THAT'S REPUGNANT

SELECT OTHER INSURANCE ISSUES AND THE DEBATE OVER PRIORITY FOR THE ADDITIONAL INSURED

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Introduction

An additional insured ("AI") is a person or organization that typically gains insured status by means of a policy provision or endorsement identifying the additional party by name or general description, *i.e.*, owner or contractor. Often times a policy clause might include as an AI any person or organization for whom the named insured is required to procure additional insured coverage. Additional insured provisions typically contain language limiting the scope of coverage, as well as Other Insurance ("OI") clauses that attempt to dictate the order in which the policy will apply in comparison to other applicable coverage. For example, the policy might state that it is excess under certain circumstances and primary in others. Such OI provisions can and often do conflict with OI provisions in other policies, resulting in "priority" disputes between insurers. The following is a select discussion of such OI issues.

These priority disputes can be further complicated when underlying contractual agreements impact the analysis, as they typically do in the additional insurance context. For instance, when the OI clause references the named insured's procurement obligation, *i.e.*, where it states it will apply on a primary (as opposed to excess) basis if the named insured has "agreed in writing in a contract or agreement that [the] insurance would be primary." The New York Court of Appeals addressed such a priority of coverage analysis in *Pecker Iron Works of New York, Inc. v. Travelers Ins. Co.*[1] and, as detailed below, the case and the broad manner in which it interpreted underlying procurement contracts has sparked some debate. Recent case law may signify a refinement of *Pecker* in New York, a rule which – in any event – stands in contrast to that applied in other jurisdictions.

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[1] 99 N.Y.2d 391, 786 N.E.2d 863, 756 N.Y.S.2d 822 (2003).

Priority of Coverage and the Additional Insured

Upon determining that a person or entity qualifies as an AI, practitioners next address the order in which the applicable policies (*e.g.*, the policies on which that person or entity is an AI and/or a named insured) must pay. This requires a careful comparison of all relevant OI provisions in order to determine the intent of each policy, *i.e.*, whether it applies as primary, excess or co-insurance.[2] Of paramount concern in a priority dispute is "the right of each insurer to rely upon the terms of its own contract with its insured."[3] Not surprisingly, this has led to complicated coverage disputes, which have been described as "'a court's nightmare' ... compared sarcastically to the 'struggles which often ensue when guests attempt to pick up the tab for their dinner companions' ... and produced, it has been said, judicial decisions that are 'difficult to interpret and in some instances impossible to reconcile.'"[4]

If the policies "dove tail" – *i.e.*, if one policy purports to provide the given insured with primary coverage and the other with excess, then sorting out primacy of coverage is a straightforward task. If, on the other hand, both policies purport to be excess, then the analysis becomes more complicated. All other things being equal, two policies applying on an excess

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2 *See, e.g.*, *BP Air Conditioning Corp. v. One Beacon Ins. Grp.*, 8 N.Y.3d 708, 871 N.E.2d 1128, 840 N.Y.S.2d 302 (2007); *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140, 855 N.Y.S.2d 459 (1st Dep't 2008); *see also* B. Ostrager & T. Newman *Insurance Coverage Disputes* §11.01, at 958 (2015) (*citations omitted*) ("When an insured has more than one potentially applicable policy for a claim, courts determine the insurers' obligations to the insured by applying a body of law developed to resolve 'other insurance' disputes."). *See also generally Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1455 (3d Cir. 1996); *John Burns Const. Co. v. Indiana Ins. Co.*, 189 Ill. 2d 570, 576, 727 N.E.2d 211, 216 (2000) ("... the purpose of an 'other insurance' clause is ... to provide a method of apportioning coverage that would be triggered otherwise.").

3 *State Farm Fire & Cas. Co. v. LiMauro*, 65 N.Y.2d 369, 373, 482 N.E.2d 13, 16, 492 N.Y.S.2d 534, 537 (1985) (providing the general law of "Other Insurance").

