Personal Injury Quarterly

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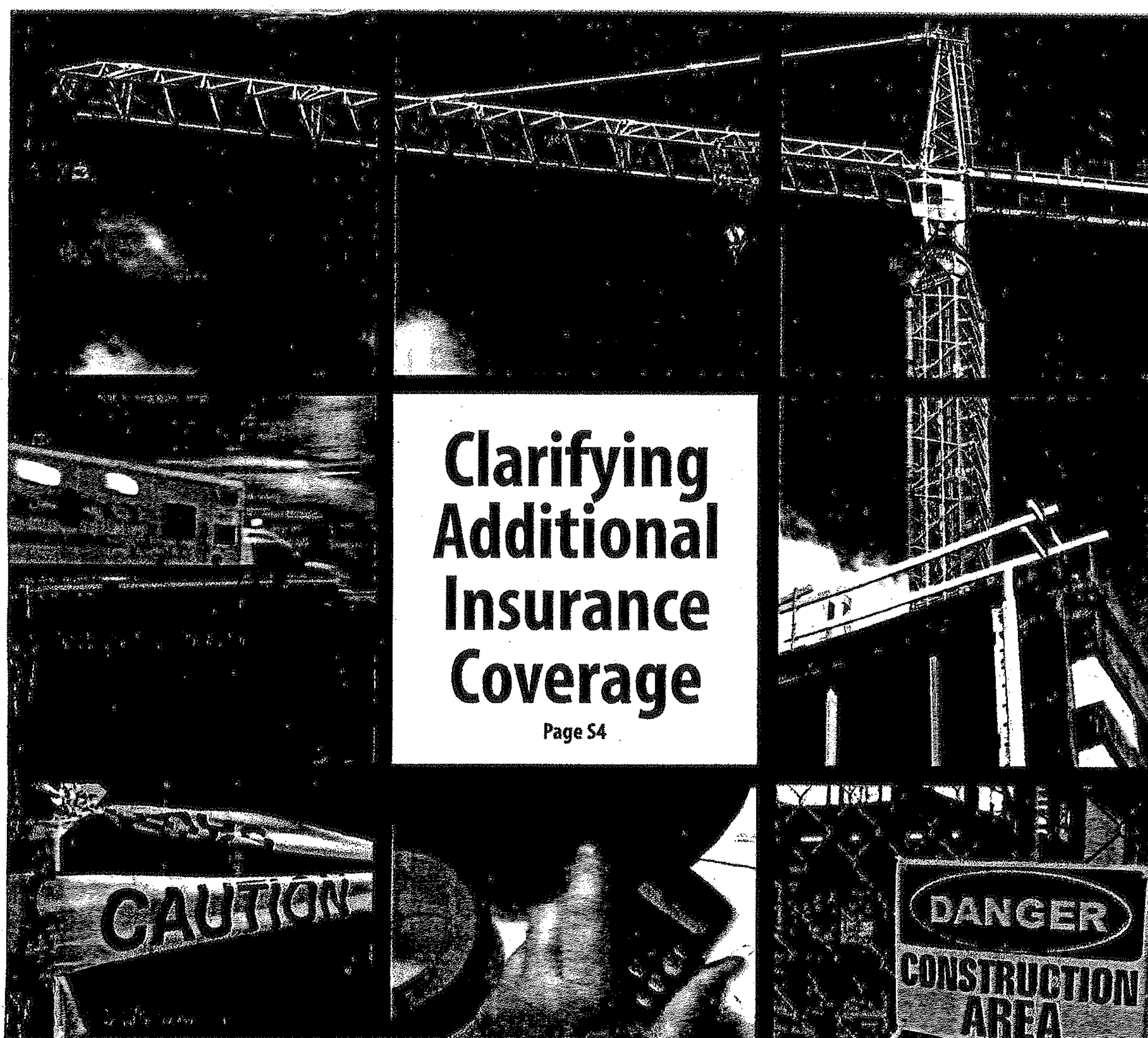

State High Court Tweaks **Additional Insurance** Coverage

Clarifying what triggers the duty to defend and indemnify for construction site injuries.

