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Importance of Providing the Policy to the Court

This month we mark the 20th anniversary of our coauthorship (and the 35th anniversary of this column in the New York Law Journal which was previously coauthored by Norman H. Dachs and the late Neil T. Shayne). We hope to continue together to provide our readers with helpful discussions of interesting issues involving insurance law and practice for many years to come.

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We have, over the years, frequently preached the vital importance of reading carefully the actual language of an insurance policy, rather than assuming the contents thereof. One never knows what one may find in a "standard" policy until one reads that policy thoroughly and meticulously. See e.g., Dachs, N and Dachs, J., "Trial De Novo—Read Your Policy," NYLJ, June 13, 1989, p. 3, col. 1; "The Importance of Reading the Policy," NYLJ, July 19, 1995, p. 3, col. 1.

After reviewing some of the "greatest hits" on this issue that we have discussed in the past, as well as a more recent example of the importance of reading the policy, we note that there is a related, and equally important obligation imposed upon counsel in insurance litigation, the obligation to furnish copies of the subject insurance policy to the court being asked to determine issues of coverage. While this obligation may seem obvious, as will be seen, it is all too frequently observed in the breach.

Read the Policy

The prime, and most frequently cited, example of the importance of reading the policy is the case of *Maxwell v. State Farm Mutual Auto. Ins. Co.*, 92 AD2d 149 (3d Dept. 1983), in which a careful lawyer observed that the subject insurance policy inexplicably failed to track the language of a statutorily authorized exclusion from no-fault coverage and, instead of excluding coverage to one who is injured "as a result of operating a motor vehicle while in an intoxicated condition *or* while his ability to operate such vehicle is impaired by the use of a drug" [emphasis added], drafted its exclusion to read "as a result of operating a motor vehicle while in an intoxicated condition *and* while his ability to operate such vehicle is impaired by the use of a drug" [emphasis added]. Having been perceptive enough to note the flaw in the policy, the lawyer was able to convince the court to rule in his client's favor and to find an entitlement to no-fault benefits notwithstanding the fact that the client was undeniably drunk at the time of the accident because "by its use of the conjunctive 'and' in place of the disjunctive 'or,' defendant's exclusion does not come into play unless the driver is both intoxicated and impaired by the use of a drug.... There being no mention or allegation that Mr. Maxwell's ability was impaired through the use of a drug, the exclusion does not apply...."

Another excellent example of this important insurance practice lesson is *Mostow v. State Farm Ins. Co.*, 88 NY2d 321 (1996), which actually extends that lesson to include reading the declarations pages as well. There, where the issue involved the limits of coverage available to each of multiple persons injured in an accident under an automobile liability policy with limits of coverage of $100,000 per person/$300,000 per accident, the plaintiffs' astute lawyer noted that rather than mimicking the language of the statute, Ins. L. §3420(f)(2)(A), which makes clear, by rendering the "per accident" limit "subject to [the] limits for one person," that no one injured person may recover greater than the "per person limit," State Farm's policy omitted the "subject to" language altogether, thus enabling an interpretation that the policy provided $100,000 in coverage where bodily injury damages are owed only to "one person," but that when two or more persons are injured, the full $300,000 per accident limit is available to be divided in any manner, even to the extent that one or more claimants may recover more than $100,000. Insofar as State Farm's provision was more favorable to the claimants than the statutory provision, and the ambiguity created by State Farm's language was to be construed against it and in favor of the claimants, the Court agreed that the second claimant, Mrs. Mostow, was entitled to $190,000 under State Farm's 100/300 policy. Had Mrs. Mostow's counsel not been cautious and thorough enough to obtain and examine the specific "limits of liability" section of the actual policy, and, instead, carelessly assumed that the policy complied with and/or simply copied the provisions of the applicable statutes, Mrs. Mostow would have been $90,000 poorer because her $190,000 award would have been reduced to $100,000.

Recent Case

A more recent example comes from the case of *New York Central Mutual Fire Ins. Co. v. Ward*, 38 AD3d 898 (2d Dept. 2007) (in which the authors represented the successful claimant/appellant on appeal). There, a careful review of the policy issued by the petitioner revealed the existence of a self-imposed prejudice requirement where none otherwise would have existed at the time the policy was written. Specifically, in an amendatory endorsement to the section of the policy denominated Part E, "Duties After an Accident or Loss," which included the insured's/claimant's various notice obligations, the policy provided that the insurer had no duty to provide coverage "if the failure to comply with [the notice provisions] *is prejudicial to us*" [emphasis added].

