

WHO QUALIFIES AS AN ADDITIONAL INSURED UNDER THE CGL POLICY

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I. INSIDE THE CGL POLICY

A. SECTION II -- WHO IS AN INSURED -- The policy defines who is an insured.

The issue of whether an individual or entity is an “insured” within the context of the policy is not always clear-cut and may require judicial determination.

1. Where a crane operator was also the vice president of the company that owned the crane and the operator, individually, and the company were sued as the result of an accident involving the operation of the crane, an issue arose as to whether coverage was afforded to the operator as an executive of the firm. The insurer argued that since the individual was operating the crane, he could not be acting in his executive capacity and coverage did not extend to him. The court held that the purpose of such a clause “is to protect the officer against suits whenever his conduct is such, in relation to the corporation, that the corporation would be liable.” *Zavota v. Ocean Accident & Guarantee Corp.*, 408 F.2d 940 (1st Cir 1969)

2. Where the tenant of a co-op apartment allegedly fell sustaining injuries, she sued the corporation that owned the building (the named insured), the limited partnership that owned the shares and rented the apartment to the tenant and the individual who was the president and a board member of the cooperative corporation. The insurer denied coverage to all defendants on late notice grounds and to the limited partnership and individual on the grounds that they were not covered under the policy because they were not named insureds. The insureds brought a declaratory judgment action seeking, among other things, a declaration that the limited partnership and the individual were covered under the “who is an insured” provisions of the policy. On the insurer’s motion for summary judgment, the limited partnership claimed that it was a shareholder of the co-op corporation and, as such, was entitled to coverage because the allegations of the complaint

could be construed to be read that the plaintiff was seeking to impose liability on it because it was a shareholder. It also claimed that it performed the duties of a real estate manager for the co-op corporation and was thus entitled to coverage under that provision of the policy. The individual claimed coverage as an officer and director of the co-op corporation. The court observed that co-op corporations purchase CGL policies in an effort to protect their officers, directors and shareholders who, in many cases are residents of the building who are “volunteers.” The court stated: “The policy may be interpreted as providing coverage to an officer, director, or shareholder who is sued in relation to his or her conduct that is on behalf of the corporation, inextricably linked to his or her duty, role or position on behalf of the corporation, or where a shareholder is targeted as an alter ego, or similarly targeted.” The court denied the insurer’s motion for summary judgment. *426-428 West 46th Street Owners, Inc. et al v. Greater New York Mutual Insurance Company*, 847 N.Y.S. 896 (Sup. Ct. NY Cty 2007).

II. OUTSIDE THE POLICY -- WHERE COVERAGE IS EXTENDED TO INDIVIDUALS OR ENTITIES BY ENDORSEMENT

A. THERE ARE MANY ADDITIONAL INSURED (AI) ENDORSEMENTS PROMULGATED BY THE INSURANCE SERVICE OFFICE (ISO) COVERING A HOST OF SITUATIONS.

1. Condominium unit owners for the benefit of the condo; franchisees using the name of the franchise owner, etc.

2. The AI endorsements we will deal with most often on a day to day basis are endorsements obtained by a tenant for the benefit of the landlord and endorsements obtained by a contractor or subcontractor for the benefit of the general contractor and owner of a project.

B. THE ISO 2010 AI ENDORSEMENT

1. This is the most often-seen AI Endorsement but it comes in different editions and care must be taken to determine which edition you are dealing with.

a. The 1985 Edition - extended coverage to the AI “with respect to liability arising out of ‘Your Work’ (the work of the named insured - subcontractor) for that insured (the AI) by or for you.”

(i) “Your Work” definition was broad enough for coverage to attach for the AI whether or not the AI was held responsible vicariously because of the act or omission of the named insured.

(ii) “Your Work” definition was broad enough to cover completed operations, which became a significant factor in construction defect cases.

b. The 1994 Edition limited coverage for the AI to liability arising out of the named insured’s “ongoing operations performed” for the additional insured.

(i) This was an apparent attempt to obviate coverage for completed operations - very important in construction defect cases.

c. The 2001 Edition excluded coverage for completed operations.

d. The 2004 Edition requires that the claim must have been “caused in whole or in part” by the acts or omissions of the named insured or those acting on behalf of the named insured.

2. Compare the difference in coverage attaching for the AI for liability “arising out of” the work of the named insured with coverage extended to the AI for liability “caused in whole or in part” by the acts or omissions of the named insured.

