PRIORITY OF COVERAGE IN THE ADDITIONAL INSURED CONTEXT

PECKER AND ITS PROGENY

By Marci Goldstein Kokalas and Rippi Gill

A contractor's employee is injured on the job and sues the property owner. The owner's insurer turns to you, its counsel, and asks "whose insurance policy covers the loss?" During contract negotiations, the owner made sure that the contractor agreed to procure insurance that would include the owner as an "additional insured." The property owner and its insurer tender the claim to the contractor's insurer for additional insured coverage. Question answered, right? Well, maybe not.

An additional insured is a person or organization that typically gains insured status by means of a policy provision including the additional party by name or through a blanket provision extending such coverage to, for example, any owner or contractor for whom the named insured had agreed to procure such insurance. Additional insured provisions typically contain language limiting their scope to losses connected in some way to the named insured's conduct or operations, as well as "other insurance" 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 other insurance provisions can and often do conflict with other insurance provisions in competing policies covering the same risk, resulting in priority disputes between insurers.

Priority disputes can be further complicated when underlying contractual agreements impact the analysis, as they often do in the additional insured context. They frequently involve policy provisions purporting to apply additional insured coverage on a primary (as opposed to excess) basis *if* the named insured previously agreed in writing not only to procure insurance, but to procure *primary* insurance. Perhaps the most notorious case in which this situation was examined was New York's *Pecker Iron Works of New York, Inc. v. Travelers Insurance Co.*[1] This article discusses *Pecker* and its progeny, a more recent appellate opinion that suggests *Pecker*'s possible limits and some uncertainty in the law, and the manner in which other jurisdictions have treated similar circumstances.

Priority of Coverage and the Additional Insured

Whether a claimant qualifies as an additional insured is determined, of course, by the relevant policy language. Policies commonly include blanket provisions extending additional insured coverage to entities for which the named insured is required by written contract to procure such insurance (subject to other policy terms and conditions).[2]

If it is determined that an entity qualifies as an additional insured and that one or more other policies cover the same risk, the practitioner must also address the order in which all pertinent policies apply.[3] This requires a careful comparison of all relevant "other insurance" provisions in order to determine whether and to what extent each carrier intended its policy to apply as primary, excess, or coinsurance.[4] Of paramount concern in a priority dispute is "the right of each insurer to rely upon the terms of its own [insurance] contract with its insured."[5] Not surprisingly, this has led to complicated coverage disputes that 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 judicial decisions that are "difficult to interpret and in some instances impossible to reconcile."[6]

In the additional insured context, each policy should be reviewed carefully for the possibility of multiple other insurance provisions. For example, some policies contain not only the standard other insurance provision in the main commercial general liability (CGL) form, but also additional insured-specific provisions addressing priority that might override the provisions in the main form.

If the policies "dovetail"—that is, if one policy purports to provide the given insured with primary

TIP

Pay attention to the *specific* wording of other insurance provisions, and any reference to underlying contracts, when determining priority of coverage for additional insureds.

coverage and the other says it is excess—then sorting out primacy of coverage should be relatively straightforward. If, on the other hand, *both* policies purport to be primary or excess, then the analysis becomes more complicated. All other things being equal, two policies applying on an excess basis will normally be deemed "mutually repugnant" and hence "drop down" and apply together as coinsurance on a primary basis.[7] Various jurisdictions are in accord.[8]

This formula might be subject to an added twist, however, if one of the two "excess" policies "negates contribution" by expressly ruling out any obligation to share with another policy.[9] In that instance, the "excess" policy that negates contribution may be deemed "more excess" than the other "excess" policy.[10] Further, in construing the order of such excess 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.[11]

In sum, the practitioner facing an additional insured claim will normally have to examine multiple documents, including the policies and underlying contracts between the named insured and the putative additional insured, to determine additional insured status, the scope of coverage, and priority among the relevant insurers. In the end, the policy language should control.

Pecker

In at least one jurisdiction—New York—the analysis is not necessarily that straightforward. Illustrative of this is the seminal New York Court of Appeals' ruling in *Pecker Iron Works of New York, Inc. v. Travelers Insurance Co.*[12] There, Pecker had engaged the services of a subcontractor, Upfront Enterprises. After an injured Upfront worker sued Pecker, a dispute arose about whether Upfront's insurer was obligated to provide Pecker with additional insured coverage on a primary or excess basis.

