



OUTSIDE COUNSEL

BY SALVATORE J. DeSANTIS

'BP Air v. One Beacon': Are Majority, Dissent That Far Apart?

Early last month, the First Department issued a decision with uncharacteristically contentious majority and dissenting opinions in a significant insurance dispute which arose when a construction worker fell on an oil slick on the 39th floor of the then existing World Trade Center. The case was *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 2006 NY Slip Op 05297, decided on July 6, 2006.

Specifically, Henegan, the general contractor, hired plaintiff BP as a heating ventilation and air-conditioning (HVAC) subcontractor. BP in turn subcontracted with Alfa. Pursuant to a written agreement between BP and Alfa, Alfa was required to obtain a Comprehensive General Liability (CGL) policy naming BP as an additional insured.

The Issue

The question posed in this case is whether plaintiff (BP):

- was an additional insured
- is under a CGL policy
- is entitled to a defense
- if the allegations of the complaint do not preclude the possibility that the liability arose out of the ongoing operations of the named insured, was provided for in the additional insured endorsement.

The opinion includes a heated exchange in which the majority noted that Judge Joseph P. Sullivan, who authored the dissent, was on the bench in a case that the majority states held the other way. Judge Sullivan responded that this may be explained by a measure of his capacity for



growth, referring to portions of the majority opinion as “puzzling,” and the result “absurd” and “confused.” It may be that the rift can be closed by considering that the majority assumes that BP is an additional insured, while the dissent, with which Judge James M. Catterson concurs, finds there is a question of fact on that issue.

Citing the Court of Appeals decision in *Pecker Ironworks of New York v. Travelers Ins. Co.*, 99 NY2d 391, 393, 786 NE2d 863, 864, 756 NYS2d 822, 823 (2003), the 3-2 majority stated that:

- 1) the controlling principle is that an additional insured enjoys the same protection as the named insured;
- 2) the insurer's duty to defend the additional insured in the underlying personal injury action was triggered by allegations that could come within the coverage;
- 3) in the absence of unambiguous contractual language to the contrary, the additional insured endorsement provided plaintiff with primary coverage; and
- 4) the insurer covering the plaintiff as a named insured was not a co-insurer, but the insurer providing additional insured coverage could seek contribution from insurers which also provided additional insured coverage to the plaintiff.

The 3-2 majority described the issue in *Pecker* as whether Mr. Pecker was entitled to primary coverage as an additional insured

under a policy issued to Upfront, one of Mr. Pecker's subcontractors. The majority noted that Travelers agreed to provide excess coverage to any party with whom Upfront had contracted with in writing to provide coverage, unless Upfront agreed in writing that the coverage would be primary. Although the Pecker-Upfront agreement was silent as to whether the coverage would be primary or excess, the Court of Appeals found the contract sufficiently demonstrated the parties' intent to make it primary, reasoning that, in the world of construction, this is what subcontractors and general contractors intend when contracting for such an insurance requirement.

The Majority

The majority concluded that “it follows from *Pecker* that BP's coverage as an additional insured under Alfa's policy is primary.” The majority opinion noted that this point was apparently not disputed by the insurer.

The majority took issue with the dissent's contention that the language of the additional insured endorsement, which provided additional insured status only with respect to liability arising out of the ongoing operations of the named insured, rendered additional insured status conditional until the facts were developed entitling the additional insured to indemnification. The majority reasoned that since the additional insured enjoys the same protection as the named insured, the activation of the duty to defend must depend on the allegations of the pleadings, and not factual findings establishing the additional insured's entitlement to indemnification.

The majority asserted that its decision was consistent with prior decisions of the Appellate Division pre-dating *Pecker*. The majority found *79th Realty Co. v. X.L.O. Concrete Corp.*, 247 AD2d 256 (1998), to be almost exactly on point and instructive. In that case, the court imposed a duty to defend the general contractor as an

Salvatore J. DeSantis is a partner with Molod Spitz & DeSantis PC. **Anita G. Fox**, a frequent lecturer on insurance coverage disputes and a shareholder of Fraser Trebilcock Davis & Dunlap PC in Michigan, assisted in the preparation of this article.

additional insured, while it declined to issue a declaration that the insurer had a duty to indemnify, pending determination that the underlying action arose out of the subcontractor's performance of work under the contract. The majority also distinguished the case of *Kajima Constr. Serv. v. CATI, Inc.*, 202 AD2d 228 (2003), cited by the dissent as contrary to the majority's holding. The majority found that *Pecker* would not require the additional insured coverage to be primary under the facts of the *Kajima* case, because, in that case, the additional insured endorsement stated that the coverage would be primary only if the underlying claims were determined to be solely as the result of the "negligent responsibility of the named insured." The court found *Kajima* inapplicable because the policy at issue in *BP* did not contain the language making coverage contingent on a future factual determination.

