LEGAL NEWS IN BRIEF

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"EMPLOYEE" EXCLUSION APPLIES TO EMPLOYEE OF ADDITIONAL INSURED

Gabriele v. Lyndhurst Residential Community, L.L.C.
426 N.J. Super. 96; 43 A.3d 1169 (App. Div. 2012)

A, an additional insured under B's policy, negligently injured B's employee. B's insurer denied coverage to A. The court upheld denial based on an exclusion for liability for injury to an "employee of any Insured…(d) arising…as a consequence of, employment by any insured." The court found the exclusion clear on its face, rejecting A's arguments for a narrower application. Exclusions (a)-(c) were directed at employee discrimination, but were later additions to standard policy language and did not require a narrowing of the application of (d). Another exception in the basic coverages section applied only to employees of the named insured, but was superseded by the exclusion in question, which appeared in an endorsement that explicitly amended the policy terms. ■

MOTION TO AMEND COMPLAINT DENIED

Greater NY Mut. Ins. Co. v. Coach, Inc.
New York Supreme Court
2012 NY Slip Op 31862U
(NY County, July 17, 2012)

The New York Supreme Court denied Plaintiff's motion to amend its complaint in its subrogation action, which was filed against a tenant of Plaintiff's insured and the tenant's purported contractor, for damage to the insured's building. Because the SOL had since expired, Plaintiff had to demonstrate that the party sought to be added, the actual contractor working in the building on the date of loss, was united in interest with the first contractor, such that they would be vicariously liable for each other's conduct. That both companies have the same General Manager, liability insurance policy and telephone and fax numbers is insufficient; a parent-subsidiary relationship between two companies, by contrast, would allow for unity of interest. Moreover, Plaintiff did not exercise due diligence in seeking to amend the pleadings, as it apparently had at least constructive knowledge of the second contractor's potential liability before the SOL expired. ■

PACKING UP IS PART OF THE SHOW; COVERAGE DENIED

Dzielski v. Essex Ins. Co.
New York Court of Appeals
19 N.Y.3d 871 (2012)

The NY Court of Appeals reversed a policy coverage decision in the Appellate Division, Fourth Department, essentially adopting the dissenting opinion in the lower court decision. On the evening of the underlying incident, Plaintiff provided sound equipment for a band performing at a nightclub owned and operated by Defendant's insured. When exiting the nightclub to return equipment to his truck after the concert, Plaintiff fell from the loading dock outside the nightclub's rear door, and sued the nightclub owner for the resulting personal injuries. After Defendant defaulted, Plaintiff sought indemnification from Defendant's insurer, which

disclaimed coverage for "bodily injury…to any entertainer, stage hand, crew, independent contractor, or spectator, patron or customer who participates in or is a part of any athletic event, demonstration, show, competition or contest."

By adopting the Appellate Division's dissent, the Court of Appeals rejected the argument that the exclusion was ambiguous. The provision did not limit the exclusion to incidents occurring during the course of the concert. Rather, it only identified those classes of persons not covered, regardless of whether they sustained injuries after the show ended. Moreover, the clause "arising out of" merely required a causal nexus between the injury and the risk for which coverage was provided. Here, Plaintiff sustained injuries while removing equipment that was used in the concert. ■

USE OF VEHICLE

Liberty Mut. Ins. Co. v. Sweeney
U.S. Court of Appeals (3rd Cir.)
Docket Nos. 11-4074 and 11-4180
(August 2, 2012)

The U.S. Court of Appeals reviewed three exclusions to the UIM insurance policy of James Sweeney, the owner of a transmission repair shop, who sustained injuries while running a personal errand. Sweeney would refer customers to George Tradewell's rental car business, and would occasionally pick up Tradewell's rental cars, to be delivered to such customers. Tradewell encouraged Sweeney to use the rental vehicles on such occasions for personal errands so as to test-run the vehicles.

Liberty invoked exclusions for "bodily injury sustained" (1) "while using a non-owned motor vehicle in any kind of auto business"; (2) "using a non-owned car" without the owner's permission and/or "used in a way [not] intended by the owner; and (3) "using a motor vehicle…not insured…that is…made available for regular use." The Court of Appeals found that as Sweeney sustained injuries "while" using the vehicle for personal reasons, the temporal limitation of the "auto business" exclusion rendered the exclusion inapplicable. Moreover, the Court construed Tradewell's encouragement of Sweeney's test-run of the vehicles on personal errands as "intended use" by the owner which did not occur habitually enough to be deemed "regular use." Thus, the Court found coverage for Sweeney. ■

INTRA-FAMILY EXCLUSION

Khandelwal v. Zurich Ins. Co.
New Jersey Appellate Division
Docket No. A-2620-10T2
(May 29, 2012)

The wife and children of a rental insurance policyholder sued for supplemental liability insurance after sustaining personal injuries in an automobile accident, even though it appeared that the policy did not in fact apply liability coverage for injuries to the insured's family members. Claimants successfully argued that such an exclusion was void as against public policy. Case law recognizes that intra-family exclusions in automobile insurance policies violate public policy, and is void even in supplemental policies that apply only beyond state-minimum-required coverage. The court distinguished umbrella policies, which "cover[] a variety of risks that need not arise out of the use of an automobile in any way," and therefore may exclude liability for injuries to family members, even when those injuries arise from motor vehicle accidents. ■

DEBT COLLECTION

Opinion 48 and Opinion 725
UPLC and ACPE
(May 30, 2012)

The Committee on the Unauthorized Practice of Law and Advisory Committee on Professional Ethics reaffirmed prior rules that a lawyer may not lend his law firm letterhead to non-lawyers to write and send collection letters without the lawyer's review and independent evaluation of debts before the letters are sent. To do otherwise is to unethically assist a non-lawyer in the unauthorized practice of law. Moreover, New Jersey ethics rules set a higher standard than federal law for lawyers who engage in lay debt collection practices; they must not only make clear when engaging in lay debt collection practices that they are not so acting in a "lawyer capacity," but must also maintain the two practices as entirely separate businesses in physically distinct locations, and not represent any relationship between the two businesses. ■

OFFICE UPDATE

We are pleased to announce the recent addition to our office of paralegal **Jayne Rush**. Ms. Rush is a graduate of the Paralegal Studies Program at Fairleigh Dickinson University. ■ LOJM attorney Noah Gradofsky published an article in the latest Subrogator magazine. "Subrogating NJ Workers' Compensation in Motor Vehicle Accidents," appears on page 97 of the Spring/Summer 2012 issue of Subrogator. ■