4 *Id.* at 372.

basis will be deemed to be "mutually repugnant" and, hence, will "drop down" and apply together as co-insurance on a primary basis.[5] The various jurisdictions are generally in accord.[6]

This formula will not necessarily apply, however, if one of the two "excess" policies "negates contribution" (*i.e.*, rules out any obligation to share) with another policy.[7] In that instance, the "excess" policy that negates contribution will be deemed to be, in effect, "more excess" then the other "excess" policy.[8] Further, in construing the order of such "excess"

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[5] *See, e.g.*, *Endurance Am. Specialty Ins. Co. v. Century Sur. Co.*, 46 F. Supp. 3d 398, 431 (S.D.N.Y. 2014), *rev'd on other grounds* No. 14-4184-CV, 2015 L 6717686 (2d Cir. 2015); *LiMauro*, 65 N.Y.2d at 372. *See also U.S. Fire Ins. Co. v. Fed. Ins. Co.*, 858 F.2d 882, 885 (2d Cir. 1988) (stating "the general rule under New York law is that '[t]here is [a] well-settled equitable right to contribution, where there is concurrent insurance even in the absence of a policy provision for apportionment' and reiterating rule that competing excess clauses cancel each other out) (*citations omitted*); *Lumbermens Mut. Cas. Co. v. Allstate Ins. Co.*, 51 N.Y.2d 651, 655, 417 N.E.2d 66, 435 N.Y.S.2d 953, 955 (1980).

[6] *See, e.g.*, *Cosmopolitan Mut. Ins. Co. v. Cont'l Cas. Co.*, 28 N.J. 554, 562, 147 A.2d 529, 533 (1959) (where two policies provide that they shall be excess insurance, "[] it is obvious that there can be no 'excess' insurance in the absence of 'primary' insurance [and] [s]ince neither policy by its terms is a policy of 'primary' insurance, neither can operate as a policy of 'excess' insurance," resulting in mutual repugnance); *Twin City Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 386 F. Supp. 2d 1272, 1278 (S.D. Fla. 2005) *aff'd sub nom. Fireman's Fund Ins. Co. v. Twin City Fire Ins.*, 200 F. App'x 953 (11th Cir. 2006) (under the "rule of mutual repugnancy," ... "where two policies cover the same occurrence and both contain 'other insurance' clauses, the excess insurance provisions are mutually repugnant and must be disregarded. Each insurer is then liable for a prorata share of the settlement or judgment."); *Galen Health Care, Inc. v. American Cas. Co. of Reading, Pennsylvania*, 913 F. Supp. 1525, 1530 (M.D. Fla. 1996) (where two insurance policies contain similar excess clauses, the "'other insurance' clauses cancel each other out and both insurers share the loss on a prorated basis."); *Reliance Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 753 F.2d 1288, 1291 (4th Cir. 1985) ("When two insurance policies cover the same risk and each contains an excess clause, the clauses are considered mutually repugnant and are disregarded. Once disregarded, the general coverage of each policy applies and the insurers are obligated to share the loss.").

[7] *See, e.g.*, *LiMauro*, 65 N.Y.2d at 374-76 ("The rule to be distilled ... is that an insurance policy which purports to be excess coverage but contemplates contribution with other excess policies or does not by the language used negate that possibility must contribute ratably with a similar policy, but must be exhausted before a policy which expressly negates contribution with other carriers, or otherwise manifests that it is intended to be excess over other excess policies."); *see also Lumbermens*, 51 N.Y.2d at 655 (considering the purpose each policy was intended to serve as evidenced by its stated coverage to determine whether it would "distort the meaning of the policies" involved).

[8] *See, e.g.*, *Utica Mut. Ins. Co. v. Government Employees Ins. Co.*, 98 A.D.3d 502, 504, 949 N.Y.S.2d 182, 184 (2d Dep't 2012) (finding policy with other insurance provision stating it "is excess over, and shall not contribute with any of the other insurance," is senior to policy stating it is "excess over any insurance" without any reference to contribution); *Liberty Mut. Ins. Co. v. Hartford Ins. Co. of the Midwest*, 25 A.D.3d 658, 662, 811 N.Y.S.2d 716, 720 (2d Dep't 2006) (policy deemed non-contributory where other insurance clause provided that "if collectible insurance with any other insurer is available for a loss also covered by this policy, this policy will be excess and will not contribute with such other insurance"); *Argonaut Ins. Co. v. U.S. Fire Ins. Co.*, 728 F. Supp. 298, 300 (S.D.N.Y. 1990) (excess policy deemed senior and non-contributing where other insurance provision specifically stated that

coverage, courts will sometimes take into consideration whether a policy is a "true excess" policy, as opposed to a primary policy that, under defined circumstances, becomes excess.[9]

