



CONTINUING LEGAL EDUCATION (“CLE”) SEMINAR

New York, by Webinar

Free for DANY members, \$40 for non-members

Defense Association of New York (“DANY”) has been granted CLE accreditation by the New York Office of Court Administration, and will provide the following program:

2022 Coverage Updates For Insurance Defense Attorneys

Appropriate for both experienced and newly admitted attorneys.

**Tuesday, September 13, 2022
5:00 p.m. - 7:00 p.m.**

Panelists:

Julian Ehrlich - Senior Vice President of Claims at Aon - US Construction and Infrastructure

Darrell John - Managing Partner, Conway Farrell Curtin & Kelly, P.C. (moderator)

Jennifer A. Ehman - Senior Litigation Manager, Merchants Mutual Insurance Co.

Rona L. Platt - U.S. General Counsel, Accelerant

To Join DANY: Visit <http://www.defenseassociationofnewyork.org/page-769847>

One year of free membership for attorneys / law firms in the Third and Fourth Departments! Attorneys who join DANY by 9/30/22 are eligible for a free 1 year membership in DRI.

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DANY President-Elect: Thomas E. Liptak

CLE Committee: Teresa A. Klaum and Bradley J. Corsair, Chairs;

Steven R. Dyki, Heather Wiltshire Clement and Eileen E. Buholtz

Two CLE Credits will be granted in Professional Practice to New York attorneys who attended the entire presentation and state the announced course codes in an affirmation (see link below) submitted by email to danyexecdir@gmail.com. http://ww2.nycourts.gov/attorneys/cle/affirmation_sample.pdf.

FINANCIAL HARDSHIP: For information on payment plans, volunteer service in lieu of tuition, or needs based scholarships; call DANY-212.313.3657* This CLE is intended to be free of charge for attorneys who have an individual membership with DANY or are with a firm which has a DANY group membership. If the CLE registration system does not recognize your membership status, please send an email to danyexecdir@gmail.com.

Rona Platt

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Rona Platt is the General Counsel for Accelerant Group's US operations. Ms. Platt's experience includes holding similar positions at StarStone US, including StarStone National Insurance Company and StarStone Specialty Insurance Company, as well as at The Wright Insurance Group, including WRM America Indemnity Company and Wright National Flood Insurance Company, along with her experience as Associate Corporate Counsel, Head of US Licensing and Compliance at the Enstar US, which included not only the StarStone companies but also Clarendon National Insurance Company, Providence Washington Insurance Company, Sussex Insurance Company, Pavonia Life Insurance Company and Pavonia Life Insurance Company of New York. Ms. Platt began her career as a coverage litigator at Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, beginning as a summer associate and ultimately leading the Insurance Law Group as a partner at the firm before going in-house. She has regularly lectured on insurance coverage issues for the New York State Bar Association.





Darrell John

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Darrell John is a trial attorney and managing partner at Conway, Farrell, Curtin & Kelly, P.C. Darrell focuses his practice on the defense of business entities against commercial, construction accident, construction defect, design defect, environmental, personal injury, products liability, and property damage claims. In addition to his trial practice, Darrell has prosecuted and defended coverage actions and appeals on behalf of insurers and insureds in New York since 2001.

Prior to joining the firm, Darrell practiced in Boston, MA focusing on matters of insurance coverage, reinsurance, surety bonds and fidelity bonds.

EDUCATION

- Boston University School of Law, Boston, Massachusetts, J.D.
 - Editor Boston University Law Review, Edward F. Hennessey Scholar
- State University of New York at Stony Brook, Stony Brook, New York, B.A.

Jennifer Ehman

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Jennifer Ehman is a Senior Litigation Manager at Merchants Mutual Insurance Company where she oversees construction defect, third-party property litigation and New York Labor Law claims. Prior to joining Merchants, she was a member of Hurwitz & Fine, P.C. located in Buffalo, New York, where she specialized in insurance coverage matters representing insurers in both federal and state court.



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Responsibilities

Julian is part of the Aon National Claims Leadership and has direct responsibility for the claims practice for the Greater New York Metro Region. His team of professionals advocate for clients on issues ranging from accurate reserving, proper resolution strategies, best practices, an expanded carrier view of coverage, to making clients better insureds and providing superior service throughout the claims and litigation processes.

