

MORRIS DUFFY ALONSO & FALEY
Case Law Update (December 2007)

THE OBLIGATION TO DEFEND ADDITIONAL INSUREDS

In BP Air Conditioning Corp. v. One Beacon Insurance Group, 8 N.Y.3d 708, 871 N.E.2d 1128 (2007), the Court of Appeals has clarified the duty to defend additional insureds. In BP, the General Contractor subcontracted HVAC work to BP which, in turn, subcontracted work to Alfa Piping. The purchase order required Alfa to indemnify and hold harmless the GC and BP for bodily injury arising out of the work and caused by Alfa's negligence.

In the underlying personal injury action, the plaintiff was injured when he slipped and fell on oil at a jobsite. The plaintiff sued the GC which then started a third party complaint against both BP and Alfa. Although the complaint alleged that the accident arose out of Alfa's work, Alfa contended that it did not.

Thereafter, the insurer for Alfa declined coverage to BP arguing that it was not obligated to defend BP until it was determined that plaintiff's injury arose out of Alfa's work.

In a unanimous decision, the Court of Appeals held that the standard to determine if an additional insured is entitled to a defense is the same standard used to determine if a named insured is entitled to a defense. The Court reiterated the long standing rule that in order to trigger the duty to defend the allegations of the complaint need only "suggest a reasonable possibility of coverage. The duty to defend is broader than the duty to ultimately indemnify. No finding of negligence of the additional insured was necessary."

Citing Pecker Iron Works of N.Y. v. Traveler's Ins. Co., 99 N.Y.2d 391, 756 N.Y.S.2d 822, 786 N.Y.S.2d 822 (2003), the Court stated that the "well-understood meaning of the term [additional insured] is an entity enjoying the same protection as the named insured" and that the "standard for determining whether an additional insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense."

Further the Court found that it could not determine whether Alfa's coverage was primary to BP's coverage under its own policy of insurance as all relevant parties and policies were not before the Court. Accordingly, a finding that a policy provides additional insurance coverage does not necessarily mean that other insurance policies may not afford primary or co-insurance as well. This holding appears to address an issue which was apparently left open by the Court of Appeals in Pecker.