Pecker – Primary or Excess

The named insured's contractual procurement obligation presents added twists to the OI issue, particularly in New York. Illustrative of this is the seminal New York Court of Appeals' ruling in *Pecker Iron Works of New York, Inc. v. Travelers Ins. Co.*[10] There, Pecker Iron Works of New York, Inc. ("Pecker") engaged the services of a subcontractor, Upfront Enterprises ("Upfront") for a construction project. Upfront agreed to name Pecker as an AI on its CGL policy with Travelers, which contained a provision extending only excess coverage to an AI, unless Upfront had "agreed in a written contract for this insurance to apply on a primary or contributory basis."[11]

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when other collectible insurance was available, it "shall be in excess of, and not contribute with, such other insurance). *See also generally Aetna Cas. & Sur. Co. v. Beane*, 385 So. 2d 1087 (Fla. Dist. Ct. App. 1980) ("Where excess liability policy provided that it should be considered to be excess insurance over any other valid and collectible insurance and another party's umbrella policy provided that its insurance should be in excess of and shall not contribute with other insurance, policies were not mutually repugnant so as to require proration and excess policy must be exhausted before proceeds of umbrella policy become available.").

[9] *See Lumbermens*, 51 N.Y.2d at 655-56 (in finding that a "catastrophe policy" need not share ratably, the Court took into account that it was a true excess policy, which contemplated no primary coverage, as well as the premiums paid for that policy, which reflected its "true excess" nature"); *LiMauro*, 65 N.Y.2d at 375 ("[i]ndicative of … an intent [not to contribute] may be the fact that a policy is issued as "umbrella" or "catastrophe" coverage at rates which reflect the reduce risk insured"); *Endurance*, 46 F. Supp. 3d at 429 (noting "there is a difference between a primary insurance policy containing an excess other insurance clause and a true excess policy" and declining to enforce defendant's argument that its primary policy is excess because, among other reasons, the plain language of plaintiff's primary policy makes clear that its drafters did not intend for the defendant's policy to be excess). *See also generally U.S. Fire Ins. Co. v. Maryland Cas. Co.*, 52 Md. App. 269, 280, 447 A.2d 896, 902 (1982) (Where there is a conflict between a policy providing essentially primary coverage which is made excess and a policy providing umbrella or catastrophe coverage, the umbrella policy need contribute only after the primary and ordinary excess coverages, as "other collectible insurance" within the meaning of the other insurance clause of the umbrella policy, are exhausted).

[10] 99 N.Y.2d 391, 786 N.E.2d 863, 756 N.Y.S.2d 822 (2003).

[11] *Id.* at 393.

After an injured Upfront worker sued, a dispute arose about whether Upfront's insurer was obligated to provide Pecker with primary or excess coverage. That issue turned on whether Upfront had in fact agreed to provide Pecker with primary coverage in their contract, as required to trigger any primary coverage under the Travelers policy's language.

The Court held that Upfront had so agreed, noting Travelers provided Upfront with primary coverage as a named insured, and that because Upfront had agreed to include Pecker as an AI, Pecker was an "entity enjoying the same protection as the named insured,"[12] thereby also entitling it to primary coverage.

The "priority" issue in *Pecker* revolved around the Court's analysis of the underlying contract (and was not simply a mandate that all AI coverage is primary) because its terms were expressly referenced in the pertinent AI policy provision – providing that the named insured's policy was "excess over any valid and collectible insurance available to the additional insured unless you [the named insured] have agreed in a written contract for this insurance to apply on a primary or contributory basis."[13] The Court reviewed the underlying contract and concluded:

> When Pecker engaged Upfront [the named insured] as a subcontractor and in writing provided that Upfront would name Pecker as an additional insured, Pecker signified, and Upfront agreed, that Upfront's carrier – not Pecker's – would provide Pecker with primary coverage on the risk.[14]

Although the contract in *Pecker* was actually silent on whether the AI coverage was to be primary or excess, the Court went on to hold that "[p]ursuant to the policy provision at issue, Travelers agreed to provide primary insurance to any party with whom [the named insured] had

[12] *Id.*

[13] *Id.*

[14] *Id.* at 393-94.