The additional insured provision in Upfront's policy provided that its coverage would be "excess" over any valid and collectible insurance available to the additional insured unless Upfront "had agreed in a written contract for this insurance to apply on a primary or contributory basis."[13] The court thus reviewed the underlying Upfront-Pecker contract's insurance procurement provision. It interpreted that contract as obligating Upfront to procure *primary* additional insured coverage for Pecker, even though the contract did not expressly state as much. Drawing upon the general concept that an additional insured enjoys "the same protection as the named insured," the court 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]

Thus, although the contract in *Pecker* did not expressly state whether the additional insured coverage was to be primary or excess, the court held that "[p]ursuant to the policy provision at issue, [Upfront's insurer] agreed to provide primary insurance to any party with whom [the named insured] had contracted in writing for insurance to apply on a primary basis."[15]

As an aside, the *Pecker* court did not have before it the language of the other insurance provision in the other policy at issue—that issued to Pecker as a named insured. Thus, the court did not analyze how the primary additional insured coverage interfaced with that other policy.

Pecker's Ramifications and Progeny

It seemed clear that the *Pecker* decision was limited in that it invoked the underlying contract to assess priority of coverage only because the insurance policy itself, by its express language, incorporated that contract's priority terms. Initially, however, some courts interpreted *Pecker* more broadly by suggesting that any agreement generally requiring the procurement of additional insured coverage automatically renders such coverage primary, seemingly disavowing the need to first analyze the policies' other insurance provisions in a priority dispute (e.g., to see if they incorporated the underlying contract relative to the other insurance issue).[16] For example, in *BP Air Conditioning Corp. v. One Beacon Insurance Group*,[17] the New York Supreme

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Court, Appellate Division, relying on *Pecker*, held that BP's coverage as an additional insured 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 regardless of any relevant other insurance clauses, which were not before the court. At first glance, the Appellate Division's decision seemed to eliminate the possibility of coinsurance between a named insured's and additional insured's respective carriers.

The New York Court of Appeals, however, modified the Appellate Division's decision and rejected such a broad view by stating that it could not determine the ultimate priority issue because all relevant policies were not before it. In other words, the court implicitly ruled that a policy's other insurance provision, and not merely an underlying contract, must be examined in order to determine coverage priority.[18] *Pecker* therefore does not, and cannot, stand for the principle that primary coverage is automatically conferred to an additional insured based solely on the terms of an underlying contract.

Indeed, the Appellate Division confirmed in *Bovis Lend Lease LMB, Inc. v. Great American Insurance 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." Thus, *Pecker* is consistent with the notion that policy terms control and one takes into consideration an underlying contract's priority terms only when the policy's other insurance clause so requires. The *Bovis* court recognized that "[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.'"[20]

> 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.[22]

Accordingly, just like in *Pecker*, the *Kel-Mar* court looked to the terms of the underlying contract because the Harleysville other insurance clause expressly referenced it. The underlying agreement between Kel-Mar and Arcadia, like that in *Pecker*, did not explicitly state that the additional insured coverage was to be primary. *Kel-Mar* held, however, that "[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."[23] Thus, while the court offered little analysis on the priority issue, it apparently drew upon the policy's use of the word "specifically" to opine that Kel-Mar's entitlement to primary or excess additional insured coverage turned on whether the underlying contract *specifically* required Harleysville to provide primary coverage.[24]

Notably, other post-*Pecker* cases have dealt with this "specifically" language in the context of similar additional insured/priority of coverage disputes. They have nonetheless found primary additional insured coverage despite the

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Kel-Mar

In a more recent additional insured decision addressing the interplay between a policy's other insurance provision and priority specified in an underlying contract, the Appellate Division implied that there might be additional limits to the *Pecker* holding. In *Kel-Mar Designs, Inc. v. Harleysville Insurance Co. of New York*,[21] the general contractor, Kel-Mar, sought additional insured coverage under a Harleysville policy issued to its subcontractor, Arcadia Electrical Contractors LLC. The Harleysville policy contained a blanket additional insured endorsement extending coverage to any person or organization as required by written contract. The endorsement also contained the following other insurance provision:

> Any other coverage provided by this endorsement to an additional insured shall be excess over any other valid and

inclusion of the word "specifically" in the other insurance clause, based on the *Pecker* analysis.[25] Thus, arguably there is uncertainty on how and to what extent the *Pecker* rule would apply to such provisions.