3. In April 2013, ISO made several substantive changes to the 2013 AI Forms significantly narrowing the scope of coverage under those forms. The changes include:

- (1) limiting coverage to the additional insured “only to the extent permitted by law”;
- (2) providing that coverage to the additional insured will not be broader than that which the named insured is required by the contract or agreement to provide;

(3) limiting the amount the insurer is required to pay out to the amount of insurance (a) required by the contract or (b) available under the applicable limits of insurance, whichever is less.

ISO also added the following language in the 2013 AI Forms:

[t]he insurance afforded to such additional insured only applies to the extent permitted by law.

This acts as a “savings clause” in states that have enacted “anti-indemnity” statutes, where the statutes extend to naming a party as an additional insured, in addition to preventing or otherwise limiting the extent to which an indemnitor may be required to indemnify an indemnitee from the indemnitee’s own negligence.

ISO also added the following language in the 2013 AI Forms:

[i]f 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 [the insured] are required by the contract or agreement to provide for such additional insured.

Based on this language, if the contract between a contractor and an owner, as an additional insured, requires the contractor to maintain insurance coverage that is narrower in scope than what the contractor actually carries, the owner, as an additional insured, will be limited to what is actually required by the contract. In other words, it is possible there could be a scenario where the contractor’s insurance might have been broad enough to cover a claim in whole, but because the contract between the contractor and the owner required less coverage, the owner only would be entitled to collect part of the total amount of that claim. Therefore, if the 2013 AI Forms are utilized, the parties will need to be extremely careful when negotiating and drafting the terms and conditions of the insurance requirements to ensure they fully and accurately reflect the bargained-for coverage.

The final change to the 2013 AI Forms by ISO was to add a new provision that modifies the limits of insurance as follows:

If coverage to the additional insured is required by a contract or agreement, the most [the insurer] 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 shown in the Declarations; whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.¹⁴

Consider a case where a contractor's commercial general liability policy contains limits of \$5,000,000 each occurrence and aggregate, but the contract between the contractor and the owner, as an additional insured, requires the contractor only to maintain commercial general liability insurance with limits of \$2,000,000 each occurrence and aggregate. Further, assume there is a loss valued at \$4,000,000. Generally, if the owner had been named an additional insured utilizing any of the pre-2013 ISO additional insured endorsements, assuming there is coverage under the policy, the owner would be entitled to make a claim against the policy for the entire \$4,000,000. However, under the 2013 AI Forms, the owner's claim would be limited to the amount of insurance required by its contract with the contractor (i.e., \$2,000,000). Therefore, if the 2013 AI Forms are utilized, it is more important than ever that the additional insured negotiate and include in its contract insurance requirements that accurately reflect the insurance coverage and limits for which the additional insured is paying (i.e., the insurance coverage and limits associated with the costs that have been factored into the insured party's compensation

C. LITIGATION ARISING OUT OF THE "ARISING OUT OF" LANGUAGE OF THE AI ENDORSEMENT

1. The "arising out of" language in the AI Endorsement triggers a duty on the part of the insurer to defend the additional insured without regard to

whether named insured's acts or omissions caused or contributed to the occurrence. The focus in determining if the liability arises out of the work is not the precise cause of the accident, but the general nature of the operation in the course of which the injury or damage was sustained. *Consolidated Edison Company v. Hartford Insurance Co.*, 203 A.D.2d 83 (1st Dept. 1994).

2. Where the AI acknowledged that the named insured bore no responsibility for the occurrence giving rise to the claim, it was sufficient to relieve the named insured carrier from the obligation of defending the AI. In *Worth Construction, Inc. v. Admiral Insurance Co., et al.*, 10 N.Y.3d 411 (2008), the named insured completed its work (installing metal pans for concrete steps) and was not on the jobsite when the occurrence took place. The court held that additional insured coverage was not triggered because the allegations of negligence were without merit and the construction of the staircase was merely the situs of the accident. This was a more narrow construction of "your work." The Court held: "Based on the policy language, the contractor could not be an additional insured as it conceded that the staircase was merely the situs of the accident."

3. In *BP Air Conditioning Corp. v. One Beacon Insurance Group*, 8 N.Y.3d 708, (2007), the AI Endorsement provided that the coverage under the CGL policy was extended to "any person or organization for whom you are performing operations...only with respect to liability arising out of your ongoing operations performed for that insured." (emphasis supplied). The insurer argued that coverage could not be triggered for the AI until there was a determination that the AI was being cast in liability because of the conduct of the named insured in the performance of its operation on behalf of the AI. The Court of Appeals held that the duty to defend an insured is "exceedingly broad" and that "the standard for determining whether an additional insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense." Thus, a finding that the named insured's conduct precipitated the claim against the additional insured is not a condition precedent to coverage.