contracted in writing for insurance to apply on a primary basis,"[15] drawing its reasoning from the generalized concept that an additional insured enjoys the same protections as a named insured.[16]

As an aside, the *Pecker* Court did not have before it the language of the OI provision in the other policy at issue – *i.e.*, that issued to Pecker as a named insured. Thus, the Court did not analyze how the primary AI coverage interfaced with that other policy.[17]

Pecker's Ramification and Progeny

It seemed clear that the *Pecker* decision was limited – *i.e.*, it invoked the underlying contract to assess priority of coverage only because the insurance policy incorporated that contract's "priority" terms. Initially, however, some courts interpreted *Pecker* more broadly and argued that any agreement generally requiring the procurement of AI coverage automatically renders such coverage primary, disavowing any need to first analyze policies' OI provisions in a priority dispute (*e.g.*, to see if they incorporated the underlying contract relative to the OI issue). For example, in *BP Air Conditioning Corp. v. One Beacon Ins. Grp.*,[18] the First Department, relying on *Pecker*, held that BP's coverage as an AI under One Beacon's policy was primary over its coverage as a named insured under its own policy based on the terms of the underlying contract and regardless of any relevant OI clauses, which were not before the Court. At first glance, the First Department's decision seemed to eliminate the possibility of co-insurance between a named insured and AI's respective carriers.

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15 *Id.* at 394.

16 *Id.* at 393.

17 99 N.Y.2d 391, 786 N.E.2d 863, 756 N.Y.S.2d 822 (2003).

18 33 A.D.3d 116, 821 N.Y.S.2d 1 (1st Dep't 2006), *modified*, 8 N.Y.3d 708, 871 N.E.2d 1128, 840 N.Y.S.2d 302 (2007).

The Court of Appeals, however, in modifying the First Department's decision, rejected such a broad view and clarified that it could not determine the priority issues because all relevant policies were not before it. In other words, the Court implicitly ruled that a policy's OI provisions, and not merely an underlying contract, must be examined in order to determine coverage priority. *Pecker* therefore does not, and cannot, stand for the principle that primary coverage is automatically conferred to an AI based solely upon the terms of an underlying contract.

Indeed, the First Department confirmed in *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*[19] that, in *Pecker*, "[t]he critical point [was] that the Court of Appeals looked to the subcontract because the insurance policy itself expressly provided that the terms of the subcontract would determine whether the additional insured coverage afforded was primary or excess."[20] *Pecker*, thus, really supports the contention that the policy terms control and one looks to an underlying contract's "priority" terms only when the policy's OI clause so requires. The *Bovis* Court agreed, stating "[t]he controlling nature of the policy terms is made explicit by one of *Pecker's* concluding sentences: '*Pursuant to the policy provision at issue*, Travelers agreed to provide primary insurance to any party with whom [the subcontractor] had contracted in writing for insurance to apply on a primary basis.'"[21]

Kel-Mar

Significantly, the First Department recently addressed the interplay between a policy's OI provision and "priority" specified in an underlying contract in *Kel-Mar Designs, Inc. v.*

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[19] 53 A.D.3d 140, 855 N.Y.S.2d 459 (1st Dep't 2008).

[20] *Id.* at 145.

[21] *Id.* at 145-46.

Harleysville Ins. Co.[22] In *Kel-Mar*, the general contractor, Kel-Mar, sought AI coverage under a Harleysville policy issued to its subcontractor, Arcadia Electrical Contractors LLC ("Arcadia"). The Harleysville policy contained a blanket AI endorsement extending coverage to any person or organization as required by written contract. The endorsement also contained the following OI provision:

> Any other coverage provided by this endorsement to an additional insured shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent, or on any other basis unless the "written contract" *specifically* requires that this insurance be primary and that the additional insured's primary coverage be non-contributory.[23]

Accordingly, just like *Pecker*, the *Kel-Mar* Court looked to the terms of the underlying contract because the Harleysville OI clause expressly referenced it. The underlying agreement between Kel-Mar and Arcadia was silent on the issue of coverage priority (as was the case in *Pecker*); however, the Court held "[t]he Harleysville policy, by its plain terms, provides excess coverage to [Kel-Mar], because the subcontract between [Kel-Mar] and Arcadia does not '*specifically*' require the Harleysville policy to provide [Kel-Mar] with primary coverage."[24] Thus, as required by the OI clause, Kel-Mar's entitlement to primary or excess coverage under the Harleysville policy turned on whether the underlying contract *specifically* required Harleysville to provide primary coverage.

