

OPENING STATEMENT

On August 1, 2007, Governor Spitzer vetoed a Bill proposing to limit insurers' ability to deny liability claims on the basis of late notice of claim and to expand plaintiffs' access to courts to determine coverage for damage claims. We discuss the Governor's veto and its possible future impact in this issue's lead article.

Also in this issue, we report recent developments in the law in two of AGF&J's major practice areas: professional liability defense and insurance coverage, as well as two favorable decisions obtained by the firm.

Governor Spitzer Vetoes Bill

Intended to Change New York Late Notice Law

By: Thomas R. Maeglin

Senate Bill Number 6306 sought two amendments to existing New York statutes. It proposed to expand the power of courts to hear a declaratory judgment action brought by a plaintiff in an underlying suit, seeking to determine "the existence or extent of coverage owed by an insurer ... to the party against whom the original claim is interposed." It also would have added a new section to the Insurance Law that would have required insurers to demonstrate "material prejudice" in order to deny coverage for a claim based upon failure to give timely notice of claim. Under the Bill, evidence that the insurer had knowledge of the accident, loss or injury would have created a rebuttable presumption that the insurer had not been prejudiced by any delayed notice. The Insurance Law amendments had the purpose of mitigating against "the potential for procedural denial of insurance coverage resulting in unreasonable loss of insurance protection for claimants."

Governor Spitzer returned the Bill, without his approval, expressing support for its aims, but taking issue with the way in which the bill had moved through the legislature. The Governor wrote, "if this bill merely permitted late notices of claim where there is no prejudice to the insurer, I would sign it." The Legislature, however, had rushed passage of the Bill in three days and at a time most of those affected by it were unaware it had been introduced. This had prevented sufficient consideration of differing points

of view of the amendments, particularly whether it would increase litigation, costs and insurance premiums. "As a result, there are significant unanswered questions relating to what the actual impact of the bill might be, and the members of the Legislature have not had an opportunity to appropriately balance the views of both sides."

The amendments would have changed existing New York law in important ways. Currently, insurers operate under a "no-prejudice" rule, allowing them to deny claims on the basis of untimely notice of occurrence, claim or suit without demonstrating that the delayed notice had prejudiced them. This rule has been upheld repeatedly by the state's courts, notably by the highest judicial authority, the Court of Appeals, in *Argo Corporation v. Greater New York Mutual Ins. Co.*, in 2005. The Bill would have abrogated this long-standing line of case law insofar as it concerned denials of coverage for late notice of claim. While it was silent as to denials on the basis of late notice of occurrence, the Bill's impact upon the handling of claims was expected to be radical.

Likewise, the proposed amendment of the Civil Practice Law and Rules concerning Declaratory Judgment Actions would have given plaintiffs a powerful legal tool in seeking insurance coverage. Currently, a stranger to an insurance policy may not bring an action for a declaratory judgment concerning the extent of an insurer's duty to defend. See *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 (2004). The Insurance Law permits a plaintiff to sue an insurance company for indemnity, but only after an entry of judgment which has

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AGF&J

One Battery Park Plaza
4th Floor
New York, New York 10004
Phone: 212 422-1200
Fax: 212 968-7573

www.agfjlaw.com

Insurance Law § 3420(b)(1). Thus, the proposed Amendment would have empowered a plaintiff to draw an insurer into litigation at a far earlier point than is currently possible.

The Governor's veto has not ended the matter. What is likely to follow is series of investigations and hearings that will consider these issues in far greater detail. In his Veto message, the Governor announced that his staff and the Superintendent of Insurance have been instructed to work with the legislature, the insurance industry, business groups, consumer advocates, the trial bar and the courts "to determine the impact of these provisions on injured parties, on insurance rates, and on the court caseloads." No schedule has been announced, but any new Bill will likely contain extensive revision, and lobbying for and against a revised Bill is sure to be intense.