4. *Frank v. Continental Casualty Company*, Appellate Division, Second Department, Landlord Entitled to Additional Insured Status Under Tenant's Policy; However Subtenant's Insurer Walks Because Landlord Not Added as Additional Insured on That Policy.

The issue is whether Continental had to defend or indemnify Frank in an underlying action involving an August 25, 2008 slip and fall on a public sidewalk. Colon was the underlying plaintiff, and claimed that, as she walked past clothing racks on the sidewalk, she tripped, and her husband thereafter told her that she tripped on a crack in the sidewalk. Frank, the property owner, leased the premises to White Plains Sportswear (“Sportswear”), which in turn subleased the premises to Pretty Girl, Inc. (“Pretty Girl”). Continental was the CGL carrier for Sportswear and Leading Insurance (“Leading”) was the insurance carrier for Pretty Girl. An insurance carrier's duty to defend arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy. If any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action. Continental failed to establish that it had no duty under the subject policy to defend Frank. Its policy contained an endorsement stating that a lessor of premises is an additional insured with respect to liability arising out of the ownership, maintenance, or use of the specific part of the premises leased. It was established that their potential liability in the underlying action arises out of the ownership, maintenance, or use of the specific part of the premises leased to Continental’s insured, Sportswear and sublet to Pretty Girl. The underlying claim arises out of the maintenance or use of the leased premises, as the sidewalk was necessarily used for access in and out of the leased building. At the time of the accident, Frank was not listed as an additional insured on the Pretty Girl policy issued by Leading.

5. *Wilson Central School District v. Utica Mutual Ins. Co.*, Appellate Division, Second Department, Additional Insured Endorsement Covered Only Vicarious Liability and Not Independent Liability of Purported Additional Insured.

The Wilson Central School District (“Wilson”) sought a defense and indemnity from Utica Mutual Insurance Company (“Utica”). Utica insured School Bus Service, Inc. (“Bus Service”) and provided coverage to Wilson under an additional insured endorsement. That endorsement provided that Wilson is an additional insured, but only

"[t]o the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured; or . . . [w]ith

respect to property owned or used by, or rented or leased to, you."

The language of the endorsement covers only the District's vicarious liability for the acts of the Bus Service. The underlying complaints seek to hold the District liable only for its own independent acts and omissions. The defendant School Bus Service, Inc., the insured, is not even referred to in the underlying complaints. Hence, the District is not an additional insured under the policy.

6. In *Jenel Management Corp. v. Pacific Insurance Co.*, 2008 Slip Op 07192 (1st Dept. 2008), the court held that there was a trigger of additional insured coverage for the landlord and managing agent where the accident occurred in a stairwell of the demised premises, the court finding that the accident occurred in the course of an activity necessarily incidental to the lease of the space and in a part of the premises necessarily used for access in and out of the leased space. The court also awarded attorney's fees to the insurer for the prosecution of the third party action finding they were an essential component of their defense of the underlying action.

7. In *City of New York v. Philadelphia Indemnity Insurance Co.*, 2008 WL 06792 (2nd Dept. 2008), the court held that the City had demonstrated its entitlement to defense as an additional insured, citing well-established principles of contract interpretation and opining that the interpretation urged by the defendant reflected extremely narrow coverage and would rewrite the policy without regard to the plaintiff's reasonable expectations as expressed in the contract between it and the named insured. The court did not provide any specifics as to the facts in the underlying action.

8. In *Regal Construction Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2009 Slip Opinion 05831 (1st Dept. 2009), the court held that National Union was obligated to defend and indemnify URS Corp. in an underlying personal injury action. The issue determined by the court involved the status of URS as an additional insured under a policy issued to the prime contractor, Regal, at a construction and renovation project at Riker's Island. The injured claimant was the employee of Regal who was injured while supervising the demolition of the building's bath and shower area when he slipped and fell in an area that had recently been painted. There was deposition testimony that a URS employee had painted the area.

