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Alerts

Second Circuit "Punts" on Question of Whether Insurer Is Estopped From Disclaiming Coverage Based on Issuance of Certificate of Insurance

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Insurance Coverage Alert

A demolition contractor agreed to name the owner and construction manager as additional insureds under primary and umbrella liability policies. The contractor's insurer, through its agent, issued a certificate of insurance evidencing the policies and the status of the owner and construction manager as additional insureds. The certificate contained the standard language, stating that it was issued only for informational purposes, that it did not "amend, extend, or alter the coverage," and that coverage was "subject to all terms, exclusions and conditions of such policies." After providing the certificate, the contractor was permitted to commence work.

Under the primary policy's terms, a written contract between the named insured and the owner and construction manager had to be "executed" in order for additional insured coverage to exist. Before the contract was executed, a worker was injured during the demolition project. He sued the owner and construction manager, who then requested additional insured coverage from the contractor's insurer. The insurer disclaimed coverage, reasoning that the parties had failed to "execute" the written contract prior to the loss. Coverage litigation ensued. The district court held that the contract was constructively "executed" because the parties had begun to perform their respective obligations and that the carrier was estopped from denying coverage because its agent issued the certificates of insurance.

The U.S. Court of Appeals for the Second Circuit rejected the argument that the contract had been constructively "executed." *10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.,* 2010 WL 5295420 (2nd Cir. Dec. 28, 2010). Under New York law, a contract is only executed if signed or fully performed. At the time of the accident, the contract had not been signed and the work was ongoing. The court also dismissed the suggestion that the "contract" that required signatures was the requirement to obtain coverage. Instead, the court explained, the requisite contract was the prime contract between the owner and the contractor in connection with the project. Obtaining the requisite coverage was only one of the named insured's obligations, so there was at best only partial performance. As a result, the court concluded that a material element of coverage under the primary policy had not been satisfied.

The estoppel issue, however, had been the subject of contrary New York appellate opinions, with some courts relying on certificates of insurance to impose an estoppel and others rejecting such arguments.

Next, the Second Circuit discussed the compelling rationale that it is the named insured's obligation to confirm that the policy requirement for the additional insured coverage has been met, and the insurer does not typically see the contract under which the named insured agrees to add an additional insured. But the court also recognized that notwithstanding the disclaimers in the certificate, an insurer has an obligation not to issue certificates that could mislead the additional insureds to believe that the coverage is in place. That was particularly true in this case, where the coverage was not being expanded, and the issue was simply when it incepted.

Because of the split of authority and the significance of the issue, the Second Circuit certified the following question to the New York Court of Appeals:

In a case brought against an insurer in which a plaintiff seeks a declaration that it is covered under an insurance policy issued by that insurer, does a certificate of insurance issued by an agent of the insurer that states that the policy is in force but also bears language that the certificate is not evidence of coverage, is for informational purposes only, or other similar disclaimers, estop the insurer from denying coverage under the policy?

Practice Note

As insurers are only conferring additional insured status subject to the terms of the policy, and the insurer does not determine whether those terms have been satisfied, the better rule is that the additional insured or the named insured should bear the responsibility to make sure the policy conditions for inception of the coverage have been met. If the New York Court of Appeals decides otherwise, insurers (and their agents) will need to do far more investigating before issuing the certificates and to ascertain that at least the prerequisites for the inception of the coverage have been met.

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