Experience

Prior to joining Aon in September 2008, Julian was Claims Counsel for AIG's Construction Risk Division, after serving as a member of their in-house defense firm and in private practice for more than 16 years.

He is known for his "4Cs" approach to claims management – client service, communication, competency and compliance. He is also recognized for his unparalleled expertise in scaffold statute litigation having authored the Labor Law § 240 section in the New York State Bar Association treatise "Construction Site Personal Injury Litigation."

Julian has written for the *New York Law Journal's* Outside Counsel and Expert Commentary columns regularly for over 20 years. He has authored over 50 articles on insurance, coverage, tort liability trends and emerging issues in numerous trade, industry and law journals. He has been quoted in *Crain's New York Business*, *Claims Journal*, *ENR (Engineering News-Record)*, and *Business Insurance*.

Julian has presented at programs for the American Bar Association, New York State Bar Association, IRMI (International Risk Management Risk Institute), the Defense Research Institute (DRI), the Defense Association of New York (DANY), the Alpha Construction Conference, New York RIMS and for other many bar and trade associations.

He served as President the Defense Association of New York (DANY) from 2010 to 2011 for which he received the Defense Research Institute (DRI) Exceptional Performance Citation Award. He has also served on numerous committees of DRI.

Expertise

Julian brings key constituencies together to work towards successful resolutions. He is adept at negotiating claims disputes and developing proactive preemptive solutions leveraging internal resources. He is the author of numerous published opinions and articles, and is a frequent lecturer at legal and industry conferences.

Education

Julian graduated from Pace University School of Law and is licensed to practice in State and Federal Court, New York and Connecticut.

Last Updated [04.21]

FOURTH ANNUAL* COVERAGE DEVELOPMENTS FOR THE INSURANCE DEFENSE ATTORNEY

SEPTEMBER 13, 2022

Panelists:

Jennifer A. Ehman, Sr, Litigation Manager, Merchants Mutual Ins. Co.

Julian D. Ehrlich, DANY Past President, Senior VP Claims/Construction Group, AON

Rona L. Platt, US General Counsel and Head of Compliance, Accelerant

Moderated by Darrell John, Managing Partner, Conway Farrell Curtin & Kelly P.C.



BURLINGTON V. NYC TR. AUTH.

29 N.Y.3D. 313 (2017)

- Importance
- Holding
- What the case does NOT say
- Trends
- Implications for insurance defense counsel

BURLINGTON V. NYC TR. AUTH.

29 N.Y.3D. 313 (2017)

- *Goff v. Charter Communications* (Dallas Tx, Co. Ct. 7/26/22)
- Negligent hiring wrongful death
- \$375M in compensatory damages
- \$7B in punitive damages

BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

Interprets ISO 07 04, 04 13 & 12 19 “caused by acts or omissions”

- named insured must be the proximate cause of the loss
- no coverage where putative AI was solely negligent
- the named insureds status of employer alone is not proximate cause
- putative additional insured can be covered for up to 99% negligence



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

Interprets ISO 07 04, 04 13 & 12 19 “caused by acts or omissions”

Putative AI NYCTA ...

- stipulated to 100% sole negligence
- was the employer
- tendered to direct defendant BSI & Burlington
- Highly unusual



POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR
CONTRACTORS – SCHEDULED PERSON OR
ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.



COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II - Who Is An Insured is amended to include as an additional insured:

1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and
2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1. above.

Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

- a. Your acts or omissions; or
- b. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.



Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

- a. Your acts or omissions; or
- b. The acts or omissions of those acting on your behalf;

BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313, 322 (2017)

“These words - ‘in whole or in part’ - can only modify ‘proximate cause.’”

WHAT IS PROXIMATE CAUSE?



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

WHAT IS PROXIMATE CAUSE?

“there can be more than one proximate cause.”

Id. at 322.



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

WHAT IS PROXIMATE CAUSE?

"proximate cause" refers to a "legal cause" to which the Court has assigned liability

Id. at 321.



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

WHAT IS PROXIMATE CAUSE?

" 'because of convenience, of public policy, of a rough sense of justice, the law **arbitrarily** declines to trace a series of events beyond a certain point' "

Id. at 322.