The policy provided for additional insured coverage only with respect to liability arising out of Regal's ongoing operations performed for URS. The court cited the Court of Appeals' decision in *Worth Construction Inc. v. Admiral Ins. Co.*, 10 NY3d 411 (2008) but distinguished the court's decision in *Worth* noting that Regal, the prime contractor, had responsibilities that encompassed all of the demolition and construction work to be done. They found thus, that there was a causal connection between the plaintiff's injury and Regal's work as a prime contractor and, after noting that the focus on the phrase "arising out of ongoing operations" is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained, determined that Regal Corp. was obligated to defend and indemnify URS in the underlying bodily injury action.

D. WHERE THE ADDITIONAL INSURED IS ALSO COVERED BY ITS OWN CGL POLICY A DETERMINATION, MUST BE MADE AS TO THE PRIORITY OF THE COVERAGES.

1. In *Pecker Iron Works v Travelers Insurance Co.*, 99 N.Y.2d 391 (2003) the named insured's policy was issued by Travelers, naming Pecker Iron Works as an additional insured. The Travelers policy contained an AI Endorsement that provided, in addition to the extension of coverage to the AI, that the Travelers coverage would be excess unless the named insured had agreed in a written contract that the Travelers coverage would "apply on a primary or contributory basis." The contract between Pecker Iron Works and the named insured stated that the named insured would "name Pecker Iron Works, Inc. as an additional insured." The court held that by agreeing to name Pecker as an additional insured, the named insured intended to confer primary insured status upon Pecker and, thus, the language of the AI Endorsement to the effect that the coverage would be primary if it so provided in the agreement between Pecker and the named insured was satisfied.

a. the case does not stand for a broad proposition that the coverage provided by the named insured is always primary and the coverage provided by the additional insured is always excess. See, in this regard, *U.S. Liability Ins. Co. v. Mountain Valley Indemnity Co.*, 371 F.Supp.2d 554 (SDNY 2005). Although this case, decided under New York law dealt with auto policies and not CGL policies, the analysis of the effect of a contract between the named

insured and the additional insured is parallel. Here, the auto lease required the lessee to provide liability coverage designating the owner as an AI which coverage was to be designated as primary with the owner's own coverage to be designated as excess. The U.S. Liability policy which covered the lessee stated that the coverage would be excess "over all other valid and collectible insurance ... which is available to the Insured, covering a loss also covered by this policy,...". The Mountain Valley policy which covered the owner provided that "For any covered 'auto' you own, this Coverage Form provides primary insurance." The court held that the language of the respective policies trumped the lease agreement and that, as a result, Mountain Valley's coverage was primary and U.S. Liability's coverage was excess. The court distinguished this case from the Pecker Iron Works case by noting that in the decided case, there was no disagreement between the parties as to the intent of the lease agreement, while in the Pecker case, the conflict between the parties revolved around the intent of the contract between the named insured and Pecker.

2. Where both the named insured's policy and the AI's own policy contain the same or similar "other insurance" clauses, the policies may contribute pro rata by limits or by equal shares, depending upon the "sharing" provisions of the policies.

3. In *Tishman Construction Corp. of NY v. Great American Ins. Co.*, 2008 Slip Opinion 06177 (1st Dept. 2008), the court analyzed the respective priorities of coverage amongst policies issued to the property owner and construction manager, considering the intended purpose of each policy as evidenced by both its stated purpose and the premium paid for it, as well as upon the wording of its provision concerning excess coverage, citing its decision in *Bovis Lend Lease LMB, Inc. v. Great American Ins. Co.*, 855 N.Y.S.2d 459 (1st Dept. 2008).

III. OTHER ISSUES THAT MAY AFFECT THE "ADDITIONAL INSURED" STATUS

- A. WHERE THE POLICY REQUIRES A WRITTEN CONTRACT TO CONFER COVERAGE, IT MEANS WHAT IT SAYS BUT ALWAYS READ THE POLICY -- SOME AFFORD COVERAGE BASED UPON AN ORAL AGREEMENT.

1. Where the AI Endorsement provides that coverage will be extended to an AI if the named insured is required to provide the coverage pursuant to a written contract executed prior to loss, the contract must, in fact be executed. In *Rodless Properties, L.P. v. Westchester Fire Insurance Co.*, 835 N.Y.S.2d 154 (1st Dept. 2007), the AI Endorsement contained an “executed contract” requirement. When the named insured’s carrier declined coverage for the putative AI, it was argued that the AI and the named insured had a verbal agreement and the occurrence took place while the work was in progress, so that the contract was “executed.” No way, said the court, although an “executed” contract may be an oral agreement that has been fully performed or a written agreement that has been signed, neither was the case in this instance. Since the work was still in progress, the job had not been completed. In the absence of a signed written agreement, no coverage was extended to the AI.