BIGSTOCK

BY KEVIN G. FALEY

RECENTLY, the New York Court of Appeals was asked once again to determine the obligation of an insurer to defend and indemnify an additional insured for potential liability arising out of the operations of the primary insured.[1] In the past several years the Court has addressed this issue, and others, in the well known cases of *Pecker Iron Works*,[2] *BP Air*[3] and *Worth Construction*.[4]

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In *BP*, the Court offered a liberal interpretation of the obligations of an additional insured carrier and also put a related issue raised by *Pecker* to rest. A year later, in the *Worth* case, the Court placed restrictions on *BP*'s reach. Now, in *Regal*, the Court provides a refresher on what triggers additional insurance coverage.

2003: 'Pecker Iron Works'

In 2003, the Court decided the *Pecker Iron Works* case. In *Pecker*, a subcontractor, Upfront, purchased insurance naming Pecker an additional insured. Upfront's carrier, Travelers, issued a policy that provided

additional insurance coverage to any entity so designated in a written contract.

However, the policy also provided that this coverage would be excess unless the contract called for such coverage to be primary. The Pecker/Upfront contract was silent on whether Travelers' coverage would be primary; the contract only referred to the insurance being purchased on Pecker's behalf as being "additional insurance."

A claim was brought against Pecker by an injured construction worker and Travelers denied coverage, claiming that its policy was excess to Pecker's insurance as the contract did not require the additional insurance to apply on a primary basis.

In a decision in which many attorneys believed that the Court of Appeals was rewriting the Travelers' insurance policy, the Court found that the term "additional insurance" means "primary" insurance. The Court further held, without making any reference to the insurance provisions contained in either Travelers' policy or any policy purchased by Pecker Iron Works, that Travelers' insurance was primary.[5]

> In the past several years the Court has addressed this issue, and others, in the well known cases of 'Pecker Iron Works,' 'BP Air' and 'Worth Construction.' Now, in 'Regal,' the Court provides a refresher.

The question of whether or not additional insurance is either primary, excess or co-insurance depends upon the terms and conditions of the insurance policies affording coverage to that insured. What the Court seemingly did in *Pecker* was to find that additional insurance is primary insurance regardless of insurance policy provisions to the contrary.

2007: 'BP Air Conditioning'

In the 2007 *BP Air* case, the Court dealt with the issue raised in *Pecker* concerning priority of coverage and also with the more general and equally important question of whether "liability must be determined before an additional named insured is entitled to a defense in an underlying personal injury action."[6]

By way of background, when an owner or a general contractor sought coverage for a claim by an injured subcontractor's worker, the subcontractor's insurance carrier would sometimes defer that issue until it could be shown that the injury arose out of the named insured's work. Although a pleading might allege that a subcontractor was at fault for the injuries suffered by the worker, the subcontractor's insurance company would argue that its insured was not responsible or that its insured was one of several potentially liable subcontractors and would defer providing coverage until liability was determined.

In the *BP* case, the general contractor subcontracted HVAC work to BP. BP subcontracted a portion of this work to Alfa Piping.

The purchase order between BP and Alfa required Alfa to name BP as an additional insured. Alfa's carrier, One Beacon, issued an additional insured endorsement that included as an insured any organization that the parties agreed in a written contract to name as an additional insured. Further, the organization was an additional insured "only with respect to *liability* arising out of your ongoing operations performed for that insured."[7]

An employee of another subcontractor, Aaro Sheet Metal, was injured when he slipped and fell on oil that had come from a pipe cutting machine. The worker brought suit against the GC which impleaded BP and Alfa.