Other Jurisdictions

Other jurisdictions have questioned or simply not followed the *Pecker* rule.[26] For instance, in *Kummer Enterprises, Inc. v. Valley Forge Insurance Co.*, the Western District of Michigan held that, when interpreting a policy that purports to provide 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."[27] Even though *Kummer* involved a policy with the "specifically" language (and hence arguably was distinguishable from *Pecker*), the court took the opportunity to question *Pecker*, stating that the above 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, permit[s] primary insurance only if a writing 'specifically requires' it."[28]

Some courts addressing the issue have deemed the "specifically" requirement—i.e., "any coverage [provided to the additional insured] shall be excess . . . unless a contract specifically requires that this insurance be primary coverage"—to be a condition precedent, which if not satisfied, results in a finding of only excess coverage available to the additional insured.[29] Other courts have rejected the *Pecker* rule even where the word "specifically" is not included in this type of other insurance provision.[30]

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Conclusion

Priority of coverage disputes are often challenging to resolve. An added complication typically arises when primacy of coverage interfaces with additional insured provisions and related procurement contracts.[31] Needless to say, it would be dangerous to view any given other insurance 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. ■

Notes

1. 786 N.E.2d 863 (N.Y. 2003).

2. This general summary of prioritization issues is based primarily on New York law and a small sampling of opinions from other jurisdictions. Practitioners should carefully consult the law of the jurisdiction applicable to the given matter they are handling.

3. Only where the same risk is covered by two or more policies is the priority of coverage (or allocation of coverage) among the different policies determined by a comparison of their respective other insurance clauses. *See* Great N. Ins. Co. v. Mount Vernon Fire Ins. Co., 708 N.E.2d 167, 170 (N.Y. 1999) ("In insurance contracts the term 'other insurance' describes a situation where two or more insurance policies cover the same risk in the name of, or for the benefit of, the same person." (citation omitted)); Sport Rock Int'l, Inc. v. Am. Cas. Co. of Reading, PA, 878 N.Y.S.2d 339, 344 (App. Div. 2009); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hartford Ins. Co. of the Midwest, 677 N.Y.S.2d 105, 110 (App. Div. 1998), *aff'd*, 717 N.E.2d 1077 (N.Y. 1999); B.K. Gen. Contractors, Inc. v. Mich. Mut. Ins. Co., 612 N.Y.S.2d 198, 199 (App. Div. 1994).

4. *See* BP Air Conditioning Corp. v. One Beacon Ins. Grp., 871 N.E.2d 1128, 1133 (N.Y. 2007); Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co., 855 N.Y.S.2d 459, 466 (App. Div. 2008); *see also* 2 Barry R. Ostrager & Thomas R. Newman, Insurance Coverage Disputes § 11.01, at 988 (16th ed. 2013) ("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."). Other jurisdictions generally apply the same analysis. *See, e.g.*, Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1455 (3d Cir. 1996); Jones v. Medox, Inc., 430 A.2d 488, 489 (D.C. 1981); John Burns Constr. Co. v. Ind. Ins. Co., 727 N.E.2d 211, 216 (Ill. 2000); Cosmopolitan Mut. Ins. Co. v. Cont'l

Cas. Co., 147 A.2d 529, 532 (N.J. 1959).

5. State Farm Fire & Cas. Co. v. LiMauro, 482 N.E.2d 13, 16 (N.Y. 1985).

6. *Id.*

7. *See* 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*, 630 F. App'x 6 (2d Cir. 2015); *see also* U.S. Fire Ins. Co. v. Fed. Ins. Co., 858 F.2d 882, 885 (2d Cir. 1988) ("The general rule under New York law is that 'there is [a] well-settled equitable right to contribution, where there is concurrent insurance even in the absence of a policy provision for apportionment,' and that where each of the policies covering the risk 'generally purports to be excess to the other, the excess coverage clauses are held to cancel out each other . . . .'" (citations omitted)); *LiMauro*, 482 N.E.2d at 17; Lumbermens Mut. Cas. Co. v. Allstate Ins. Co., 417 N.E.2d 66, 68 (N.Y. 1980).

8. *See* 15 Steven Plitt et al., Couch on Insurance § 217:10 (3d ed. 2016) (citing cases from various jurisdictions holding dual excess clauses to be mutually repugnant, resulting in prorated sharing among insurers); *see, e.g.*, Reliance Ins. Co. v. St. Paul Surplus Lines Ins. Co., 753 F.2d 1288, 1290 (4th Cir. 1985); 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); Galen Health Care, Inc. v. Am. Cas. Co. of Reading, Pa., 913 F. Supp. 1525, 1530 (M.D. Fla. 1996); *Cosmopolitan*, 147 A.2d at 533.

