New York Law Journal
MONDAY, FEBRUARY 22, 2016 INSURANCE LAW

Insurance Law Lessons My Father Taught Me

This column, which has been co-authored for the past 28-plus years, now has a lone author. Conspicuous by its absence is the byline and smiling face of my long-time co-author, and even longer-time father, mentor, law partner, and friend, Norman H. Dachs, who passed away December 2014 following a brilliant 60-plus-year career in the law, which included 42 years as a New York Law Journal columnist. See Obituary, New York Law Journal, Dec. 11, 2014, at p. 2. It was a distinct privilege, and, indeed, a blessing, to have been able to work side by side with my father, and to learn from his sheer brilliance, ingenuity and skill how to practice law, and how to think, read and write like a lawyer, while at all times being and remaining a gentleman.

While at first, during my mourning period, I wondered how or whether I should continue to write this column without my dad, I have now come to the conclusion that to do so would be a meaningful way to maintain and preserve his wonderful legacy. I, therefore, lovingly dedicate this inaugural solo article to his memory.

I have a very distinct recollection of a meeting in my father's office just a few days after I began to work for and with him. He sat me down and offered three important insurance law lessons, which I have never forgotten, and which have served me well in the ensuing years.

Lesson No. 1: Read the Policy

The first lesson was that the careful practitioner should never assume anything at all about the contents of an insurance policy, and must, instead, be diligent in obtaining a copy of the policy and making sure to always read the actual policy provision. To illustrate this point, he told me about the then-recent case of *Maxwell v. State Farm Mut. Auto. Ins. Co.*, 92 AD2d 1049 (3d Dept. 1983), which involved a claim for no-fault benefits. Such benefits are statutorily

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excluded under Ins. L. §5103(b)(2) for a person injured as a result of operating a motor vehicle in an intoxicated condition or while his (or her) ability to operate such vehicle is impaired by the use of a drug.

In *Maxwell*, the particular endorsement used by the insurer set forth the exclusionary provisions in language different from that stated in the statute, i.e., it excluded persons in an intoxicated condition and impaired by drugs. Thus, the claimant, who was concededly intoxicated with alcohol, but did not consume any drugs, was held by the court to fall outside of the exclusion as written. Clearly, had the claimant's counsel not carefully read the actual endorsement, he would never have discovered the unusual [erroneous] provision, and, instead assumed that his client's condition precluded coverage.[1]

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Lesson No. 2: 'Zappone'

The second critical insurance law lesson my father taught me was to read—and remember—the words and analysis of the Court of Appeals in the seminal case of *Zappone v. Home Ins. Co.*, 55 NY2d 131 (1982), because they contained a mini-course in insurance law in and of themselves.

Zappone was a declaratory judgment action brought by an insured against her automobile insurer seeking a judicial determination that the insurer's denial of coverage was invalid, and, therefore, the owner and driver of the automobile involved in a collision were entitled to excess coverage.

Judith Zappone, her brother, Michael, and her father, Dominick, all resided in the same household. Home Insurance Co. issued an automobile liability policy to Judith covering a 1970 MG. Judith also owned a 1966 Mercedes Benz, which was, however, not insured by Home, but, rather, by Aetna Ins. Co. Home also insured a 1963 Chevrolet owned by Dominick.

On July 20, 1975, Michael was involved in a collision while driving Judith's Mercedes Benz, with Judith's permission. Aetna defended the claim arising out of that accident, and even offered to pay up to its policy limits to settle that claim. Notice of the action and the accident was given by the Zappones to Home on Jan. 6, 1976. Home promptly advised that it was reserving its rights based essentially upon late notice, but it was not until April 14, 1977, that Home advised the Zappones in a written notice of disclaimer that because the Mercedes Benz was neither an owned nor a non-owned automobile under either Judith's or Dominick's policy, it would not provide coverage excess to the Aetna policy.

The declaratory judgment action ensued, in which the Zappones and Aetna argued that the Zappones were entitled to excess coverage under the two Home policies, and that Home's disclaimer was invalid by reason of the disclaimer statute (then Ins. L. §167 [8] (now Ins. L. §3420 [d][2]), which required, inter alia, a written notice of disclaimer to be sent "as soon as is reasonably possible" to the insured and the injured person or any other claimant.

In affirming the Appellate Division's declaration in favor of Home, finding that neither of Home's policies provided coverage for the subject accident, and that, under the circumstances, where no coverage existed in the first instance, Home was not required to give notice of its denial of coverage within any particular period of time, the Court of Appeals stated the following significant insurance law principles:

• The disclaimer statute applies whether the policy in

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question is primary or excess.

• If the disclaimer statute is applicable, it is the carrier's burden to explain its delay in notifying the insured, the injured party, and any other claimant of its disclaimer or denial.