2. See also *Nicotra Group, LLC v. American Safety Indemnity Co.*, 850 N.Y.S.2d 455 (1st Dept. 2008) where the court held that the construction manager’s letter proposal which was not signed by the owner failed to qualify as a written agreement predating the accident so as to afford coverage under the construction manager’s policy. In *Stellar Mechanical Services of NY, Inc. v. Merchants Ins. of NH*, 2010 NY Slip Opinion 04986 (2nd Dept. 2010), the court held that Merchants, the insurer for Serge Duct Design, a subcontractor of plaintiff Stellar Mechanical Services, was obligated to afford liability coverage to Stellar on a primary basis, rejecting Merchants' position that the loss did not arise out of the work performed by its named insured, Serge, and that the notice of an occurrence and of a suit was not provided as soon as practicable. Stellar, who was insured by American Empire Surplus Lines Ins. Co., had contracted with Serge Duct Design to perform duct work at a building that was being constructed. At the time that Serge's owner executed the subcontract, he also executed an indemnity agreement and an agreement to maintain certain insurance. Serge's policy, which was issued by defendant, Merchants, specified that an additional insured included any person or organization that Serge was required by written contract to name as an insured but only with respect to liability arising out of work Serge performed for the person or organization at the location designated.

An employee of another subcontractor was injured after falling through an opening in the building's roof. The initial lawsuit did not name either Stellar or Serge. Nearly two years thereafter, an amended complaint was served identifying Stellar as a defendant. Six months after receipt of the amended

complaint, Stellar demanded that Merchants defend and indemnify Stellar in the underlying action. After Merchants disclaimed, the injured claimant served a second amended complaint naming Serge as a defendant. Stellar again tendered its defense and indemnity to Merchants, noting that the amended pleading contained allegations that the accident arose out of Serge's work. Merchants again refused to acknowledge a duty to defend and indemnify and the declaratory judgment action was thereafter instituted. The court concluded that Stellar established that they qualified as an additional insured under Serge's policy, concluding that Stellar was entitled to defense only from the time they were served with the second amended complaint. The court further determined that as between American and Merchants, Merchants was the primary insurer and that any coverage provided to Stellar under its own policy was excess. The issue of indemnity was to await the determination that there was a covered loss.

Certificate of Insurance

B. CERTIFICATES OF INSURANCE DO NOT CONFER COVERAGE ON ADDITIONAL INSUREDS.

1. Tender of Defense

The act in which one party places its defense, and all costs associated with said defense, with another due to a contract or other agreement. This transfers the obligation of the defense and possible indemnification to the party the tender was made to.

2. Certificate of Insurance Defined

A document providing evidence that certain general types of insurance coverages and limits have been purchased by the party required to furnish the certificate. However, often the certificate will contain disclaimers indicating that it is furnished for informational purposes only and confers no rights upon the parties.

C. Relevant Case Law

1. The parties seeking or claiming insurance coverage bear the burden of demonstrating entitlement to coverage. *Consolidated Edison Co. of NY*

v. Allstate Ins. Co., 98 N.Y.2d 208 (2002).

2. A party not named on the face of the policy is not entitled to coverage under the policy. *Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d 198 (1st Dept. 2004); *Tilden Commercial Alliance, Inc. v. 2ND Edition Originals, Inc.*, 242 A.D.2d 702 (2nd Dept. 1997).

3. A Certificate of Insurance purporting to afford a party coverage which on its face states that it is issued for information purposes only, cannot by itself establish coverage. *Tribeca Broadway Associates, LLC*, supra; *American Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.*, 248 A.D.2d 420 (2nd Dept. 1998).

4. A Certificate of Insurance containing disclaimers that it was for information only, that it conferred no rights on the holder and that it did not amend, extend or alter the coverage provided by the policy was insufficient to raise a triable issue of fact as to whether a party had been named as an additional insured under the subject policies. *American Motorist Ins. Co. v. Superior Acoustics, Inc.*, 277 A.D.2d 97 (1st Dept. 2000).

5. *Sevenson Envntl. Services, Inc. v. Sirius Am. Ins. Co.*, 2010 NY Slip Opinion 05062 (4th Dept. 2010), plaintiff, Sevenson Environmental Services and Goodyear Tire and Rubber sought a declaration that they were entitled to additional insured status on a policy issued by Sirius. Sevenson and Goodyear had submitted a Certificate of Insurance providing that Sevenson, the project's owner and engineer, and their respective officers, employees and agents are named as additional insureds on a direct, primary and non-contributory basis. They also submitted an additional insured endorsement naming persons or organizations as "on file" with company.