Accounting Malpractice

The "Continuous Representation" Doctrine Will Not Apply To Separate and Discrete Audit Services

In a recent decision, the New York Court of Appeals held the continuous representation doctrine would no longer be available to toll the statute of limitations in accounting malpractice actions. The principle of continuous representation originated in the context of professional malpractice lawsuits, for which the statute of limitations is three years. Courts allowed for an extension of the statute of limitations in medical malpractice cases due to the concern that plaintiffs would be reluctant to sue health-care professionals from whom they were still in the process of receiving care. In recognition of the importance of preserving the doctor-patient relationship, the court in *Borgia v. New York* stated that "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the "accrual" comes only at the end of the treatment." (12 NY2d 151, 155)

The tolling of the statute of limitations proved advantageous and slowly became applicable to other areas of professional malpractice, such as the legal and architectural fields. The time extension ran rampant and has been curbed in *Williamson v. Pricewaterhouse Coopers LLP* (2007 NY Slip Op 4719), a recent decision by the New York Court of Appeals, the State of New York's highest authority. The Court approached the issue with zeal, describing it as the "first opportunity to determine the applicability of the continuous representation doctrine in an accounting context."

The case resulted from a suit instituted by the owners of hedge funds who had engaged defendant's services in auditing their financial statements at the end of the year. These statements were prepared by the Funds' management in accordance with generally accepted accounting principles. Pricewaterhouse Coopers, on the other hand, reviewed the documents using generally accepted auditing standards. As a result, when the Funds' owners began reviewing its financial statements, they discovered that due to the discrepancy from the use of differing accounting methods, the Fund's financial statements overstated its assets, capital and

profits. The Fund's owners thereafter brought suit against defendants for malpractice.

The defendants filed a motion to dismiss the complaint, arguing that it was time barred by the three year statute of limitations. Plaintiffs replied, arguing that the statute of limitations should be tolled under the continuous representation doctrine. These opposing arguments led the Court of Appeals to explore the issue and to determine where to draw the line on the continuous representation doctrine. The Court held that in the given case, the statute of limitations is not available since the plaintiffs entered into annual agreements, each constituting a "separate and discrete audit" service, since at the end of each fiscal year, no further work was performed by Pricewaterhouse Coopers, nor was the company engaged in providing remedial services to the Funds. Therefore, the "mutual understanding" essential to the continuous representation argument was missing.

In its conclusion, the Court stated that "given the Fund's lack of awareness of a condition or problem warranting further representation and the fact that no course of representation was alleged, the purpose underlying the continuous representation doctrine would not be served by its application here." In so holding, the Funds were only permitted to bring claims against Pricewaterhouse Coopers for the damages sustained during the previous three years, which were within the statute of limitations. All other claims were considered time-barred.

This decision demonstrates the importance of communication between auditors and the management of the companies they audit. Likewise, it underscores the necessity for a meeting of the minds regarding any remedial actions, if such should be necessary. Lastly, should a company be unsatisfied with the work performed, it should move swiftly in filing its claim. As the *Williamson* decision demonstrates, the courts of New York will examine such claims closely, and guided by the holding in this case, will be wary of granting extensions of the statute of limitations under the doctrine of continuous representation, without a compelling reason. For more information on accounting malpractice issues, contact Barry Jacobs at bjacobs@agfjlaw.com

Recent Decision of Interest

Additional Insureds Are Entitled To Defense Without A Liability Finding Against A Named Insured; Priority Of Coverage Among Policies Must Be Determined With Reference To Language Of All Policies.

By: Thomas Maeglin

BP Air Conditioning Corp. v. One Beacon Insurance Group, 2007 N.Y. Slip Op. 05581 (N.Y. June 27, 2007).

The New York Court of Appeals recently handed down a much-anticipated decision in a declaratory judgment action regarding the obligations of insurers to defend and indemnify

those claiming to be additional insureds under their policies. In BP Air Conditioning Corp. v. One Beacon Insurance Group, 2007 N.Y. Slip Op. 05581 (N.Y. June 27, 2007), an HVAC contractor, BP Air Conditioning, sought additional insured coverage under a policy issued to one of its subcontractors, Alfa Piping Corp., for a bodily injury action commenced by an employee of another subcontractor, Karo Sheet Metal. Alfa's policy extended additional insured coverage "only with respect to liability arising out of [Alfa's] ongoing operations performed for that insured."