Accordingly, the claimant argued, and the court agreed, that "the petitioner clearly assumed a contractual obligation to provide coverage for the appellant unless the appellant's failure to comply with his contractual duties is prejudicial to it," and "the petitioner demonstrated no prejudice in this matter stemming from the appellant's failure to submit the proffered proof of claim form." Thus, the court invalidated the insurer's disclaimer of coverage and denied its petition to stay arbitration.

As can be seen from the above, by carefully and thoroughly reading insurance policies, an attorney may be able to snatch

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victory from the jaws of defeat, and turn what might otherwise be a "loser" (i.e., a case involving no insurance coverage or benefits) into a "winner."

Furnish the Policy

Of course, attorneys may be just as capable of snatching defeat from the jaws of victory. One of the best ways to guarantee such a dubious achievement in the context of an insurance coverage dispute is to fail to afford the court the same opportunity that the lawyers had to read and analyze the policy by failing to furnish a copy of the policy together with the papers submitted to the court, whether they be a Petition to Stay Arbitration, a motion for summary judgment in a declaratory judgment (DJ) action, or the opposition thereto. Whether motivated by an intentional desire to save trees, or simply as a result of an unintentional omission, the practice of seeking affirmative relief based upon specific policy provisions without providing the court with proof that the provision actually exists is a dangerous, and, indeed, reckless one, upon which the courts clearly frown. Notwithstanding that fact, the courts continue to be faced with petitions and/or motions that are not properly supported with copies of the pertinent policies or policy provisions.

Petitions to Stay Arbitration

In *New York Central Mutual Fire Ins. Co. v. Marchesi,* 238 AD2d 135 (1st Dept. 1997), lv. to appeal denied, 90 NY2d 806 (1997), the court observed that the petitioner insurer, as the party seeking a stay of arbitration, had the burden to make a record justifying that relief. Noting that "the arbitrability of the timeliness of the notice [of claim] is a threshold judicial issue that depends on the scope of the arbitration agreement in the subject policy, which is not to be found in the record," the court held that "in the absence of the arbitration agreement," the insurer failed to meet its burden of proof, and, thus, denied the petition outright.

In *New York Central Mutual Fire Ins. Co. v. Julien,* 298 AD2d 587 (2d Dept. 2002), the court observed that "the uninsured motorist indorsement of an insurance policy does not operate unless and until it has been established that there was no insurance coverage on the offending vehicle on the date of the accident [citations omitted]. Thus, the additional respondent...must produce a copy of its insurance policy in order to establish that the alleged nonpermissive use of the rental vehicle either fell under an exclusion to its policy for which it issued a timely disclaimer, or that the nonpermissive use is not within the ambit of its policy. It is insufficient to establish the uninsured status of the offending vehicle in this CPLR Article 75 proceeding simply by alleging that the authorized use of the rental vehicle violated the terms of the rental agreement. Only after it is determined that the policy contained a provision stating that coverage is not afforded for use of the vehicle without permission of the owner...should the court confront the question of whether restrictions in the rental agreement are enforceable such that [the driver's] use of the vehicle can be considered nonpermissive [citations omitted], and the question of whether the additional respondents have submitted substantial evidence that the use of the rental car was without the permission of the lessee [citations omitted]." Rather than deny the petition outright, this court remitted the matter for a hearing on the issue of whether the offending vehicle was insured at the time of the accident. Presumably, the petitioner would then have another opportunity to produce a copy of its policy.

Similarly, in *AIU Ins. Co. v. Rodriguez,* 303 AD2d 181 (1st Dept. 2003), which involved, inter alia, a question of whether the petitioner's policy was excess to the insured's personal auto insurance, the court noted that "petitioner has not included a copy of its insurance policy in the record." Under those circumstances, the court held that "the question of coverage provided to respondents by this policy is appropriately consigned to the framed issue hearing directed by the Supreme Court."