BP tendered its defense to One Beacon, which declined to defend. BP moved for summary judgment seeking a defense from One Beacon; One Beacon opposed, contending that "it was not obligated to defend BP until it was determined that plaintiff's alleged injury arose out of Alfa's activities."[8]

The trial court found that One Beacon was obligated to defend BP. However, the Appellate Division, apparently following the Court of Appeals' ruling in *Pecker*, held that not only must One Beacon provide BP a defense but also that One Beacon was primary and that BP's policy was excess. Further, in a polar opposite dissent, two justices found that without a liability determination that plaintiff's accident arose out of Alfa's work, the additional insurance endorsement was not triggered and One Beacon had no duty to defend BP.

The Court of Appeals, in reinstating the Supreme Court order, noted that the duty to defend is derived from the allegations in the complaint and the terms of the policy. If "a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend."[9]

The inquiry is whether the allegations "fall within the risk of loss undertaken by the insured and [it is immaterial] that the complaint...asserts additional claims which fall outside the policy's general coverage or within its exclusionary provisions." An insurer "may be required to defend under the contract even though it may not be required to pay once the litigation has run its course."[10]

One Beacon argued that the portion of the endorsement that stated that BP was an additional insured "only with respect to liability arising out of [Alfa's] ongoing operations performed for that insured" required a determination of liability before BP Air was entitled to a defense.[11]

The Court, however, noted that "when considering this policy language in light of an insurer's broad obligation to defend an insured, it does not affect the standard under which a duty to defend is determined. When the *duty to defend* is at issue, a liability alleged to arise out of Alfa's ongoing operations is one "arising out of" such operations within the meaning of the policy."[12]

The complaint alleged that Alfa was engaged in construction work, that Alfa breached its duty to keep the work site safe and that Alfa's breach caused the plaintiff's injuries. The Court found that these allegations formed a "factual [and] legal basis on which [One Beacon] » Page S11

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might eventually be held to be obligated to indemnify [BP] under any provision of the insurance policy." Since there was "a *possibility* that plaintiff's injuries arose out of Alfa's work performed for BP, One Beacon's obligations to provide BP with a defense is triggered."[13]

The Court also noted that in order to determine the priority of coverage among different policies, the court must review and consider all of the relevant policies at issue. Since none of the other insurance carriers were parties to the declaratory judgment action and no relevant policies were submitted, the priority of coverage could not be determined. This further reasoning was absent in the *Pecker* case and, although without specifically stating so, the Court apparently distinguished (really, overruled) its prior holding in *Pecker*.

2008: 'Worth Construction'

Just how far the Court would go in determining additional insurance coverage was addressed in its 2008 decision in *Worth Construction*.

Worth, a general contractor, retained subcontractor Pacific Steel for the construction of a staircase and handrails in an apartment complex. Pacific provided insurance through Farm Family naming Worth as an additional insured.

Pacific's work involved the fabrication and installation of a staircase consisting of steel pan stairs and handrailings. After Pacific installed the stairs, Worth's concrete subcontractor would fill the pans. Once the concrete had been poured and the walls were erected around the stairs, Pacific would return and complete its work by affixing the handrailings to the walls.

After the stairs had been installed, but before the walls had been raised, a worker was injured when he slipped on fireproofing on the stairs.

The injured worker sued, alleging injury on the staircase installed by Pacific and Worth demanded a defense and indemnification from Pacific's insurance carrier, Farm Family.

Farm Family's additional insured endorsement was similar to that encountered in *BP*, namely, that Worth was an additional insured "but only with respect to liability arising out of [Pacific]'s operations."[14]

Farm Family declined to provide Worth with a defense and, after both parties moved for summary judgment, the Supreme Court declared that Farm Family was obligated to defend and indemnify Worth under the terms of the policy.