• A reservation of rights letter does not constitute compliance with the requirements of the disclaimer statute.

• The Legislature did not intend by its use of the words 'deny coverage' to bring within the policy a liability incurred "neither by the person insured nor in the vehicle insured, for to do so would impose liability upon the carrier for which no premium had ever been received by it and to give no significance whatsoever to the fact that automobile insurance is a contract with a named person as to a specified vehicle."

• A distinction is to be made between situations in which the carrier is relying upon breaches of policy conditions or the application of exclusions, on the one hand, and situations in which the carrier made no contract of insurance with the person and for the vehicle involved, or even though there was such a policy at one time, it had been canceled or terminated prior to the accident, on the other hand.

As the court so clearly explained: In the first instance, the policy covers the driver, the vehicle and the accident and the carrier will be liable unless it disclaims liability because of the insured's breach. In the second, the policy covers the driver and the vehicle and the accident would be covered except for the specific policy exclusion and the carrier must deny coverage on the basis of the exclusion if it is not to mislead the insured and the injured persons to their detriment. In the third, though the carrier may have some other relationship with the owner or driver of the vehicle, it has no contract with that person with respect to the vehicle involved, and, there being no contractual relationship with respect to the vehicle, is not required to deny coverage or otherwise respond to a claim arising from an accident involving that vehicle except as statute mandates or courtesy suggests.

This important distinction between non-coverage by virtue of breach or exclusion, and non-coverage by virtue of "lack of inclusion" is also pertinent and determinative with regard to the issue of whether or not a carrier is obligated to move to stay arbitration within 20 days, pursuant to CPLR §7503(c).

Lesson 3: Contra Proferentem

The third crucial lesson dealt with an issue pertaining to insurance policy interpretation—the doctrine of contra proferentem.

It is well-known that insurance policies are contracts, and, thus, are subject to the general principles of contract interpretation.[2] One such important principle is that while unambiguous provisions of a policy must be given their plain and ordinary meaning,[3] and a court may not make or vary the insurance contract to accomplish its notions of abstract justice or moral obligation,[4] ambiguous provisions in insurance policies should be construed in favor of the insured and against the insurer—the drafter of the policy.[5] This rule of contract interpretation is known as the doctrine of contra proferentem (literally "against the offerer"). Indeed, it has been stated that the resolution of an ambiguity should result in affirming coverage to the fullest extent that any fair interpretation will allow.[6]

This doctrine, which is based upon the manifold rationale that (a) the proponent of a particular term or phrase is more likely aware of its possible ambiguities; (b) a disparity in sophistication and bargaining power generally exists between the insurer and the insured as a result of the adhesive nature of the insurance contract; and (c) equity dictates that the party that selected the language used in the policy should be answerable and responsible for any problems or issues caused by that language, is enforced even more strictly when the language in question appears in an exclusionary provision, which purports to limit the insurer's liability.[7]

Notwithstanding its common and frequent application by the New York courts, limitations and/or exceptions as to its applicability have been recognized over the years. See Epstein, Howard B. and Keyes, Theodore A., "Contra Proferentem: Sophisticated Entities Negotiating," N.Y.L.J. Aug. 30, 2006.

Question Re Applicability. One question that has always intrigued me (and which I can recall discussing with my father, without resolution), is whether the doctrine of contra proferentem can be applied in the context of an insurance policy or endorsement that was not, in fact, drafted by the insurer, but, instead, was drafted and prescribed by the Superintendent of Insurance, pursuant to statute, and mandated to be utilized by the insurer.

While several cases have addressed the situation where both parties participated in negotiating the terms of the policy, finding the doctrine to be inapplicable under those circumstances,[8] and, of course, many others have dealt with the more common situation where one of the parties (the insured) "had nothing to do with the preparation" of the policy, finding the doctrine there to apply,[9] the question of whether the doctrine is applicable where neither party was involved in or responsible for the policy's drafting has less commonly arisen.

Early Precedent. In *Country-Wide Ins. Co. v. Wagoner*, 45 NY2d 581, 586 (1978), an appeal from an order denying a petition to stay an uninsured motorist (UM) arbitration, the Court of Appeals was faced with what was essentially a dispute between two insurers—Country-Wide, the insurer of the motorcycle that the claimant/respondent Wagoner was operating, and Aetna, the insurer of a car owned by Wagoner's father, with whom he resided and under which policy he, therefore, also qualified as an "insured" for purposes of uninsured motorist coverage. The specific issue involved was whether the term "automobile," as it appeared in the basic, mandatory Motor Vehicle Accident Indemnification Endorsement then in effect, was intended to include "motor-

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cycles." In order to determine that issue, the court was required to analyze and construe the specific provisions contained in that prescribed endorsement.