Most recently, in *New York Central Mutual Fire Ins. Co. v. Josue,* 15 Misc.3d 1144(A) (Sup. Ct. Kings Co. 2007), the petitioner submitted, inter alia, what was described by the court as "a blank uninsured motorist endorsement form." In pointing out several deficiencies in the petitioner's papers, which provided the basis for the denial of the petition, the court noted, in pertinent part, that "petitioner's request for a stay of arbitration is premised on a claim that Josue was not injured while an occupant of the vehicle operated by [the insured] and, therefore, is not an insured person under the definition language contained in [the insured's] uninsured motorist endorsement to his motor vehicle policy. The petitioner, however, did not annex either [the insured's] motor vehicle policy or the uninsured motorist endorsement. Instead, it annexed a blank uninsured motorist endorsement form and a document which purports to prove [the insured's] motor vehicle coverage but does not do so." Accordingly, the court concluded that the attachments to the petition did not present evidentiary proof in admissible form sufficient to make out a prima facie case, and thus denied the petition.

DJ Actions

Similar results have obtained in the context of declaratory judgment (DJ) actions against insurance companies and summary judgment motions made therein.

For example, in *Zurich American Insurance Company v. Argonaut Ins. Co.,* 204 AD2d 314 (2d Dept. 1994), the issue before the court was whether Argonaut was required to defend the plaintiffs in an underlying personal injury action against them. Plaintiffs claimed that Argonaut was primarily responsible for providing coverage to them pursuant to an automobile insurance policy which named them as an additional insured. However, plaintiffs failed to include a copy of the subject policy in their submissions to the court. After noting that "it is axiomatic that '[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case' [citations omitted]," the court held that the plaintiffs "failed to sustain their initial burden" and, thus, affirmed the denial of summary judgment declaring that Argonaut was obligated to defend and indemnify the plaintiffs under the policy.

In *Guishard v. General Security Ins. Co.,* 32 AD3d 528 (2d Dept. 2006), the plaintiffs sought, inter alia, a judgment declaring that the defendant insurer was obligated to defend them in an underlying personal injury action brought against them by a plaintiff who was struck by a rivet from a rivet gun while converting a van owned by the plaintiffs into an ice cream vending truck. The insurer moved for summary judgment declaring that there was no coverage under its general liability policy, based upon the auto exclusion contained therein. However, the insurer "did not submit the policy schedule defining the term 'auto' as used in the policy." Accordingly, after noting that "in an insurance coverage case, the insurer bears the burden of establishing that the claimed policy exclusion defeats the insured's claim to coverage by demonstrating that the exclusion relied upon is 'stated in clear and unmistakable language, is subject to no other interpretation, and applies in the particular case,'" the court held that the insurer's submissions "failed to demonstrate its prima facie entitlement to judgment as a matter of law or raise a triable issue of fact in opposition to the plaintiff's prima facie showing of entitlement to judgment as a matter of law" and affirmed the denial of the insurer's motion and the grant of the plaintiff's motion.

More recently in *Empire Ins. Co. v. Insurance Corp. of New York,* 40 AD3d 686 (2d Dept. 2007), the plaintiff insurer sought a judgment declaring that the defendant insurer was primarily responsible for defending their mutual insured in an underlying personal injury action. However, the plaintiff insurer failed to include in its submissions to the court a copy of the commercial general liability policy under which it claimed the defendant's coverage obligations arose. Under those circumstances, the court held that the plaintiff insurer failed to sustain its initial burden of demonstrating, as a matter of law, that the defendant insurer was required to defend and indemnify the insured, and, accordingly, denied the insurer's motion for summary judgment.

And, most recently, in *BP Air Conditioning Corp. v. One Beacon Insurance Group,* 8 NY3d 708 (2007), even the Court of Appeals was faced with this issue. There, in the context of a declaratory judgment action in which the plaintiff additional-named insured sought a declaration as to the defendant insurer's obligation to defend and indemnify it in an underlying action and a determination as to the priority of coverage among several different policies, the Court stated, "In order to determine the priority of coverage among several different policies, a court must review and consider all of the policies at issue [citation omitted]. Here, [the] Supreme Court correctly concluded that because none of the other insurance carriers are parties to this declaratory judgment action and no other relevant policies have been submitted, the priority of coverage cannot be determined."

Conclusion

By now the lesson should be clear. When it comes to copies of insurance policies, it is not only important to receive (and read), but to give, as well.