Kel-Mar, like *BP* and *Bovis*, therefore follows *Pecker's* limited holding that an underlying contract's "priority" terms need be considered only where those terms are incorporated in the relevant OI provision. Again, the underlying agreements in the earlier cases

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[22] 127 A.D.3d 662, 8 N.Y.S.3d 304 (1st Dep't 2015).

[23] Def.'s Br. Summ. J., *Kel-Mar Designs, Inc. v. Harleysville Ins. Co., et al.*, p. 3 (emphasis added).

[24] 127 A.D.3d 662, 663, 8 N.Y.S.3d 304 (1st Dep't 2015).

were silent on the priority issue, but *Kel-Mar* diverged from *Pecker* by finding the procured coverage to be excess, apparently by virtue of the inclusion of the word "*specifically*" in the Harleysville policy's OI provision. While the Court's analysis was sparse, arguably it appears to distinguish *Kel-Mar* from the *Pecker* line of cases – and, at a minimum, *Pecker's* implicit ruling that a silent contract equals primary AI coverage would not apply where the OI clause requires specificity in the underlying contract.

Other Jurisdictions

Other jurisdictions have not followed the *Pecker* rule. Courts beyond New York have held that "when interpreting a policy that provides only excess coverage to an additional insured unless a written agreement states that coverage will be primary, the majority of jurisdictions seem to require that a written agreement *explicitly* state that an additional insured's coverage will be primary before extending primary coverage to the additional insured."[25] As the Michigan District Court stated in *Kummer*, "[t]his rule appears to be more appropriate than the *Pecker* rule because it gives effect to the plain terms of the insurance contract, which, in this case, permits [] primary insurance only if a writing 'specifically requires' it." Further, other courts have rejected the *Pecker* rule even where the word "*specifically*" is not included in the relevant OI provision.[26]

The distinction between New York's *Pecker* rule and that applied in other jurisdictions, for practical purposes, might not matter that much. Underlying contracts now commonly contain

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[25] *Kummer Enterprises, Inc. v. Valley Forge Ins. Co.*, No. 1:09-CV-109, 2010 WL 431423, at *7 (W.D. Mich. Jan. 27, 2010) ("In short, Section C(2) of the Endorsement entitles Plaintiff to primary coverage only if a written contract provides for primary coverage, and neither the subcontract between Plaintiff and WPM, the certificate of insurance, or any other document satisfies this requirement. Thus, the insurance available to Plaintiff as an additional insured is excess only"). *See also River Village I, LLC v. Central Ins. Cos.*, No. 1–08–3529, 2009 WL 4041944, at *8 (Ill. App .Ct. Nov. 20, 2009) (unpublished); *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, 171 P.3d 610, 617 (Ariz. Ct. App. 2007); *Jessop v. City of Alexandria*, 871 So.2d 1140, 1146 (La. Ct. App. 2004).

[26] *See, e.g., Irene Realty Corp. v. Travelers Prop. Cas. Co.*, 973 A.2d 1118 (R.I. 2009); *Englert v. Home Depot*, 389 N.J. Super. 44, 911 A.2d 72, 81–82 (N.J. Super. Ct. App. Div. 2006).

primary/noncontributory procurement language and, hence, explicitly trigger "primary-when-required-by-contract" OI clauses like that in *Pecker*.[27]

Conclusion

Other insurance disputes are often difficult to resolve in any context. An added complication typically arises when primacy of coverage interfaces with additional insured provisions and related procurement contracts. Needless to say, it would be dangerous to view any given OI dispute as "cookie cutter." When facing this issue, the practitioner is well advised to carefully consult the language of all relevant policies, recent case law and, where applicable, any underlying procurement contracts.

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[27] Although it is beyond the scope of this piece, practitioners should also consider whether - under the circumstances of a given case - a priority fight is, for practical purposes, impacted where a "downstream" entity (typically, a named insured sub-contractor) has contractually agreed to indemnify various "upstream" entities (*i.e.*, owners and contractors/putative additional insured). Of course, relevant state statutes and case law should also be carefully consulted in making this determination.