

The Rights and Remedies of the Forgotten Additional Insured

How to Get Your Clients the Financial Protection to Which They are Entitled

BY BRIAN E. ROOF

Could the following scenario happen to your client? Alpha Corporation enters into a written agreement with Beta Company in which Beta agrees to include Alpha as an additional insured on Beta's commercial general liability policy. Beta, or its broker, however, fails to include Alpha as an additional insured. The bad fortune continues for Alpha as a third party sues Alpha arising out of its business relationship with Beta. Fortuitously for Alpha, it has potential coverage through its commercial general liability policy with Delta Insurance Company.

Two main questions arise out of this scenario. First, what are Alpha's claims for Beta's failure to add Alpha as an additional insured? Second, what are Delta Insurance's claims, if any, for Beta's failure? This article addresses both questions and related issues.

Alpha's Potential Rights or Claims

Alpha potentially has two claims in this scenario. The obvious claim is a breach of contract claim against Beta. The not so obvious claim is a negligence claim against Beta's broker.

Breach of Contract

Alpha has a breach of contract claim against Beta for its failure to have Alpha named as an insured. See *Brady v. K&R Industries, Inc.*, 1989 Ohio App. LEXIS 4592, *4 (1st Dist. 1989); *Angola Dev. Co., Ltd. v. The Lion Dry*

Goods Co., 1989 Ohio App. LEXIS 2861, *5 (6th Dist. 1989). As a prerequisite to recovering on this claim, Alpha must establish that the underlying claim would have been covered under Beta's insurance policy. *Brady*, 1989 Ohio App. LEXIS 4592 at *4.

Notably, Alpha's breach of contract claim also may function as a shield. That is, it would be a defense to any contribution claim that Beta, or its carrier through subrogation, would have against Alpha. See *Am. Int'l Specialty Lines Ins. Co. v. KinderCare Learning Center, Inc.*, 2011 U.S. Dist. LEXIS 28212, *28-29 (D. Or. 2011) (barring the contribution claim of

summary judgment in favor of broker in a lawsuit against broker for negligence in failing to add plaintiff as an additional insured on CGL policies). However, the plaintiff must prove the underlying claim would have been covered by the policy. *Id.*

Thus, under our example, Alpha has a colorable negligence claim against Beta's broker as long as Alpha can establish that the underlying claim would have been covered under Beta's policy.

Damages

The next issue is Alpha's damages. Its damages generally include recovering the legal fees and any judgment/settlement in the underlying litigation. See *Angola*, 1989 Ohio App. LEXIS 2861 at *5 ("A party who fails to obtain such insurance becomes liable for the loss to the same extent as though the agreed upon insurance had

been obtained."); *Cromartie v. Carteret Savings & Loan*, 649 A.2d 76, 86 (N.J. App. 1994); *Rupp v. Am. Crystal Sugar Co.*, 465 N.W.2d 614, 618 (N.D. 1991); *Zettel v. Paschen Contractors, Inc.*, 427 N.E.2d 189, 193 (Ill. App. 1981).

This seems simple, but if Delta Insurance provides coverage (i.e., pays the legal fees and judgment/settlement) in the underlying lawsuit, the issue is whether Alpha actually suffered these damages. Can Alpha recover these damages, or do they belong to Delta? Ohio courts have not directly addressed this issue. Courts in other jurisdictions have reached contrary conclusions.

... All is not lost for your client who was not named as an additional insured as required under a contract. Your client has a breach of contract claim against the procuring party and possibly a negligence claim against the procuring party's insurance broker. Finally, your client's insurer may also have a third-party beneficiary claim against the procuring party to recover the legal fees and settlement/judgment paid in the underlying lawsuit.

procuring party's carrier because procuring party breached its contract in failing to name KinderCare as an additional insured).

Negligence

Depending on whether Beta requested its broker to ensure that Alpha be named as an insured, Alpha could have a negligence claim against the broker. Ohio courts have not directly addressed this issue, but a California court allowed the negligence claim to proceed. See *Roger H. Proulx & Co. v. Crest-Liners, Inc.*, 98 Cal. App. 4th 182 (2nd App. 2002) (reversing

A Pennsylvania court concluded that the additional insured can recover against the breaching party the settlement amount and attorneys' fees that the additional insured's insurer paid in the underlying lawsuit. See *Borough of Wilkensburg v. Trumbull-Denton Joint Venture*, 568 A.2d 1325, 1327 (Pa. Sup. Ct. 1990) ("We do not agree with appellant's premise that appellant should be excused of its obligations under the contract merely because an insurance company was the ultimate payor of appellant's obligation."); *PPG Indus., Inc. v. Continental Heller Corp.*, 603 P.2d 108, 114 (Az. App. 1979) ("[I]t is clear that PPG is not relieved of such liability merely because Continental Heller took the precaution of insuring itself."); *Mass. Bay Trans. Auth. v. U.S.*, 129 F.3d 1226, 1232-3 (Fed. Cir. 1997); *Choinski v. Dentrite Int'l*, 2013 N.J. Super. Unpub. LEXIS 952, *4-8 (N.J. App. 2013).