In answering the question presented in the affirmative (and reversing the Appellate Division's decision and ruling in favor of Aetna and against Country-Wide), the court stated, as particularly pertinent to this discussion, as follows: "The endorsement itself, not unlike other provisions in contracts offered to the public by the government regulated insurance industry, is not the product of insurance company draftsmanship. The words of [the provision at issue] were chosen by the legislatively created Motor Vehicle Accident Indemnification Corporation with the approval of the State Superintendent of Insurance as part of the endorsement required by subdivision 2-a of section 167 of the Insurance Law [now §3420 (f)(1)]. We, therefore, hearken back to the neutral sources that brought it into being for clues about the intended scope of [the provision]." Notably absent from this discussion was any mention of the doctrine of contra proferentem.

Recent Enlightening Decision. Last year, in *State Farm Mutual Automobile Insurance Company v. Fitzgerald*, 25 NY3d 799 [2015], an appeal from an order granting a petition to stay a supplementary uninsured motorist (SUM) arbitration, the Court of Appeals, for the first time, addressed head on the question of the applicability of contra proferentem in the context of a prescribed and mandated policy endorsement.

There, answering in the negative the specific question of whether a police vehicle is a 'motor vehicle' under the SUM Endorsement prescribed in the Insurance Regulations, (11 NYCRR §60-2.3[f]), Justice Sheila Abdus-Salaam, writing for a 4-3 majority, stated, in pertinent part, as follows: "Although provisions of an insurance policy drafted by the insurer are generally construed against the insurer if ambiguous [citation omitted], a policy provision mandated by statute must be interpreted in a neutral manner consistently with the intent of the legislative and administrative sources of the legislation [citing *Country-Wide Ins. Co. v. Wagoner*, supra]. Since State Farm did not choose the terms of the SUM endorsement here of its own accord but, rather, was required to offer SUM coverage in compliance with the terms of Insurance Law §3420(f)(2)(A) and Department of Insurance regulations (see 11 NYCRR 60-2.3[f]), we must interpret the SUM endorsement and the language of the statute in the manner intended by the neutral sources of that enactment [citations omitted]."

There is now no doubt that the doctrine of contra proferentem is inapplicable where the insurance policy provision at issue was mandated by statute or regulation, and was not drafted by the insurer.

There is also no doubt that the lessons my father taught me were very valuable ones, indeed.

1. See Dachs, N. and Dachs, J., "The Importance of Reading the Policy," N.Y.L.J., July 19, 1995; Dachs, N. and Dachs, J., "Trial De Novo—Read Your Policy," N.Y.L.J., June 13, 1989. See also *Mostow v. State Farm Ins. Cos.*, 88 NY2d 321 (1996) (policy failed to make the "per accident" limit "subject to" the "per person" limit, as set forth in the statute).

2. See *Matter of Estates of Covert*, 97 NY2d 68 (2001).

3. See *P.J.P. Mechanical Corp. v. Commerce and Industry Ins. Co.*, 65 AD3d 195 (1st Dept. 2009).

4. *Bretton v. Mutual of Omaha Ins. Co.*, 110 AD2d 46 (1st Dept. 1985), affd. 66 NY2d 1020 (1985); *Breed v. Ins. Co. of North America*, 46 NY2d 351 (1978).

5. See *Dean v. Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 (2012); *Westview Associates v. Guaranty Natl. Ins. Co.*, 95 NY2d 334, 340 (2000); *Mostow v. State Farm Ins. Cos.*, supra; *Breed v. Ins. Co. of North America*, 46 NY2d 351 (1978).

6. See *U.S.F. & G. v. Annunziata*, 67 NY2d 229 (1986); *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 NY2d 663 (1981).

7. See *Belt Painting Corp. v. TIG Ins. Co.*, 100 NY2d 377 (2003); *Continental Cas. Co. v. Rapid-American Corp.*, 80 NY2d 640 (1993).

8. See *Citibank, N.A. v. 666 Fifth Avenue Ltd. Partnership*, 2 AD3d 331 (1st Dept. 2003); *Coliseum Towers Assoc. v. County of Nassau*, 2 AD3d 562, 565 (2d Dept. 2003), lv. denied, 2 NY3d 707 (2004); *Loblaw, Ins. v. Employer's Liab. Assur. Corp.*, 85 AD2d 880, 881 (1981), affd 57 NY2d 872 (1982); *Cummins, Inc. v. Atlantic Mutual Ins. Co.*, 56 AD3d 288 (1st Dept. 2008).

9. See *Matthews v. American Cent. Ins. Co.*, 154 NY 449, 456-457 (1897); *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 697-698 (2d Cir. 1998).