

***SELECTED INSURANCE COVERAGE TOPICS OF
RECENT IMPORTANCE***

A Round Table Discussion

**Presented by the Insurance Coverage Committee of the
Tort, Insurance & Compensation Law Section**

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Many of the coverage issues being addressed by the Courts today involve the creation, scope and priority of additional insured coverage under commercial general liability policies. Some recurring questions are addressed here.

I

CONTRACTUAL DUTY TO PROVIDE PRIMARY COVERAGE TO ADDITIONAL INSURED

"Pecker" and its Progeny

Under Pecker Iron Works of NY, Inc. v. Traveler's Ins. Co., 99 NY2d 391, 786 NE2d 863 (2003), an additional insured enjoys the same protection as the named insured, i.e. primary insurance coverage from the named insured's carrier. That is what the parties intended in accord with the recognized meaning of addition insured. A copy of the Pecker decision is attached for reference.

Query: What does Pecker say, or not say, about other insurance and the duty to defend?

The Appellate Division, First Department in BP Air Conditioning Corp. v. One Beacon Ins. Group, __ AD3d __, 2006 WL 1843350 (7/6/06) has taken the holding in Pecker a step (or two) further. By a 3 to 2 decision, the court in BP holds that, notwithstanding the language of the policy restricting the definition of an additional insured, an additional insured has primary coverage regardless of whether the accident at issue arose out of the named insured's conduct at the worksite. The pleadings, not the facts, trigger the underlying obligation of the CGL carrier.

In addition, absent clear language to the contrary in the underlying contract, an additional insured has a reasonable expectation that such coverage would be primary, triggering a duty to defend. The "other insurance" clauses in the underlying policies are not considered. As to co-insurance, it is the burden of the carrier for the additional insured to pursue any other responsible carriers for a co-insurance contribution.

The dissent, relying on AIU Ins. Co. v. American Motorists Ins. Co., 292 AD2d 277 (1st Dept. 2002), argued that the additional insurance carrier's obligation to defend the additional insured had not yet been established and had to await

resolution of the liability question at the trial of the underlying action. Pecker was said to be inapposite, having addressed only the issue of whether the coverage afforded to an additional insured was primary or excess, and not whether the additional insured in fact enjoyed additional insured status.

In accord with the dissent: Liberty Mut. v. Trystate Mechanical, 15 AD3d 236, 790 NYS2d 433 (1st Dept. 2/10/05) [policy language determines who qualifies as additional insured; additional insurance is primary "subject to the other provisions of the contract and policy"; Pecker not cited]; *see also* Buck v. Horsehead Indus. Capital Mgt., 362 FSupp2d 403 (WDNY 3/31/05); Pepco Constr. v. CNA, 6 Misc3d 1017(A), 800 NYS2d 354 (Sup. Ct. Kings County 9/17/03, Partnow, J), *mod. on other grounds* 15 AD3d 464, 790 NYS2d 490 (2d Dept. 2/14/05).

Where additional insured coverage applies only with respect to liability arising out of the named insured's operations, and a reasonable reading of the complaint does not allege such liability, the additional insured is not an additional insured for the purposes of the acts alleged in the complaint, and will not be afforded coverage. City of NY v. Safeco Ins. Co. of America, 31 AD3d 478 (2d Dept. 7/11/06).

Distinguishing Pecker, a Southern District judge has ruled that, where the terms of a construction contract conflict with insurance policy provisions, the insurance policy provisions will control. United States Liab. Ins. Co. v. Mountain Valley Indem. Co., 371 FSupp2d 554 (SDNY 5/23/05). Pecker did not involve a conflict between the contract on the one hand and the insurance policies on the other, but addressed only the definition of the term additional insured: there was never a conflict between the insured's agreement and the insurance provisions.

