LOWENSTEIN SANDLER PC CLIENT ALERT

INSURANCE LAW

ATTORNEY ADVERTISING

BE CAREFUL WITH WHOM YOU SHARE YOUR POLICY: N.J. APPELLATE DIVISION CONSTRUES ADDITIONAL INSURED CLAUSE BROADLY

By: Robert D. Chesler, Esq., and Ryan J. Cooper, Esq.

March 2012

Recent case law demonstrates that when agreeing to add a party as an additional insured, careful risk management requires explicit and unambiguous insurance provisions to properly assign risk.

In *Marshall v. Raritan Valley Disposal*,[1] the New Jersey Appellate Division interpreted an "additional insured" provision to find broad coverage where the parties may not have expected it. The decision also highlights the slippery slope of conferring and receiving additional insured coverage. It is a cautionary tale about the importance of being precise in both your contract and insurance policy documents to ensure that the parties' expectations are identified and met.

As is often the case in insurance coverage law, *Marshall* involved a tragic accident. The town of West Amwell contracted with Raritan Valley Disposal ("Raritan Valley") to place a garbage truck on a site one day a week so that residents could empty their garbage in it. Raritan Valley Disposal only had to bring the garbage truck to the site, place it where a municipal employee told it to, and then remove it at the end of the day. Raritan Valley had no further responsibilities at all. A township resident backed his pick-up truck into another resident, pinning her against the stationary truck and causing fatal injuries.

The contract between West Amwell and Raritan Valley required Raritan Valley to name West Amwell as an additional insured on its business auto insurance policy, issued by Illinois National Insurance Company ("Illinois National"). West Amwell's general liability insurer provided West Amwell with coverage for the accident. After resolving the wrongful death lawsuit, that insurer sued Illinois National for contribution.

The court first addressed the scope of West Amwell's coverage as an "additional named insured" under the policy. Illinois National asserted that since its insured, Raritan Valley, was not in any way liable for the accident, the accident did not trigger West Amwell's additional insured coverage. The court disagreed. It found Illinois National's policy unambiguous when it provided, without limitation, that a "named insured" included, "at the option of [Raritan Valley], any entity."[2] Illinois National did not place any restrictions on that status, such as limiting its application to instances where West Amwell was liable as a result of Raritan Valley's acts or omissions. Thus, the court found that the certificate of liability that named West Amwell as an "additional named insured" provided full coverage to West Amwell even for its own sole negligence.

Illinois National noted that the underlying bid documents required that Raritan Valley name the municipality as an additional insured "with respect to the Contractor's actions pursuant to the Contract," but the court found that unpersuasive.

In some instances, insurance policies have additional insured endorsements that set forth precisely what rights the status confers on the additional insured. *Marshall* is the first New Jersey case that sets forth the rights that additional insured status confers when the insurance policy itself does not specify. As was the case in *Marshall*, most companies conferring additional insured status to a customer or general contractor may not realize their insurance may be used to pay claims that do not arise out of their direct negligence.

Indeed, the Appellate Division's decision establishes that the additional insured now not only can seek insurance coverage for its liability

Lowenstein Sandler

ATTORNEYS AT LAW

arising from the original insured but also can exhaust the policy with a claim arising from its sole negligence.

Having found that the insurance policies of both West Amwell and Raritan Valley provided concurrent coverage for the accident, the court then considered the priority of those policies by analyzing their competing "other insurance" clauses, as established by the Appellate Division decision in *W9/PHC Real Estate LP v. Farm Family Casualty Insurance Co.*[3] This is also problematic.

When a company demands to be an additional insured on another company's insurance program, that company is trying to shield not only itself but also its insurance program from liability. The parties intend that the policy on which the party is named as an additional insured should take priority over that party's own policy.

However, *W9* reached a different result. The case involved a commercial landlord insured by Zurich North American ("Zurich") that was named as an additional insured on its snow removal company's insurance policy. An accident occurred, and the court found that the policies of the landlord and the snow remover, issued by Farm Family Casualty Insurance Co. ("Farm Family"), were both responsible for defending the resulting lawsuit.

The court then had to resolve how the two policies would be responsible for defense costs. The Zurich policy provided that where multiple policies were responsive, its policy would contribute in equal shares if the other policies provided for equal shares; otherwise it would respond in the same proportion as the ratio of its policy limits to all available policy limits. The Farm Family policy provided that it was excess to all other available insurance and did not provide for contribution as a concurrent policy. As a result, the court found that the landlord's policy had to pay first and that the snow remover's policy did not need to pay until the landlord's policy was exhausted.

Marshall followed the same logic. West Amwell's policy provided that it was excess to other insurance, but when it was concurrent and other policies provide for equal shares, it would share equally; otherwise, West Amwell's policy would contribute by limits. Raritan Valley's insurance provided that it too was only excess, but if it was concurrent, it would share by limits. Thus, the panel found the two "other insurance" provisions to be "mutually repugnant" because they both provided only excess coverage in the presence of other primary insurance. Therefore, the policies were deemed concurrent, and each insurer was required to pay 50% of the claim.

CONCLUSION

Effective risk management can protect the parties' rights in this situation. When additional insured status is at stake, the parties should review the available additional insured endorsements and select the one that matches their expectations. Similarly, a company should make sure that the "other insurance" clause of its policy states that the policy is excess to any policy in which the company is named as an additional insured.

Please contact the following attorneys with questions related to this alert or other insurance coverage issues:

Robert D. Chesler
973 597 2328
rchesler@lowenstein.com

Ryan J. Cooper
973 597 2410
rcooper@lowenstein.com

[1] No. A-2919-10T4, 2012 N.J. Super. Unpub. LEXIS 544 (March 13, 2012).
[2] *Id*. at *4, *12-13.
[3] 407 N.J. Super. 177, 199 (App. Div. 2009).

Lowenstein Sandler makes no representation or warranty, express or implied, as to the completeness or accuracy of this Client Alert and assumes no responsibility to update the Client Alert based upon events subsequent to the date of its publication, such as new legislation, regulations, and judicial decisions. Readers should consult legal counsel of their own choosing to discuss how these matters may relate to their individual circumstances.

www.lowenstein.com

New York
1251 Avenue of the Americas
New York, NY 10020
212 262 6700

Palo Alto
390 Lytton Avenue
Palo Alto, CA 94301
650 433 5800

Roseland
65 Livingston Avenue
Roseland, NJ 07068
973 597 2500

© 2012 Lowenstein Sandler PC. In California, Lowenstein Sandler LLP.

Lowenstein Sandler
ATTORNEYS AT LAW