New York courts, on the other hand, have concluded that the additional insured cannot recover its settlement/judgment and defense costs in the underlying lawsuit if its own insurance covered the claim. See *Inchaustegui v. 666 5th Ave. Ltd. Partnership*, 749 N.E.2d 196, sylb. 2 (N.Y. Ct. App. 2001). Plaintiff is limited to its out-of-pocket damages, which may include the premiums for acquiring its insurance, deductibles, co-payments, and increase in future premiums. *Id.*, syl. 1. The court's rationale is that the collateral source rule does not apply to contract claims. *Id.*, syl. 2.

A Vermont court, however, declined to follow *Inchaustegui* because Vermont applies the collateral source rule to contract claims. See *Green Mountain Propane Gas v. Kimball*, 2005 Vt. Super. LEXIS 97, *15 (Superior Ct. 2005). There, the court concluded that plaintiff was entitled to recover its legal fees and litigation costs in the underlying case, despite the fact that its carrier paid the legal fees and litigation costs. *Id.*, at *16.

In another analysis of the damages issue, the Alaska Supreme Court concluded that the additional insured's damages will depend, in part, on the "other insurance" clauses in its insurance policy and the procuring party's policy. *Clark v. Greater Anchorage, Inc.*, 780 P.2d 1031, 1037 (Alaska 1989). The bottom line is that choice of law is critical regarding damages.

Beta Company's Defenses

A related issue is Beta's potential legal defenses. Beta may have a waiver/estoppel defense. Although Ohio law has not directly addressed the waiver/estoppel defense in this situation, other courts have concluded that the defense is available. See *Casumano v. Ill. State Toll Highway Auth.*, 1996 U.S. App. LEXIS 11383, *21-23 (7th Cir. 1996);

Brannan Paving GP, LLC v. Pavement Markings, Inc., 2013 Tex. App. LEXIS 9258, *14-18 (Tex. App. 2013). The cases in which waiver generally has applied involve the general contractors permitting subcontractors to start, complete, and be paid in full for their work despite the fact that they had never obtained, nor furnished proof of the required insurance. See *Lehman v. IBP, Inc.*, 639 N.E.2d 152, 155 (Ill. App. 1994).

If our hypothetical involved a construction agreement, another issue would be whether the parties' additional insured provision is void as against public policy under Ohio's anti-indemnity statute, R.C. 2305.31. Generally, an additional insured provision will not violate R.C. 2305.31, as long as the additional insured provision in the contract and the additional insured language in the policy do not require coverage for the additional insured's own negligence. See *The Dayton Power and Light Co. v. Enerfab, Inc.*, 2nd Dist., 2007-Ohio-432, ¶¶ 20, 23 (additional insured provisions in contracts generally do not violate R.C. 2305.31, but the additional insured clause must provide coverage only for liability arising out of the subcontractor's work, which was not the facts of the case); *Liberty Mut. Ins. Group v. Travelers Property Cas.*, 8th Dist., 2002-Ohio-4280, ¶ 16 ("an additional insurance clause which would for all intents and purposes cover the additional insured for his own negligence would run counter to the public policy set forth in R.C. 2305.31."). *But see Brzeczek v. Standard Oil Co.*, 4 Ohio App. 3d 209, 213 (6th Dist. 1986) (the additional insured provision is "not null and void due to the application of R.C. 2305.31 and is not contrary to public policy."); *Toledo Edison Co. v. ABC Supply Co.*, 46 Fed. Appx. 757, 763 (6th Cir. 2002) (noting confusion in Ohio law).

Your clients should examine the additional insured provision in their contracts and the additional insured language in the applicable policies to ensure that they do not violate R.C. 2305.31.

Delta Insurance's Potential Rights or Claims


The final issue is whether Delta Insurance can recover the legal fees and settlement/judgment that it paid in the underlying lawsuit. Delta may have a third-party beneficiary claim against Beta. See *Choinski, supra*. However, in the only Ohio case that addresses this issue, the appellate court affirmed the trial court's judgment that the driver's carrier was not a third-party beneficiary to a rental agreement with the dealer in which the dealer warranted that there was insurance coverage on the rental car. See *Scott v. Motorists Mut. Ins. Co.*, 1991 Ohio App. LEXIS 15, *10-11 (12th Dist. 1991). The court did not decide this as a matter of law for Ohio, but rather on the facts of the case. *Id.*, at *11. Whether Delta would qualify as a third-party beneficiary would depend on the specifics of the contract and Ohio law on third-party beneficiary.

Conclusion

The point to remember is that all is not lost for your client who was not named as an additional insured as required under a contract. Your client has a breach of contract claim against the procuring party and possibly a negligence claim against the procuring party's insurance broker. Finally, your client's insurer may also have a third-party beneficiary claim against the procuring party to recover the legal fees and settlement/judgment paid in the underlying lawsuit.



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