For a discussion of the import and rationale of Pecker, see Wade & Tavella, THE WORLD AFTER PECKER: A CASE OF UNINTENDED CONSEQUENCES, 8/22/06 NYLJ 4, col. 4; Byrne & McKenna, OWNERS, LESSORS, ARE YOU ALSO ADDITIONAL INSUREDS?, 3/27/06 NYLJ 9, col. 1; DeSantis, "BP AIR V. ONE BEACON": ARE MAJORITY, DISSENT THAT FAR APART?, 8/3/06 NYLJ 4, col. 4.; Fitzpatrick & Kaminska, PECKER: CONTRACT INTERPRETATION AND CONTRIBUTION AMONG INSURERS, 2/23/04 NYLJ 4, col. 4.

Policy Limits

Because an additional insured is an entity enjoying the same protection as the named insured, it is entitled by policy endorsement to the limits of insurance contained in the policy, and not merely to minimum limits referred to in the

contract. Accordingly, the additional insured is insured up to \$1,000,000 as provided in the declarations, rather than \$500,000 as required in the construction contract. Tomco Painting & Contr., Inc. v. Transcontinental Ins. Co., 21 AD3d 950 (2d Dept. 9/12/05).

II

CERTIFICATES OF INSURANCE

A certificate of insurance is only evidence of a carrier's intent to provide coverage, but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists. Tribeca Broadway Assoc., LLC v. Mount Vernon Fire Ins. Co., 5 AD3d 198 (1st Dept. 2004); Saraco Glass Corp. v. Yeled V'Yalda Early Childhood Center, Inc., 11 Misc3d 1071(A), 816 NYS2d 700 (Sup. Ct. Kings County 3/28/06); Apartment Recycle Co. of Manhattan Inc. v. AIU Ins. Co., 10 Misc3d 1066(A), 814 NYS2d 559 (Sup. Ct. NY County 10/17/05).

Pecker did not change this rule. Benderson Dev. Co., Inc. v. Transcontinental Ins. Co., 12 Misc3d 257, 813 NYS2d 646 (Sup. Ct. Erie County 3/20/06).

Estoppel

To be estopped from denying additional insured coverage, the carrier itself or its authorized agent must have issued the certificates listing the additional insured with the intent of influencing the additional assured to proceed, and that additional insured must have relied upon the certificates to its detriment. Bucon Inc. v. Pennsylvania Mfg. Assn. Ins. Co., 151 AD2d 207, 547 NYS2d 925 (3d Dept. 1989); Niagara Mohawk Power Corp. v. Skibeck Pipeline Co., 270 AD2d 867, 705 NYS2d 459 (4th Dept. 2000).

But see:

American Ref-Fuel Co. v. Resource Recycling, Inc., 248 AD2d 420 (2d Dept. 1998) [agent could not create coverage to bind carrier].

III

ANTI-SUBROGATION

Applicability to Additional Insureds:

Huthmacher v. Dunlop Tire Corp., 28 AD3d 1166, 815 NYS2d 385 (4th Dept. 4/28/06). Where decedent's employer had owner named as additional insured on its primary and excess policies, the owner could not pursue a third-party action against the employer, since both owner and employer were insured for the same risk under the same policies.

Note: The excess carrier's worker's compensation exclusion did not apply so as to make the anti-subrogation rule inapplicable, since plaintiff's Labor Law causes of action in the primary suit against the owner did not arise under the worker's comp law.

Third-Party Actions:

McMann v. A.R. Mack Constr. Co., Inc., 8 AD3d 1083, 778 NYS2d 830 (4th Dept. 2004) [where owner and GC dropped third-party action against subcontractor, the subcontractor's sub, employer of the plaintiff, may not continue its cross-claim against the subcontractor who was an additional insured under its sub's policy. The sub-sub's employee exclusion did not apply to liability assumed by the insured under an insured contract].

Implied Co-Insured:

Phoenix Ins. Co. v. Stamell, 21 AD3d 118, 796 NYS2d 772 (4th Dept. 2005). Where a student was not named in his college's fire insurance policy, and a fire was caused by the student's negligence, the anti-subrogation rule does not bar the insurer from seeking to recover over from the student, since the student was not an implied co-insured under the college's policy, and student's college handbook did not exempt student from consequences of his own negligence.