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

WHAT IS PROXIMATE CAUSE?

NY Pattern Jury Instruction 2:70 “An act ... is regarded as the cause of an injury if it was a substantial factor in bringing about the injury ... [y]ou may decide that a cause is substantial even if you assign a relatively small percentage to it.”



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

WHAT IS PROXIMATE CAUSE?

The “overarching” principle governing proximate cause is whether a party was a *substantial* cause of events which produced injury, the determination of which “turns upon questions of foreseeability.”

Hain v. Jamison, 28 N.Y.3d 524, 528 (2016).



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

WHAT IS NOT PROXIMATE CAUSE?

Burlington “does not compel the conclusion that the endorsement incorporates a negligence requirement.”

Id. at 323.



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

WHAT IS PROXIMATE CAUSE?

the "caused, in whole or in part, by" language limits coverage for damages resulting from [the named insured's] negligence or *some other actionable "acts or omissions."*

Id. at 323.



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313, 323 (2017)

The policy extends coverage to an AI resulting from the named insureds' "*negligence or some other actionable acts or omissions*"

Named insured's

- OSHA, Building Code, Industrial Code or other violations



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

What else *Burlington* does NOT say

- The named insured must be negligent to trigger AI
- AI extends only to extent of the named insured's % of negligence
- No AI if pleadings allege or extrinsic evidence putative AI was negligent



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

The Latest

3P Pleadings

- **Alone can trigger AI coverage**

United States Specialty Ins. Co. v. Harleysville Worcester Ins. Co. (USDC/SDNY 2021 U.S. Dist. LEXIS 167928),



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

The Latest

3P Pleadings

- **+ plaintiff's S&C trigger AI coverage**

Wilcox Dev. v. HDI Global Ins. Co., 198 A.D.3d 590 (1st Dep't 2021).



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

The Latest

3P Pleadings

- **AI can be triggered v. employer's insurer even if employer is dismissed**

WDF v. Harleystville Ins. Co. of N.Y., 193 A.D.3d 667 (1st Dep't 2021).



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

The Latest

3P Pleadings

- **AI can be triggered by prior knowledge of danger by employer even if never a party**

Old Republic Gen. Ins. v. Consol. Edison of NY, 193 A.D.3d 667 (1st Dep't 2021).



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

The Latest

3P Pleadings

- **Can be “pealed back” to view extrinsic evidence**
- ***But Fitzpatrick v. American Honda Motor Co.***

LM v. Fed. Ins. Co., (2022 U.S. Dist. Ct. LEXIS 27120).



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

IMPACT

- More AI tender acceptances
- But under ROR's
- Allegations in pleadings + extrinsic evidence govern the duty to defend
- Duty to indemnify?



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

When can DC accept AI tender acceptance under an ROR?

When should DC keep the file?

When can DC sign stip of discontinuance?



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

Depends on ...

- value of case
- limits of AI
- strength of argument NI was px cz of loss?
- is horizontal exhaustion in play?
- strength of contractual indemnity claim?



BURLINGTON v. NYC TR. AUTH.

29 N.Y.3d. 313 (2017)

RECAP

- named insured must be the proximate cause of the loss
- no coverage where putative AI was solely negligent
- putative additional insured can be covered for up to 99% negligence



BURLINGTON v. NYC TR. AUTH.
29 N.Y.3d. 313 (2017)

TRENDS

- AI acceptances under ROR
- 3p pleadings may trigger AI
- Foreseeability factors in proximate cause

Burlington v. NYC Tr. Auth.





I'VE SEEN ENOUGH I AIN'T GONNA SEE ANYMORE ...
COVER ME

COVER ME, BRUCE SPRINGSTEEN AND THE E STREET BAND, *BORN IN THE USA*
(COLUMBIA RECORDS 1984).



BUT WAIT! THERE'S MORE

“Additional” Additional Insured Issues



READ THE POLICY



POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR
CONTRACTORS – SCHEDULED PERSON OR
ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II - Who Is An Insured is amended to include as an additional insured:

1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and
2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1. above.

Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

- a. Your acts or omissions; or
- b. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.