The court found that Sirius raised an issue of fact through the submission of an affidavit from its third-party claims administrator who averred that the underlying file did not contain any request or notice to name plaintiffs as additional insureds on the policy. The court, however, concluded that the mere absence of documentation in defendant's/named insured's file is insufficient to establish as a matter of law that neither Sirius nor one of its agents possessed documentation naming plaintiffs as additional insureds. It noted well-established law that a Certificate of Insurance by itself does not confer insurance coverage,

particularly where, as was the case here, the certificate expressly provided that it was issued as a matter of information only and confers no rights upon the certificate holder and does not amend, extend or alter the coverage afforded by the policies listed below.

However, the court found that an insurance company that issues a Certificate of Insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the Certificate of Insurance to its detriment, citing *Lenox Realty v. Excelsior Ins. Co.*, 255 AD2d 644, *lv denied* 93 NY2d 807; *Bucon, Inc. v. Pennsylvania Mfg. Assn. Inc. Co.*, 151 AD2d 207, 210-211. For estoppel based upon the issuance of a Certificate of Insurance to apply, however, the certificate must have been issued by the insurer itself or by an agent of the insurer. The court found that there were questions of fact as to whether the certificate was issued by an agent and therefore, denied summary judgment.

Interestingly, with respect to plaintiffs' claim that Sirius failed to provide timely notice of its disclaimer to Severson and/or Goodyear as claimants, the court concluded that such a determination was premature, as an injured claimant has a direct cause of action pursuant to Insurance Law §3420(a)(2) only after the injured claimant first obtained a judgment against the insured and, as this condition precedent had not been met, they could not, at this juncture, seek relief directly from the insurer.

6. Where the written contract between a subcontractor and general contractor did not require the subcontractor to identify the general contractor as an additional insured, additional insured status is not conferred under the insurance policy issued. *ALIB Inc. v. Atlantic Casualty Ins. Co.*, 52 A.D.3d 419 (1st Dept. 2008).

7. The First Department held that bid documents did not constitute a written agreement thereby invoking additional insured coverage for the City in *Illinois Natl. Ins. Co. v. American alternative Ins. Corp.*, 2009 NY slip Op 00308 (1st Dept. 2009). The policy included as an insured "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." The subcontract between the parties did not require the City be named as an additional insured, but the bid

documents did.

8. The New York Court of Appeals for the Second Circuit, certifying a question to the New York Court of Appeals, has asked for New York's Highest court's guidance on an issue presented in *10 Ellicott Square Court Corp. & 5182 Group, LLC v. Mountain Valley Indem. Co.*, 2010 WL 5186041 (2nd Cir. 2010). According to the procedural history set forth by the 2nd Circuit, the United States District Court for the Western District of New York had granted summary judgment in favor of the plaintiffs, finding that a contract that had been not signed on behalf of the parties nonetheless had been "executed" within the meaning of the primary insurance policy and New York law, the defendant was obligated to afford coverage to the plaintiffs under an umbrella policy and that, in any event, the defendant/insurer was estopped from denying coverage to the plaintiff based upon their issuance of a Certificate of Insurance identifying the plaintiffs as additional insured.

The Second Circuit Court of Appeals reversed the District Court's determination that the contract was "executed" within the meaning of the policy, disagreeing with the District Court's determination that a contract has been executed despite the absence of either a signature by or on behalf of both parties or full performance. However, as the umbrella policy did not require execution of an underlying written agreement to become effective, the court concluded that the plaintiffs were afforded coverage under the terms of the umbrella policy.

Notably, the court found that there exists a disagreement amongst New York courts as to whether a Certificate of Insurance issued by an agent of the insurer may estop the insurer from denying coverage to a party identified as an additional insured on the Certificate of Insurance, even where the disclaimer contains the commonly included statement that the Certificate is issued "for informational purposes only." Thus, the court certified to New York's Court of Appeals the following question: In a case brought against an insurer in which a plaintiff seeks a declaration that it is covered under an insurance policy issued by that insurer, does a Certificate of Insurance issued by an agent of the insurer that states that the policy is in force but also bears language that the Certificate is not evidence of coverage, is for informational purposes only, or other similar disclaimers, estop the insurer from denying coverage under the policy?