9. *See LiMauro*, 482 N.E.2d at 18; *Lumbermens*, 417 N.E.2d at 68.

10. *See, e.g.*, Argonaut Ins. Co. v. U.S. Fire Ins. Co., 728 F. Supp. 298, 300 (S.D.N.Y. 1990) (deeming excess policy senior and noncontributing where other insurance provision specifically stated that when other collectible insurance was available, it "shall be in excess of, and not contribute with, such other insurance"); Utica Mut. Ins. Co. v. Gov't Emps. Ins. Co., 949 N.Y.S.2d 182, 184 (App. Div. 2012) (finding policy with other insurance provision stating it "is excess over, and shall not contribute with any of the other insurance," 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, 811 N.Y.S.2d 716, 720 (App. Div. 2006) (deeming policy noncontributory 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" (emphasis omitted)); *see also* Aetna Cas. & Sur. Co. v. Beane, 385 So. 2d 1087, 1089–90 (Fla. Dist. Ct. App. 1980) (finding excess liability policy providing that it should be considered "excess insurance over any other valid and collectible insurance" not mutually repugnant with another party's umbrella policy providing that its insurance should be "in excess of and shall not contribute with other insurance," so as to require proration and exhaustion of excess policy before proceeds of umbrella policy become available).

11. *See, e.g.*, *Endurance*, 46 F. Supp. 3d at 428–29 (noting that "[t]here is a difference between a primary insurance policy containing an excess other insurance clause and a true excess policy," and declining to enforce the defendant's argument that its primary policy is excess because the plain language of the plaintiff's primary policy makes clear that its drafters did not intend for the defendant's policy to be excess); *LiMauro*, 482 N.E.2d at 18 ("Indicative 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 reduced risk insured."); *Lumbermens*, 417 N.E.2d at 68 (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); *see also* U.S. Fire Ins. Co. v. Md. Cas. Co., 447 A.2d 896, 902 (Md. Ct. Spec. App. 1982) ("[W]here . . . a policy providing essentially primary coverage [that] is made excess . . . and a policy providing umbrella or catastrophe policy are in conflict, the courts have held that the umbrella policy need contribute only after the primary and ordinary excess coverages as 'other collectible insurance' in the meaning of the other insurance clause of the umbrella policy are exhausted.").

12. 786 N.E.2d 863 (N.Y. 2003).

13. *Id.* at 863.

14. *Id.* at 864.

15. *Id.*

16. *See generally* Stephen M. Lazare & Glenn A. Kaminska, *Dispelling the "Pecker v. Travelers" Myth*, N.Y. L.J., Mar. 14, 2007.

17. 821 N.Y.S.2d 1 (App. Div. 2006), *modified*, 871 N.E.2d 1128 (N.Y. 2007).

18. *See* Deutsche Bank Trust Co. Ams. v. Royal Surplus Lines Ins. Co., No. 06C-09-261, 2012 WL 2898478, at *20–21 (Del. Super. Ct. July 12, 2012) (analyzing priority of coverage and stating that "the Court of Appeals in *Pecker Iron Works* never intended to abandon the familiar rule that other insurance disputes are resolved by comparing the competing clauses," and further "[t]his court was therefore wrong when it concluded that [the plaintiff-owner's] status as an additional insured under the [contractor's] policy precluded it from comparing the other insurance clauses of the [owner's applicable] policies"); *see also* Pac-Van, Inc. v. CHS, Inc., No. 3:12-CV-341, 2014 WL 1322761, at *4 n.4 (S.D. Tex. Mar. 31, 2014).

19. 855 N.Y.S.2d 459, 464 (App. Div. 2008).

20. *Id.* (quoting Pecker Iron Works of N.Y., Inc. v. Travelers Ins. Co., 786 N.E.2d 863, 864 (N.Y. 2003)).

21. 8 N.Y.S.3d 304 (App. Div. 2015).

22. Kel-Mar Designs, Inc. v. Harleysville Ins. Co. of N.Y., No. 650871/2012, 2013 WL 10871519, at *3 (N.Y. App. Div. Oct. 4, 2013) (emphasis added).

23. *Kel-Mar*, 8 N.Y.S.3d at 305.