OTHER ADDITIONAL INSURED ENDORSEMENTS EXIST

CG 20 11 04 13

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to be a tenant in that premises.
2. Structural alterations, new construction or demolition operations performed by or on behalf of the person(s) or organization(s) shown in the Schedule.

CG 20 27 04 13

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to their liability as co-owner of the premises shown in the Schedule.

CG 20 24 04 13

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the land leased to you and shown in the Schedule.

CG 20 26 04 13

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

1. In the performance of your ongoing operations;
or
2. In connection with your premises owned by or rented to you.

**ADDITIONAL INSURED
LESSOR OF PREMISES**

(Entries required to complete the Schedule
will be shown below or on the "declarations".)

SCHEDULE

Person or Organization designated as Additional Insured:

**Designated Premises (part of the premises leased to Named
Insured):**

The Commercial Liability Coverage is amended
as follows:

1. Under Definitions, the definition of "insured"
is amended to include each person or
organization shown in the Schedule as an
additional insured, but only with respect to
such person's or organization's liability for
"bodily injury" or "property damage" (or
"personal injury" or "advertising injury", if
provided by the Commercial Liability
Coverage):

a. for which "you" are legally liable; and

b. caused, in whole or in part, by "your" acts
or omissions or the acts or omissions of
those acting on "your" behalf in
connection with that part of the premises
shown in the Schedule that is leased to
"you" from the person or organization
shown in the Schedule.

2. With respect to the coverage provided to
these additional insureds, this insurance
does not apply to:

a. structural alteration, new construction, or
demolition operations performed by or on
behalf of the person or organization
shown in the Schedule; or

b. any "occurrence" that takes place after
"you" are no longer a tenant of the
premises shown in the Schedule.

GL 0717 10 05

**ADDITIONAL INSURED
DESIGNATED PERSON OR ORGANIZATION**

(Entries required to complete the Schedule
will be shown below or on the "declarations".)

SCHEDULE

Person or Organization designated as Additional Insured:

Designated Interests:

The Commercial Liability Coverage is amended as follows:

Under Definitions, the definition of "insured" is amended to include each person
or organization shown in the Schedule as an additional insured, but only with
respect to such person's or organization's liability for "bodily injury" or "property
damage" (or "personal injury" or "advertising injury", if provided by the
Commercial Liability Coverage) caused, in whole or in part, by "your" acts or
omissions or the acts or omissions of those acting on "your" behalf:

1. in the performance of "your" ongoing work;
2. in connection with "your" premises; or
3. in connection with other designated interests, if shown in the Schedule.

GL 0718 10 05



SIDEWALKS, CELLAR DOORS, AND OTHER MEANS OF EGRESS

- 3650 White Plains Corp. v. Mama G. African Kitchen Inc., 2022 Slip Op. 03065 (1st Dept. 2022)
- Long Island Rail Road Co. v. New York Marine and General Ins. Co., 198 AD3d 888 (2d Dept. 2021)
- Jones Mem. Hospital v. Main Street American Assur. Co., 200 AD3d 1636 (4th Dept 2021)
- *71 Lafayette Ave. LLC v New York Marine and General Ins. Co., 154 NYS3d 759 (1st Dept. 2021)

UNDERLYING CONTRACTS MATTER

- Chipotle Mexican Grill, Inc. v. RLI Ins. Co., 158 NYS3d 201 (2nd Dept. 2021)
- Oliveri v. Barnes & Noble, Inc. 2022 NY Slip Op 4849 (4th Dept. 2022)



BUT NOT EVERY CASE IS CUT AND DRIED

Corter-Longwell v Juliano, 200 AD3d 1578 (4th Dept. 2022)



FINAL BITS AND BOBS

* Additional Insured Endorsements can also limit the amount of coverage available:

CG 20 11 04 13

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, **the most we will pay on behalf of the additional insured** is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.



FINAL BITS AND BOBS

* Additional Insured Endorsements can also limit the scope coverage available:

CG 20 11 04 13

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.



So, what else?



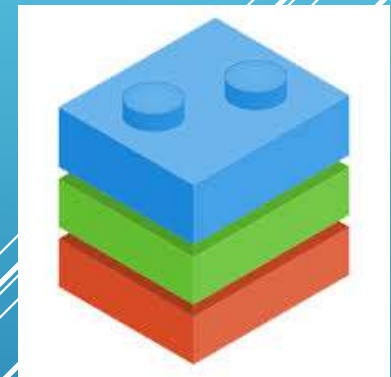
- **Other Insurance**
- **Contractual Indemnification**
- **Horizontal or Vertical Exhaustion?**

WHEN IS AN OTHER INSURANCE ANALYSIS NEEDED?