On the final question of whether Beacon, the insurer providing additional insured coverage, would be entitled to contribution from other primary insurers, the majority held that Beacon would not be precluded from seeking to prove that other insurers that had afforded additional insured coverage to BP would be required to contribute to its defense, and, if necessary, indemnification costs. The majority emphasized, however, that whether other insurers would share the duty to defend would be a matter between Beacon and those insurers.

The Dissent

The dissent focused on the fact that the critical language of the additional insured endorsement at issue provided that a person or organization would be an additional insured "only with respect to liability arising out of [the named insured's] ongoing operations performed for that insured." The dissent termed this language a condition precedent to the triggering of additional insured status. The dissent found that, unlike the duty to defend the named insured directly under the policy, defense under the additional insured endorsement was inseparable from the duty to indemnify.

Although the majority and dissenting opinions are pointedly critical of one another, the overriding principles are perhaps not as divergent as the language may suggest. The majority disagreed that the language of the additional insured endorsement, extending additional insured

status only with respect to liability arising out of ongoing operations performed for the named insured, rendering additional insured status contingent, did not overrule its earlier decision in *Kajima*. Instead, the majority distinguished that case because the policy at issue stated that the additional insured coverage would be primary only if the underlying claim were determined to be solely as a result of the negligence of the named insured. Further, the majority's recognition of *Pecker's* principle holding, that an additional insured enjoys the same protection as the named insured, is not necessarily inconsistent with the dissent's assertion that a court must first determine whether the subcontractor qualifies as an additional insured under the policy.

'Pecker' and 'Pavarini' Cases

Where the opinions differ is what effect the timing of that determination would have on triggering the duty to defend. The majority asserts that the underlying complaint alleged that the plaintiff's injuries were caused by the negligence of BP's subcontractor and the named insured,

The 3-2 majority in 'BP Air Conditioning v. One Beacon Insurance Group,' stated that: the controlling principle is that an additional insured enjoys the same protection as the named insured;...

among others. In Footnote 3 of the opinion, the majority underscored that its holding was based on the assumption that BP was unconditionally an additional insured, as the subcontractor was in both *Pecker* and *Pavarini Constr. Co. v Liberty Mut. Ins. Co.*, 270 AD2d 98, 99 (2000). The dissent, however, did not accept as a matter of law that BP is an additional insured, stating: "Here, absent a finding of its vicarious liability arising out of Alfa's work, BP, unlike the subcontractor in *Pecker*, does not enjoy additional insured status." The dissent reasoned that if it is determined by the factfinder that the plaintiff in the underlying action slipped on oil attributable to the work of some contractor other than Alfa, BP would not have additional insured status because the Beacon additional insured endorsement is triggered only if the

liability arose out of the operations of the named insured, Alfa.

The final divide between the majority and the dissent may best be explained by the fact that both the majority and the dissenting opinions may be interpreted as extending beyond the intent of the respective opinions. The dissent may not have focused on the allegations of the complaint in evaluating the duty to defend, and the majority, although recognizing that *Pecker* was dependent on the policy language at issue in that case, implies that an underlying contractual provision which does not explicitly state that the additional insured coverage would be excess would render the policy primary without regard to whether the insurance policy at issue so provided.

While the Court of Appeals in *Pecker* held that an additional insured is entitled to the same protection as a named insured, *Pecker* did not hold that parties to an underlying contract can modify an insurance policy. Rather, the issue in *Pecker* was whether the contract documents satisfied the policy condition that the insurance policy would be excess unless the parties agreed in writing that it would be primary.

Conclusion

This case involves issues that are extremely important to the insurance industry and their insureds. As the appellate courts continue to wrestle with public policy considerations along with intertwined issues of insurance policy interpretation and interpretation of contracts between contractors/owners and their subcontractors, counsel must ensure that their clients obtain appropriate coverage and insurers charge appropriate premiums. This case appears destined to reach the Court of Appeals.

1. A review of the referenced prior decision, *City of New York v. Consolidated Edison Co. of N.Y.*, 238 AD2d 119 (1997), suggests that there was no dispute that the subcontractor therein was an additional insured.

This article is reprinted with permission from the August 3, 2006 edition of the NEW YORK LAW JOURNAL. © 2006 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact ALM Reprint Department at 800-888-8300 x6111 or visit www.almreprints.com. #070-08-06-0013

Molod Spitz & DeSantis, P.C.

104 West 40th Street • New York, NY 10018

212.869.3200 • www.molodspitz.com