face an issue on which the state's intermediate appellate courts have issued conflicting decisions: the insurer's right to recoup defence costs for non-covered claims.

Liability policies typically impose two separate duties on the insurer: (i) a duty to indemnify the insured for certain covered losses; and (ii) a duty to defend the insured in litigation. The duty to defend is significantly broader than the duty to defend – indeed, the New York courts have described the duty as "exceedingly broad" (Fornino v. New York Central Mutual Fire Insurance Co., 218 A.D.3d 1192 (N.Y. App. Div. 1st Dep't 2023)) – as the insurer must defend its insured "whenever the allegations of the complaint suggest a reasonable possibility of coverage" (Auto. Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137 (N.Y. 2006) (cleaned up)). And, under the so-called "entire action" rule, if any of the claims are potentially covered, the insurer must defend the entire lawsuit, including any non-covered claims (City of New York v Philadelphia Indem. Ins. Co., 2023 WL 4422463, at *4 (S.D.N.Y. July 10, 2023)) (citing Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., 16 N.Y.3d 257, 264–65 (N.Y. 2011)).

Given the breadth of the duty to defend, insurers frequently defend the insured under a reservation of rights and later obtain a ruling that there is no duty to indemnify. Liability policies often do not address whether an insurer can later recoup defence costs it paid for what later turned out to be non-covered claims. In a lengthy decision in 2021, the Appellate Division for the Second Department ruled that an insurer has no right of recoupment unless the policy expressly provides for it (Am. W. Home Ins. Co. v. Gjonaj Realty & Mgmt. Co., 192 A.D.3d 28, 33 (N.Y. App. Div. 2d Dep't 2020)). On the other hand, a string of decisions from the First Department suggests that recoupment is permitted where the insurer has reserved a right to reimbursement in its reservation of rights letter. See Certain Underwriters at Lloyd's London v. Advance Transit Co., 188 A.D.3d 523 (N.Y. App. Div. 1st Dep't 2020);

American Home Assurance Co. v. Port Authority of N.Y. and N.J., 166 A.D.3d 464 (N.Y. App. Div. 1st Dep't 2018); Certain Underwriters at Lloyd's London v. Lacher & Lovell-Taylor PC, 112 A.D.3d 434 (N.Y. App. Div. 1st Dep't 2013).

Although the First Department decisions on recoupment are brief and offer no analysis of the legal issues, trial courts in Manhattan have continued to follow the First Department's holding. For example, in Liberty Ins. Underwriters Inc. v. The Plaza Condominium, 2023 WL 2730472 (N.Y. Sup. Ct. N.Y. Cty. Mar. 31, 2023), a justice of the New York County Commercial Division acknowledged the Second Department's holding in Gjonaj Realty, but upheld the insurer's recoupment claim, holding that the court could not "ignore binding First Department precedent in deference to a contrary decision from another Department" (id. at *2). Another trial court likewise applied the First Department precedent on recoupment in Peleus Ins. Co. v. RCD Restorations Inc., 2023 WL 193721 (N.Y. Sup. Ct. N.Y. Co. Jan. 9, 2023), while citing Gjonaj Realty as a contrary authority. In that case, however, the court denied the recoupment claim on the ground that the insurer failed to expressly reserve the right to recoup expenses not covered by the policy.

The split among the Departments of the Appellate Division will inevitably have to be resolved by the Court of Appeals, and we expect that New York's high court will side with the Second Department. An insurance policy is a contract between the insurer and the insured. Where the policy does not provide a right of recoupment, the insurer should not be permitted to unilaterally modify the agreement through its reservation of rights letter. Further, the Second Department's holding preserves the distinction between the duty to defend and the duty to indemnify; under the First Department's approach, the insurer is only required to defend claims for which it must indemnify the insured, effectively collapsing the two duties. The Restatement of the Law of Liability Insurance has recognised a national trend in favour of the view that "[u]nless otherwise stated in the insurance policy or otherwise agreed to by the insured, an insurer may not obtain recoupment of defense costs from the insured" (Restatement of the Law of Liability Insurance § 21).

In 2023, decisions by the United States Circuit Court for the Eleventh Circuit (applying Georgia law) (see Continental Casualty Co. v. Winder Laboratories LLC, 73 F.4th 934, 949 (11th Cir. 2023), and the Supreme Court of Hawaii, see St. Paul Fire & Marine Insurance Co. v. Bodell Construction Co., Hawai'i 381 (Haw. 2023)) continued this trend, holding that an insurer has no right to recoup defence costs in the absence of an express policy provision to that effect.

Insureds' Recovery of Attorney's Fees

In 2023, New York courts continued to address exceptions in the insurance context to the so-called "American Rule", under which each party bears its own litigation costs in the absence of a contractual or statutory obligation to pay the prevailing party's fees.

In Utica Mutual Insurance Co. v. Crystal Curtain Wall System Corp., 2023 WL 8179249 (N.Y. Sup. Ct. N.Y. Cty.), the court agreed with the insured that the New York Court of Appeals' ruling in Mighty Midgets, Inc. v. Centennial Insurance Co., 47 N.Y.2d. 12 (1979), namely that an insured may recover its attorneys' fees when it "has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations", applies not only when an insurer has defeated an insurer's

attempt to avoid its duty to defend, but also when an insurer has acknowledged its duty to defend but unsuccessfully challenged its duty to indemnify. In so holding, the court stated that it was not persuaded by a series of decisions issued by the Second Circuit Court of Appeals holding that if an insurer has not placed at issue the duty to defend, a defendant insured cannot recover its attorneys' fees even if it prevails in the action. The court concluded that "these Second Circuit decisions misapprehend the governing precedents in this area of the Court of Appeals and the Appellate Division", although it acknowledged that none of these precedential decisions discussed "whether a prevailing policyholder is entitled to attorney fees when the insurer has acknowledged a duty to defend but contested the duty to indemnify" (Utica Mut., 2023 WL 8179249 at *6-7). It is likely that at some point this disagreement among courts will be addressed and resolved by the New York Court of Appeals.

Courts applying New York common law have also continued to apply an exception to the American Rule for insureds' claims for bad faith claims handling (usually pled as a breach of the implied covenant of good faith and fair dealing), recognised by the Appellate Division in D.K. Property, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA, 168 A.D.3d 505 (N.Y. App. Div. 1st Dep't 2019), and 25 Bay Terrance Associates, L.P. v. Public Service Mutual Insurance Co., 144 A.D.3d 665 (N.Y. App. Div. 2d Dep't 2016).

In Zicherman v. State Farm Fire & Casualty Co., 2023 WL 6675327 (E.D.N.Y. 2023), the court explained that "when the insurer has no arguable basis to challenge the insured's claim and the insured can further show that no reasonable carrier would, under the given facts, challenge the claim, the insured can recoup attorneys' fees" (id. at *3 (cleaned up)). Finding that the insureds had made a showing that the insurer had no arguable basis for challenging their claims, the court denied the insurers' motion to strike the insureds' claim for attorneys' fees. Likewise, in Koffler v. Cincinnati Insurance Co., 187 N.Y.S.3d 922 (N.Y. Sup. Ct. Suffolk Cty.), the court refused to dismiss either the insured's claim for bad faith claims handling or his claim for breach of the implied covenant of good faith and fair dealing – claims the court noted were premised on different allegations – and also declined to dismiss the insured's demands for consequential and punitive damages and attorneys' fees, noting that all were potentially recoverable (id. at *4-5).

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com