- Insurance concept
- Two or more policies
- Same risk
- In the name of, or for the benefit of, the same person/organization
- No other insurance analysis is needed for consecutive coverage

TERMS

- Primary policy (true/pure primary coverage)
- Primary position
- Excess policy (true/pure excess coverage)
- Excess position



WHAT DOES A PURE PRIMARY POLICY LOOK LIKE?

- Higher premium
- Often an immediate defense obligation
- Names like: Commercial General Liability policy; Businessowners policy; Automobile owners policy; Tenant policy

WHAT DOES A PURE EXCESS POLICY LOOK LIKE?

- Lower premium
- Often no immediate defense obligation
- May identify the policy it sits on top of
- May have higher limits
- Names like: umbrella, excess, catastrophe

THE PROCESS

- Collect all the policies
- Put them into piles based on their layer
 - Primary policies, first layer excess policies, second layer excess policies
- Compare “other insurance” provisions in the primary policies only
- Compare “other insurance” provisions in the excess policies only
- Only consider other insurance provisions from same layer policies
 - Do not compare the other insurance provision in an excess policy with the provision in a primary policy
- Determine how they interact
 - Primary vs. primary; excess vs. excess; primary vs. excess
- If they sit in the same position, determine how they share

- **Primary:**
 - “This insurance is primary except when b. below applies...”
- **Excess:**
 - This insurance is excess over any other coverage “whether primary, excess, contingent or on any other basis”
 - “[T]he insurance provided by this Coverage Form is excess over any other collectible insurance”
- **Super Excess:**
 - “If there is any other collectible insurance available to the insured (whether such insurance is stated to be primary, contributing excess or contingent) that covers a loss that is also covered by this policy, the insurance provided by this policy will apply in excess of, and shall not contribute with, such insurance.”

PRIMARY AND NON-CONTRIBUTING ENDORSEMENTS

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRIMARY AND NON-CONTRIBUTING INSURANCE WHERE REQUIRED BY WRITTEN CONTRACT(S) ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following is added to Paragraph **4. Other Insurance** under the **Conditions** section:


d. Primary and Non-Contributing Insurance

Where you are specifically required by a written contract to provide insurance that is primary and non-contributory and the written contract so requiring is executed by you before any "occurrence" or offense, this insurance will be primary and the other insurance will not contribute with this insurance, but only if and to the extent required by that written contract.

PECKER IRON WORKS OF NEW YORK, INC. V. TRAVELER'S INS. CO.

- “Additional insured” is a recognized term in insurance contracts, with an understanding crucial to our conclusion in this case. As cases have recognized, the “well-understood meaning” of the term is “an ‘entity enjoying the same protection as the named insured’”
- “When Pecker engaged Upfront 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. Pursuant to the policy provision at issue, Travelers agreed to provide primary insurance to any party with whom Upfront had contracted in writing for insurance to apply on a primary basis. When Upfront agreed to it, the policy provision was satisfied.”


HOW DO THEY SHARE?

- Pro Rata Liability
 - Contribution by equal shares
 - Primary and Excess insurance
- 
- A decorative graphic consisting of several parallel white lines of varying lengths, slanted upwards from left to right, located in the bottom right corner of the slide.

TAKEAWAY

- Work through the analysis (no short cuts)
 - Gather all the policies
 - Group them into primary and excess categories
 - Only compare other insurance provisions from policies of the same level
 - If they cancel each other out, determine how they share

CONTRACTUAL INDEMNIFICATION

- Looks to the contract or agreement entered into between the named insured and the party seeking contractual indemnification (possibly)
 - That is the key agreement
 - Contractual indemnity can be owed in the absence of insurance
 - No immediate defense obligation
 - The insurer's role is to pay on behalf of its named insured for its named insured's contractual indemnification obligations
 - Scope of indemnity language governs scope of what is owed
- 

CONTRACTUAL INDEMNIFICATION

- Do you have the entire contract?
- Was the contract entered into before the accident?
- Scope of the contract?
- What state law governs?
- What is the trigger for indemnification?
- Are defense costs owed?
- Who is contractual indemnity owed to? Are the terms defined?
- Does the provision include saving language if for construction?