24. Similarly, in another pre-*Pecker* case, the court, faced with a similar provision, found the priority determination turned on whether the relevant contract explicitly required procurement of "primary" coverage. *See* Hartford Fire Ins. Co. v. Lo Brutto, 711 N.Y.S.2d 639, 640 (App. Div. 2000) ("[I]t is the absence of any specific requirement of primary coverage in the subcontract that is relevant to the concurrent coverage issue, rather than the absence of any specific provision that the coverage be excess.").

25. *See, e.g.*, Liberty Mut. Ins. Co. v. Harco Nat'l Ins. Co., 990 F. Supp. 2d 194, 204 (D. Conn. 2013) (applying New York law and holding that "[e]ven though the Lease Agreement does not specifically . . . provide [for] 'primary' coverage . . . , under *Pecker* it is assumed that it is primary unless explicitly stated otherwise"); Briarwoods Farm, Inc. v. Cent. Mut. Ins. Co., 866 N.Y.S.2d 847, 852 (Sup. Ct. 2008) (holding that "there is no difference between a 'specific' requirement that the insurance be primary or an 'express' designation of primary coverage in connection with a determination of whether coverage is primary or excess [under *Pecker*, which] requires that the coverage is primary").

26. *See, e.g.*, Arch Ins. Grp., Inc. v. Travelers Prop. Cas. Co., No. 03:10-cv-801, 2011 WL 6778757 (D. Or. Dec. 23, 2011); Walton Constr. Co., LLC v. Liberty Mut. Fire Ins. Co., No. 09-0706-CV, 2010 WL 4625734 (W.D. Mo. Nov. 8, 2010); Kummer Enters., Inc. v. Valley Forge Ins. Co., No. 1:09-cv-109, 2010 WL 431423 (W.D. Mich. Jan. 27, 2010); Regal Homes, Inc. v. CNA Ins., 171 P.3d 610 (Ariz. Ct. App. 2007); Lafarge N. Am., Inc. v. K.E.C.I. Colo., Inc., 250 P.3d 682 (Colo. Ct. App. 2010); Deerfield Mgmt. Co. v. Ohio Farmers Ins. Co., 529 N.E.2d 243 (Ill. App. Ct. 1988); Jessop v. City of Alexandria, 871 So. 2d 1140 (La. Ct. App. 2004); Forisso v. Mello Constr., Inc., 22 Mass. L. Rptr. 204 (Super. Ct. 2007); Gen. Cas. of Wis. v. Secura Ins., No. 270457, 2006 WL 3019439 (Mich. Ct. App. Oct. 24, 2006); Westchester Fire Ins. Co. v. Cont'l Cas. Co., No. A05-556, 2006 WL 786866 (Minn. Ct. App. Mar. 28, 2006). *But see* St. Paul Fire & Marine Ins. Co. v. Hanover Ins. Co., No. 5:99CV164, 2000 WL 34594777 (E.D.N.C. Sept. 19, 2000); 3060 Corp. v. Crescent One Buckhead Plaza, L.P., 686 S.E.2d 367 (Ga. Ct. App. 2009).

27. *Kummer*, 2010 WL 431423, at *7 ("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 [nor] the certificate of insurance, or any other document satisfies this requirement. Thus, the insurance available to Plaintiff as an additional insured is excess only.").

28. *Id.*

29. *See, e.g.*, Orchard, Hiltz & McCliment, Inc. v. Phoenix Ins. Co., 146 F. Supp. 3d 879, 893 (E.D. Mich. 2015); Certain Underwriters at Lloyd's, London v. Cent. Mut. Ins. Co., 12 N.E.3d 762, 769 (Ill. App. Ct. 2014); River Village I, LLC v. Cent. Ins. Cos., 919 N.E.2d 426, 435 (Ill. App. Ct. 2009).

30. *See, e.g.*, N. Plainfield Bd. of Educ. v. Zurich Am. Ins. Co., No. 05-4398, 2009 WL 2634906 (D.N.J. Aug. 25, 2009); Englert v. Home Depot, 911 A.2d 72, 81–82 (N.J. Super. Ct. App. Div. 2006); Irene Realty Corp. v. Travelers Prop. Cas. Co. of Am., 973 A.2d 1118, 1123 (R.I. 2009).

31. Although beyond the scope of this article, 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 subcontractor) has contractually agreed to indemnify various "upstream" entities (e.g., owners and contractors/putative additional insureds). Of course, relevant state statutes and case law should also be carefully consulted in making this determination.