IV

PROMPT NOTICE OF OCCURRENCE, SUIT AND DISCLAIMER

Insured's Duty

Condition Precedent to Coverage: Prompt Notice of Occurrence and Suit

Prompt Notice of Occurrence:

Additional Insureds: Must Provide Prompt Notice of Occurrence, Whether or Not Named Insured Itself Provided Prompt Notice

City of NY v. St. Paul Fire & Marine Ins. Co., 21 AD3d 978 (2d Dept. 2005); *see also*, American Mfrs. Mut. v. CMA Enterprises, Ltd., 246 AD2d 373 (1st Dept. 1998); Structure Tone, Inc. v. Burgess Steel Prod. Corp., 249 AD2d 144 (1st 1998).

But see:

City of NY v. Continental Cas. Co., 27 AD3d 28, 805 NYS2d 391 (1st Dept. 12/13/05) [circumstance under which additional insured may rely on named insured to forward notice]; National Union Fire Ins. Co. of Pittsburgh, PA v. Insurance Co. of NA, 188 AD2d 259 (1st Dept. 1992), *lv. den.* 81 NY2d 709 [where two parties can be said to be "united in interest"]; Ambrosio v. Newburgh Enlarged City School Dist., 5 AD3d 410 (2d Dept. 2004) [parties were not adverse to each other].

An insured's notice to its broker is not treated as notice to the insurer. Gershow Recycling Corp. v. Transcontinental Ins. Co., 22 AD3d 460, 801 NYS2d 832 (2d Dept. 2005); Paul Dev. LLC v. Maryland Cas. Ins. Co., 28 AD3d 443 (2d Dept. 4/4/06).

Prompt Notice of Suit

Policy obligation to promptly forward suit papers to insurer fell under additional insured's duty to cooperate, not its duty to notify of suit. City of New York v. Continental Cas. Co., 27 AD3d 28, 805 NYS2d 391 (1st Dept. 12/13/05).

Insurer's Prompt Notice of Disclaimer

Disclaimer of coverage 21 days after carrier was aware that insured had breached the prompt notice provision of the policy was reasonable under the circumstances. Schoenig v. North Sea Ins. Co., 28 AD3d 462, 813 NYS2d 189 (2d Dept. 4/4/06).

Insurer's staffing problem was not an external factor beyond its control which unexpectedly interferes with the insurer's ability to investigate the claim in a timely fashion so as to excuse the insurer's 36 day delay in disclaiming. Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co., 27 AD3d 84, 806 NYS2d 53 (1st Dept. 12/15/05).

Five month delay in disclaiming was reasonable where insurer needed to investigate the application of its livery vehicle exclusion where the police report conflicted with the findings of its own investigation. Halloway v. State Farm Ins. Co., 23 AD3d 617, 805 NY2d 107 (2d Dept. 11/28/05).

Uninsured motorist's carrier's delay of one and one-half months in disclaiming coverage was untimely as a matter of law. Matter of American Express Prop. Cas. Co. v. Vinci, 18 AD3d 655, 795 NYS2d 329 (2d Dept. 5/16/05).

Under Insurance Law §3420(d) an insurer's duty to give prompt notice of disclaimer is triggered when the insurer has reasonable basis upon which it may disclaim coverage, and disclaimer cannot be delayed indefinitely until all issues of fact regarding the coverage obligation have been resolved. When in doubt, the insurer should bring a declaratory judgment action. Republic Franklin Ins. Co. v. Pistilli, 16 AD3d 477, 791 NYS2d 639 (2d Dept. 3/14/05).

Where homeowner's insurance policy insured one premises owned by insured but not another, the insurer had no duty to timely disclaim coverage for the uninsured premises, since there was no coverage in the first instance. Madera v. Allstate Ins. Co., 12 Misc3d 1162(A), 819 NYS2d 210 (Sup. Ct. Kings County 5/31/06); *see also* Metropolitan Prop. & Cas. Ins. Co. v. Pulido, 271 AD2d 57 (2d Dept. 2000).