However, Pacific had also moved for summary judgment dismissing Worth's claim in the underlying action. Worth was forced to concede that any negligence claim asserted against Pacific lacked factual merit and should be dismissed. Thereafter, Farm Family moved to renew asserting that Worth admitted that plaintiff's accident did not arise out of Pacific's work. The Supreme Court held that Worth's concession that Pacific was not negligent established as a matter of law that the plaintiff's accident did not arise out Pacific's operations.

The Appellate Division reversed, holding that it was immaterial whether Pacific had completed the installation of the stairs or whether its installation was negligent. For coverage purposes, it was sufficient that plaintiff's injury was sustained on the stairs.

The Court of Appeals reversed, finding that while the absence of negligence, by itself, was insufficient to establish that an accident did not "arise" out of an insured's operations, Pacific's operations merely involved the installation of a staircase and handrails. The allegation in the underlying complaint that the stair was negligently constructed was the only basis for asserting any connection between Pacific's work and the accident. Once Worth admitted that its claims of negligence against Pacific were without merit, there was no longer any connection between plaintiff's accident and the risk for which coverage was intended.[15]

The *BP* and *Worth* cases demonstrate the relevant interpretation of additional insurance coverage and its limitations. It was certainly clear in the *Worth* case that the application of *BP*'s liberal interpretation of the additional insurance clause would be unfair. The recent Court of Appeals case, *Regal*, reinforces the Court's liberal interpretation of additional insurance clauses while distinguishing the narrow holding in *Worth*.

2010: 'Regal Construction'

In *Regal*, the city of New York engaged URS as construction manager for a renovation project. URS hired Regal Construction to serve as a prime contractor. The agreement between Regal and URS required Regal to procure insurance naming URS as an additional insured. Regal obtained a policy from INSCORP which covered URS but "only with respect to liability arising out of [Regal's] ongoing operations..."[16]

Regal's project manager was walking through the facility with an employee of Regal's demolition subcontractor. The plaintiff stepped from the plywood flooring onto a floor joist that had recently been painted (supposedly by URS) and the paint caused the plaintiff to slip.

The plaintiff sued the city and URS and URS demanded that Regal and INSCORP provide a defense and indemnification based on the additional insurance clause. INSCORP provided URS with a defense, but commenced a declaratory judgment action claiming that URS was not entitled to additional insurance coverage.

URS, citing the *BP* case, claimed that it was entitled to additional insurance coverage as an insured's duty to defend is "exceedingly broad." Not surprisingly, INSCORP cited the *Worth* case claiming that the injuries did not arise out of Regal's operations and that URS, itself, was negligent and caused the accident as it had painted the joists that the plaintiff had slipped on.

The Court, noting that the phrase arising out of only requires "some causal relationship between an injury and the risk for which

coverage is provided," held that it "is not the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained." Even if URS was negligent, the injury arose out of Regal's operations as the plaintiff was walking through the work site to indicate additional walls that needed to be demolished by Regal's subcontractor.[17]

The Court went on at great length to distinguish the *Worth* case, finding that INSCORP's reliance on *Worth* "is misplaced." The Court reiterated that in *Worth* the subcontractor, Pacific, played no role in the installation of the fireproofing, the cause of plaintiff's slip and fall on the staircase.

In *Regal*, "there was a connection between the accident and Regal's work as the injury was sustained by Regal's own employee while he supervised and gave instructions to its subcontractor." That the underlying complaint "alleges negligence on the part of URS and not Regal, is of no consequence as URS is *potentially"* liable for plaintiff's injury "as it arose out of Regal's operations."[18]

In the Second Department

Recently, the Second Department in *Stellar Mechanical*[19] distinguished between "defense" and "indemnification" under a policy providing additional insurance coverage and took from both *BP Air* and *Worth* in coming to its decision.

Plaintiff Stellar Mechanical agreed to install an HVAC system and subcontracted the duct work to Serge, which was insured by Merchants Mutual Insurance. The contract between Stellar and Serge obligated Serge to name Stellar as an additional insured on a primary and non-contributory basis.