One Beacon contended that it was not obligated to defend BP until it was determined that the plaintiff's alleged injuries arose out of Alfa's activities. One Beacon also argued that its responsibility, if any, for the costs of BP's defense could not be determined without considering other relevant policies at issue. This latter position appeared to conflict with the Court of Appeals' holding in Pecker Iron Works v. Travelers, 99 N.Y.2d 391 (2003), in which the Court implied that any underlying contract requiring procurement of "additional insured" coverage is deemed to require the procurement of primary coverage, unless it expressly states otherwise.

The Court of Appeals disagreed and it agreed. On the first issue, it held that One Beacon did have to defend BP as an additional insured because the factual allegations of the complaint *created the possibility* that the plaintiff's injuries arose out of Alfa's operations for BP, bringing the claim within the ambit of the protection of the Additional Insured Endorsement. The Amended Complaint in the underlying action had alleged that Alfa had been engaged in construction work at the site where plaintiff was injured; that Alfa breached a duty to keep the site safe; and that the breach caused the injuries. These allegations, regardless of what evidence is advanced to prove them, were enough to trigger the duty to defend BP as an additional insured. However, not all was lost for One Beacon, because the Court of Appeals also held that, "In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue," allowing One Beacon to litigate further the issue of priority among all the coverages available.

Other important aspects of the decision may raise eyebrows. The Court, drawing upon the reasonable expectations doctrine, reasoned that insurance procurement terms within a purchase order exchanged between BP and Alfa gave BP a "reasonable expectation of protection from lawsuits arising out of Alfa's work." The impact of the Court's reasoning upon insurers is difficult to predict, because it suggests that coverage can be founded not only upon the insured's reasonable expectations based upon policy terms, but also upon the expectations that arise from agreements formed between the insured and a third-party, in which the insurer has no part.

This approach can only expand the circumstances under which insurers will have a duty to defend those who enter into contracts with their named insureds. It implies that in cases in which the plaintiff does not allege injuries arising

out of the named insured's operations, the purported additional insured can still argue for coverage based upon its reasonable expectations arising out of the insurance procurement terms of their construction agreements.

Are there wider implications? Perhaps, but there is no doubt that after BP Air Conditioning, insurers of subcontractors and sub-subcontractors will be obliged to defend many "additional insureds", whatever the insurers' expectations.

AGFJ Developments

AGF&J Obtains Appellate Decision Dismissing Claims Against The Firm's Clients, Comcast Corporation And Outdoor Life Network

Glenn A. Jacobson and Jessica Ferraro successfully obtained unanimous reversal by the Appellate Division, First Department, of the Supreme Court of the State of New York, awarding the firm's clients, Comcast Corporation and Outdoor Life Network (OLN), dismissal of plaintiff's Complaint and co-defendant's Cross-Claims.

In Goodwin v. Comcast Corp., et al., at issue was whether Comcast/OLN was responsible for the negligence of the freelance writer/director it hired to write and direct the filming of an "opening animation" or "open" which, in the television industry, is a 15-30 second video clip which precedes each episode in a television series. In this case, the open was being created to accompany a television series that was to be broadcast on OLN.

As it often did, OLN solicited creative ideas from a freelance writer/director who was hired on a per-project basis if the submitted concept suited the needs of the network. This writer/director had worked on OLN projects in the past and successfully pitched the idea that this open should be an exciting sequence of scenes of individuals in natural surroundings, including a rock climber, a spelunker and a hiker.

As in the past, the writer/director was to be paid a flat fee. She requested that she be paid as an independent contractor; no taxes were deducted from her pay at her request; and she submitted invoices on personal letterhead on a per-project basis. For tax purposes, the writer/director received a 1099 rather than a form W-2. In addition, the writer/director did not participate in any of the formalities that would have been required by OLN for her to become an "employee".

OLN's role in the Open was to collaborate and communicate with the writer/director its needs and expectations; financial and time constraints; and to discuss the progress of the open. OLN retained the right to approve the final product submitted by the writer/director but did not maintain control of the means and methods of how to carry out the filming of the open. In fact, OLN did not even choose or approve of the location of the shoot and had no input into the location's

selection.