Insurer's Late Notice of Disclaimer

34 day delay in issuing disclaimer unreasonable where insurer argued late notice of accident, and where insurer could have raised an additional ground for denial of later if warranted. Matter of Allstate Ins. Co. v. Swinton, 27 AD3d 462 (2d Dept. 3/7/06).

RES JUDICATA, COLLATERAL ESTOPPEL AND EQUITABLE ESTOPPEL

SUM Arbitration

Overturing its prior decision after reargument, Supreme Court Monroe County ruled, contrary to two other published Supreme Court opinions, and in accordance with a 2004 Second Department decision, that an excess verdict rendered by a jury in an auto negligence case against a tortfeasor is not binding on the plaintiff's Supplementary Uninsured Motorist carrier so as to bind it with the excess judgment as a matter of law. That is so even though the SUM carrier was put on notice of the suit, invited to participate in discovery and trial, and did not. In addition, the SUM carrier was entitled to discovery prior to arbitration. Mason v. Ohio Cas. Group, Sup. Ct. Monroe County (Galloway, J) (10/11/05).

APIP Subrogation

An APIP carrier may seek recovery of benefits it paid to its insured for extended economic loss pursuant to an additional personal injury protection endorsement. However, where the injured claimant's suit for bodily injuries was not caused by a jury on a finding of no serious injury, with no further finding by the jury with respect to damages, the jury verdict was entitled to preclusive effect on the issue of the APIP carrier's entitlement to recoup the benefits it paid to its subrogor for extended economic loss, and its subrogation action was dismissed. State Farm Mut. Auto Ins. Co. v. Baltz Concrete Constr., Inc., 29 AD3d 777, 815 NYS2d 203 (2d Dept. 5/16/06).

Estoppel

Insurers are reminded that if they disclaim coverage and allow the underlying suit to proceed, resulting in a judgment against the insured, and the insurer's disclaimer is ultimately found valid, the insurer is estopped from contesting or relitigating the issue of liability and damages, and must both the judgment and defense costs. Martin v. Safeco Ins. Co., 19 AD3d 221, 797 NYS2d 451 (1st Dept. 6/16/05).

VI

ODDS & ENDS

Attorneys' Fees in Declaratory Judgment Actions

Although it is well-settled that an insured is generally not entitled to recover expenses incurred in bringing an action for a declaration of coverage, unless the insured has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from policy obligations (Mighty Midgets v. Centennial Ins. Co., 47 NY2d 12), what about a third-party claimant?

In a case of apparent first impression, the IAS court holds that, where an injured claimant has been named as a party defendant in an insurer's declaratory judgment action, and the insurer's defense to coverage is later withdrawn, the claimant/defendant may not recover its defense costs in litigating the declaratory judgment action. Progressive Ins. Co. v. Cousins, Sup. Ct. Erie County (Burns, J) 2005, *app. dsmd. as abandoned* (2006).

Vehicle Owner's Permission and Consent

Disavowals by both the owner and driver that the driver did not have the permission and consent of the owner to drive the owner's vehicle, without more, should not automatically result in summary judgment for the owner with respect to his liability under V&T Law §388. Whether summary judgment is warranted depends on the strength and plausibility of the disavowals, and whether they leave room for doubts that are best left for the jury. Country-Wide Ins. Co. v. National Railroad Passenger Corp., 6 NY3d 172 (2/14/2006).

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A partner in the Sugarman Law Firm, LLP, in Syracuse, Mr. Perry heads the firm's appellate/motion department and also concentrates on insurance coverage analysis and litigation. He is a frequent speaker at continuing legal education seminars on appellate, insurance and tort issues for the New York State Bar Association and Onondaga County Bar Association. His memberships include Onondaga County Bar Association, Judicial Committee Chairman; Continuing Legal Education Committee member; Federal Practice Section member; New York State Bar Association, Insurance Coverage Committee member; Torts, Insurance and Compensation Law Committee member; Syracuse University, College of Law Alumni Association and Moot Court judge and evaluator. Before joining the Sugarman firm in 1985, Mr. Perry served as a confidential law clerk to a New York Supreme Court Judge. He received his B.A. degree from the College of the Holy Cross and his J.D. from Syracuse University.