The additional insured endorsement under Serge's policy with Merchants provided that Stellar was an additional insured but, again, "only with respect to liability arising out of" its work. An employee of another subcontractor working on the project fell through an opening in the building's roof. The worker commenced an action and eventually named Stellar as a defendant.

Stellar demanded that Merchants defend and indemnify it in the underlying action. Merchants replied that its investigation revealed that the loss did not arise out the work performed by Serge.

The plaintiff served a second amended complaint, this time naming Serge as a defendant. Stellar again sought defense and indemnification from Merchants as the second amended complaint contained allegations that the accident arose out of Serge's work. Merchants refused. American Empire, Stellar's carrier, provided Stellar with a defense in the underlying action, which eventually settled.

Stellar and American then commenced an action against Merchants seeking defense and indemnification. Both parties moved for summary judgment and the Supreme Court granted Merchants' motion, claiming that Merchants was not obligated to defend and indemnify Stellar.

The Second Department reversed that portion of the trial court's decision that found that Merchants was not obligated to defend Stellar. The court noted (in citing the *BP Air* case) that an insurer must defend its insured "whenever the allegations of the complaint in an underlying action suggest a reasonable possibility of coverage." The second amended complaint included allegations that the accident was caused by the negligence of Serge's employees. Those allegations suggested a reasonable possibility of coverage and therefore, the second amended complaint triggered Merchants' duty to defend Stellar as an additional insured "regardless of whether the allegations concerning Serge were ultimately shown to be groundless."[20]

However, the court noted that the Supreme Court properly found that Merchants was not obligated to indemnify Stellar in the underlying action. The court noted that "even in cases with a negotiated settlement, there can be no duty to indemnify unless a determination is made that there was a covered loss."[21] Merchants demonstrated that Serge's employees did not create the opening through which the plaintiff fell and were not responsible for protecting construction workers from falling through that opening. Accordingly, the duty to indemnify, which is not as broad as the duty to defend, was not triggered.

Conclusion

These recent cases provide a framework for determining when additional insurance lies.

The duty to defend is broad and liberally interpreted. However, the duty to indemnify can be strictly construed, especially if the additional insured endorsement applies only in cases of "liability" or involves the newer 2005 endorsement requiring the liability to arise out of the named insured's "acts or omissions" rather than the broader "operations" definition.

These cases also illustrate that a carrier may actually benefit from deciding to defend an additional insured early on in the litigation while reserving a decision to indemnify until there is a finding of liability, a decision that the Court of Appeals endorses.

1. *Regal Const. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 15 N.Y.3d 34, 930 N.E.2d 259, 904 N.Y.S.2d 338 (2010).
2. *Pecker Iron Works of New York, Inc. v. Traveler's Ins. Co.*, 99 N.Y.2d 391, 786 N.E.2d 863, 756 N.Y.S.2d 822 (2003).
3. *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708, 871 N.E.2d 1128, 840 N.Y.S.2d 3902 (2007).
4. *Worth Const. Co., Inc. v. Admiral Ins. Co.*, 10 N.Y.3d 411, 888 N.E.2d 1043, 859 N.Y.S.2d 101 (2008).
5. *Pecker*, 99 N.Y.2d at 393.
6. *BP*, 8 N.Y.3d at 711.
7. Id. at 712. (Emphasis supplied).
8. Id. at 713.
9. Id. at 714.
10. Id.
11. Id. at 715.
12. Id. (Emphasis supplied).
13. Id. (Emphasis supplied).
14. *Worth*, 10 N.Y.3d at 414.
15. Id. at 416.
16. *Regal*, 15 N.Y.3d at 414.
17. Id. at 38.
18. Id. at 39 (Emphasis supplied).
19. *Stellar Mech. Serv. of New York, Inc. v. Merchants Ins. of New Hampshire*, 74 A.D.3d 948, 903 N.Y.S.2d 471 (2d Dept. 2010).
20. Id. at 476.
21. Id.