On the morning of May 6, 2004, during the final take of the plaintiff's segment, plaintiff lost his balance and fell from the edge of a cliff. As a result, he sustained serious bodily injuries that resulted in lengthy hospitalization, numerous surgeries and extensive rehabilitation. (Plaintiff's last settlement demand while the appeal was pending was \$2 million.)

The writer/director did not have her own liability coverage. Consequently, she took the position that she was a Comcast/OLN employee, hoping to insulate herself from plaintiff's claim. Plaintiff's counsel adopted that position, as well, in an attempt to recover from the "deep pocket".

At the conclusion of discovery, a motion for summary judgment on behalf of Comcast/OLN was filed seeking dismissal of plaintiff's Complaint and co-defendants' Cross-Claims. Comcast/OLN asserted it was not liable for the acts of the writer/director as she was an independent contractor; that Comcast/OLN had not controlled the method and means by which she filmed the Top Ten Open; and that Comcast/OLN had merely retained general supervisory powers over her concerning the Top Ten Open. Comcast/OLN's motion was denied and an appeal taken.

The Appellate Division, First Department, unanimously found that Comcast/OLN had nothing more than the most general supervisory control over the open that could not be the basis for imposing liability against Comcast/OLN. It found numerous factors pointing to control by the writer/director including, but not limited to, control over the physical details of the photo shoot; direction of the plaintiff at the time of the accident by telling plaintiff where to stand and how to move and control over the film crew.

In addition, the Appellate Division also noted that the writer/director was paid by Comcast/OLN after submitting invoice which bore the legend "20% late fee will be charged on all invoices over 30 days" which suggested further that the writer/director had the status of an independent contractor. Consequently, the Appellate Division unanimously reversed the court below and dismissed the Complaint and Cross-Claims against Comcast/OLN. For more information about the Goodwin case, issues concerning liability for acts of independent contractors, or Abrams Gorelick's trial and appellate practice, contact Glenn Jacobson at gjacobson@agfjlaw.com.

AGF&J Obtains Summary Judgment in Favor of Scaffolding Company

In *Kessler v. City of New York, et al.*, Jade Priest and Vanessa

Caballero were successful in obtaining summary judgment in favor of AGF&J client, Spring Scaffolding, Inc. Plaintiff sued for personal injuries alleging that she tripped while exiting a city bus and was caused to fall forward, hitting her

head on a rung of adjacent scaffolding. Plaintiff maintained that she was dazed after her injury and had little recollection of what precipitated her fall or of her surroundings after her fall. However, two months after the accident, plaintiff returned to the "accident location" and determined that the scaffolding on which she struck herself was erected by Spring.

At the time of the accident, there was a significant amount of construction and street re-paving that was ongoing in the area where plaintiff fell. Spring consistently maintained that while it had erected scaffolding approximately one city block from where plaintiff alleged her accident occurred, it never erected scaffolding at the location identified by plaintiff.

Relying on plaintiff's own deposition testimony, the Supreme Court, New York County found that Spring Scaffolding was not liable for any injuries sustained by the plaintiff because she could not identify the cause or location of her accident.

In addition to the plaintiff's deposition testimony, defendant introduced aerial photographs it had obtained, coincidentally taken by an employee of a nearby building on the date of the accident, which showed that there was no scaffolding at the accident location. Defendant further introduced the testimony of Michael Girdwood, the resident manager of the building in front of which plaintiff alleged she fell. Mr. Girdwood also maintained that there was no scaffolding on the date of the accident. In an effort to overcome this overwhelming evidence, plaintiff attempted to put forth a self-serving affidavit affirming that when she returned to the site of her accident it appeared exactly as it had on the date of the accident and that the scaffolding in place bore Spring's insignia.

In dismissing the action against Spring, the Court reasoned that Spring demonstrated *prima facie* entitlement to summary judgment as a matter of law. The Court further stated that no reasonable inferences as to causation could be drawn from the self-serving affidavit of plaintiff, whose surmise as to causation was insufficient to create an issue of fact warranting trial. For more information about the *Kessler* case and related issues, please contact Jade Priest at jpriest@agfjlaw.com or Vanessa Caballero at vca-ballero@agfjlaw.com

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