This interesting issue has generated much discussion amongst the

insurance community.

The subcontractor's insurance broker was under no duty to the property owner and contractor and thus, an action for breach of contract and negligence against the broker was properly dismissed, despite the fact that the broker had produced Certificates of Insurance incorrectly indicating that they had been named as additional insureds. *Greater New York Ins. Co. v. White Knight Restoration, Ltd.*, 7 A.D.3d 292 (1st Dept. 2004).

9. In *Linarella v. City University of New York*, 6 A.D.3d 192 (1st Dept. 2004), the court found that by the plain terms of the policies, Morse Diesel was not an additional insured because it had no subcontracts with the policyholders from whom coverage was sought and that even if it were a third party beneficiary of the insureds' contracts, it would simply provide standing to sue the insureds for breach of their insurance procurement obligations.

10. In *Federated Department Stores, Inc. v. Twin City Fire Ins. Co.*, 28 A.D.3d 32 (1st Dept. 2006), the court held that the insurer's twenty month defense of an insured without a reservation of rights was insufficient to estop them from disclaiming coverage on the grounds that the party claiming additional insured status was not, in fact, an additional insured on the policy. The insurer, Twin City, had responded to the tender and agreed to accept coverage based upon the insured's express representations regarding the existence of an agreement. Furthermore, it was noted that the carrier had repeatedly requested that the insured produce a copy of the agreement containing the insurance procurement obligation.

The trial court, in finding the insurer was equitably estopped from disclaiming coverage, held that prejudice to an insured may be presumed where an insurer assumes the defense and the insured, in reliance thereon, loses the right to control its own defense. The First Department disagreed and held that a delay in giving notice of a reservation of rights will be excused where it is traceable to the insurer's lack of actual or constructive knowledge of the available defense, especially where, in addition to this lack of knowledge, the insurer is misled by misrepresentations into defending the suit.

Insurers are not obligated to speculate about each and every conceivable defense to coverage at the time a defense is assumed in response to a tender. To oppose

such a burden would necessarily require that every defense of an insured be a conditional one, thereby thrusting unnecessary concern as well as initial expense upon the insured, i.e., the retention of personal counsel, which, as subsequent events might very well show, was unwarranted. Moreover, the imposition of such an obligation would take its toll on the insurer as well. In such a case, the insurer would lose control of the defense, a vital component of its policy protection, that is, the right to control its ultimate liability in any case. (Citations omitted).

11. In *1700 Broadway Co. v. Greater New York Mutual Insurance Co.*, 54 A.D.3d 593 (1st Dept. 2008), the court held the additional insured's notice provided 8 months after the loss was untimely despite having received timely notice from the primary insured, where their interests were adverse. The court noted that the insurer was not obligated to demonstrate prejudice, footnoting the amendment to New York Insurance Law.

12. The court in *West 64th Street, LLC v. Axis US Ins.*, 2009 NY Slip Opinion 04709 (1st Dept. 2009) reiterated the principle that a certificate of insurance did not confer coverage or raise a question of fact sufficient to warrant denial of a motion for summary judgment where the blanket additional insured endorsement to the policy provided coverage where the insured was required by written contract to name an entity or organization as an additional insured. The contracts between the plaintiffs and the maintenance contractor did not contain such a requirement. Thus, there was no additional insured status conferred.

C. COMPLIANCE WITH NOTICE CONDITION.

1. The additional insured has an independent obligation to comply with the notice conditions set forth in the policy that is, the obligation to afford notice as soon as practicable of both the occurrence and of any claim or suit arising therefrom. *23-08-18 Jackson Realty Assoc. v. Nationwide Mutual Ins. Co.*, 2008 Slip Opinion 06203 (2nd Dept. 2008) citing *City of New York v. St. Paul Fire & Marine Ins. Co.*, 21 A.D.3d 978 (2nd Dept. 2005); *Ambrosio v. Newburgh Enlarged City School District*, 5 A.D.3d 410 (2nd Dept. 2004).

2. The additional insured has an independent obligation to provide notice under the policy even where the named insured has provided notice where the parties were adverse in the underlying bodily injury action. *City of New York v. Welsbach Electric Corp.*, 49 A.D.3d 322 (1st Dept. 2008); *Travelers Ins. Co. v. Volmar Construction Co. Inc.*, 300 A.D.2d 40 (1st Dept. 2002).

a. The fact that the insurer may have received notice of the claim from another primary insured or from another source does not excuse an additional insured's failure to provide notice. *City of New York v. St. Paul Fire & Marine Ins. Co.*, supra.

b. An exception to this general rule is where two insureds, defendants in the same action are united in interest or where there is no adversity between them. *Ambrosio v. Newburgh Enlarged City School District*, supra., *Sayed v. McCary*, 296 A.D.2d 396 (2nd Dept. 2002); *City of New York v. Certain Underwriters at Lloyd's of London*, 294 A.D.2d 391 (2nd Dept. 2002).

D. FAILURE TO PROCURE INSURANCE

1. It remains the law that the damages available for a breach of the failure to procure insurance are the costs incurred by the other party in obtaining and maintaining its own coverage.

a. In *Netjets, Inc. v. Signature Flights Support*, 43 A.D.3d 1016 (2nd Dept. 2007), the contractor failed to identify Signature Flights Support as an additional insured in breach of the written contract between the parties. The court held that the damages were limited to Signature's out-of-pocket expenses in obtaining and maintaining its own separate insurance underwritten by its own insurance carrier as well as the costs of the premiums and any additional costs it incurred such as deductible, copayments and increased future premiums citing *Inchaustegui v. 666 Fifth Avenue Ltd. Partnership*, 96 N.Y.2d 111 (2001); *American REF-FUEL Co. of Hempstead v. Resource Recycling*, 307 A.D.2d 939 (2003).

IV. DOES INSURANCE LAW §3420 APPLY BETWEEN INSURERS

A. In *JT Magen v. Hartford Fire Ins. Co.*, 879 NYS2d 100 (1st Dept. 2009), the court held that the requirements of Insurance Law §3420 applied where

an insurance carrier received notice of a claim from another insurance carrier on behalf of a mutual insured seeking defense and indemnity. The court noted that they wished to clarify and reiterate their holding of *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 AD3d 84 (2005) which they indicated was dispositive on the issue.

B. In *Bovis*, the court held that Insurance Law §3420's requirements did not apply with respect to the other commercial general liability insurer that afforded coverage to the same insured since they were not within the zone of protected persons the statute was intended to protect, namely the insured, injured person and any other claimant. In *JT Magen*, the court held that it is only the tendering carrier that does not obtain the benefit of 3420(d) from a tendering letter it sent on behalf of its insured because that section does not apply to claims between insurers. (See also *Topps Markets v. Maryland Cas.*, 267 AD2d 999 (1999); *Thomson v. Power Authority of the State of NY*, 217 AD2d 495 (1995); and see *Bovis Lend Lease LMB, Inc. v. Garito Contra. Inc.*, 38 AD3d 260 (2007).

V. INDEMNITY OBLIGATION v. INSURANCE PROCUREMENT

A. Unlike the indemnification provision, which pursuant to General Obligations Law §5-322.1¹, renders indemnification provisions void and unenforceable as the agreement purports to indemnify a party for its own negligence, no such prohibition exists with respect to an obligation to procure insurance for another.

VI. BREACH OF INSURANCE PROCUREMENT CLAIMS

A. Based upon the holding of the Court of Appeals in *Kinney v. D.W. Lisk Co., Inc.*, 76 N.Y.2d 215 (1990), a party who fails to procure insurance which

¹ New York General Obligations Law § 5-322.1 provides that:

A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

was required pursuant to the terms of a contract is subject to a Kinney claim.

B. *Inchaustegur v. 666 Fifth Avenue Ltd. Partnership*, 96 N.Y.2d 111 (2001), the Court limited the recoverable damages for a Kinney claim to contractual damages, that where the owner or the general contractor had their own insurance, they would be limited to their out-of-pocket expenses resulting from the contractor's or subcontractor's failure to procure insurance – to wit: deductibles, co-payments and increased future premiums.

VII. ANTI-SUBROGATION

A. An insurer who has paid a claim on behalf of an insured is entitled to recover the amount paid by way of indemnity from the wrongdoer. The anti-subrogation concept provides 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. *Pennsylvania General Insurance Co. v. Austin Powder Co.*, 68 N.Y.2d 465 (1986).

B. The anti-subrogation principle becomes an issue where there are multiple insureds under a single policy.

C. Antisubrogation does not apply where, while insureds under the same policy for the same risk, one insured is not covered by the application of an exclusion; where the policy, while issued by the same insurer, does not cover the same risk; and antisubrogation does not apply in excess of the shared coverage.

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