GENERAL OBLIGATIONS LAW

- § 5-322.1 - The Legislature enacted the statute to “prevent a prevalent practice in the **construction industry** of requiring subcontractors to assume liability by contract for the negligence of others.”

- A party cannot be indemnified for its own negligence
- “To the fullest extent permitted by laws” indicates the intent is partial indemnification

- § 5-321 – A lease provision which purports to exempt a lessor from liability for its own acts of negligence is void and unenforceable

HORIZONTAL OR VERTICAL EXHAUSTION?

Before you decide, you need to work through both the insurance analysis and the contractual indemnification analysis



HARLEYSVILLE INS. CO. V. TRAVELERS INS. CO.

- Savarino Construction subcontracted HVAC work to W.C. Roberson Plumbing
- Roberson agreed to add Savarino to its CGL policy as an additional insured and to defend and indemnify Savarino
- Savarino was not an additional insured on Roberson's excess coverage, only primary
- Lawsuit was brought against Savarino by an injured employee of Savarino - Labor Law 240(1), 241(6) and 200 allegations
- Savarino was granted contractual indemnification against Roberson
- Harleysville issued Roberson primary and excess coverage; Travelers issued Savarino primary coverage
- Harleysville settled the lawsuit and paid the entirety of its primary and a portion of its excess coverage
- Harleysville commenced this action seeking a declaration that its primary policy was co-primary with Travelers and, in turn, Travelers must share equally in the cost of defense and settlement



HARLEYSVILLE INS. CO. V. TRAVELERS INS. CO.

- Appellate Division concluded that the Travelers and Harleysville policies were not co-primary, but instead that Travelers policy applied in excess of the Harleysville policy based upon the other insurance provisions.
- And, with regard to the amounts in excess of the Harleysville primary policy, “Travelers would...have a right of subrogation against Roberson in that third-party action ..., and, as a practical matter, would be entitled to reimbursement from Roberson for the amount that Travelers is obligated to pay plaintiff as excess coverage for Savarino's liability to Roberson's employee...”

CENTURY SURETY COMPANY V. METROPOLITAN TRANSIT AUTHORITY

- LIRR contracted with Rukh Enterprises to paint a railroad bridge on MTA property
- Rukh hired East Coast Painting & Maintenance to complete certain lead related work
- An employee of East Coast was injured on the job
- A number of insurance policies were implicated in the settlement
- As relevant, Century issued an excess policy to Rukh, and Admiral issued a railroad protective liability insurance policy to LIRR
- District Court ruled in favor of Century concluding that, as it was a true excess policy, it sat above the Admiral primary policy



CENTURY SURETY COMPANY V. METROPOLITAN TRANSIT AUTHORITY

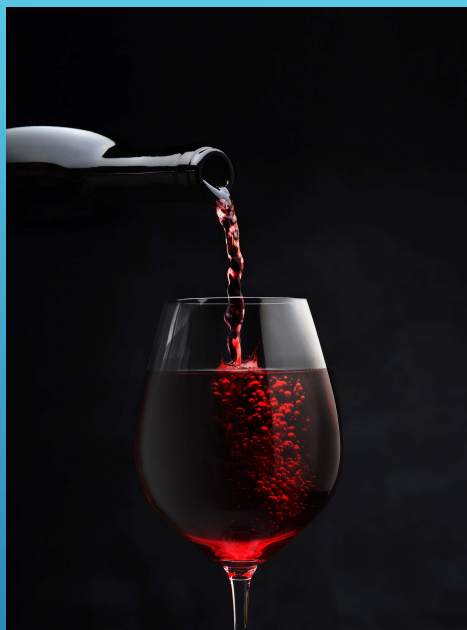
- “Contrary to the approach employed in *Bovis*, we anticipate that New York’s highest court would not require a separate action to enforce the parties’ indemnity agreement, and that the parties’ rights and obligations based upon both the terms of the Century Surety policy and the underlying indemnity agreement should be determined in one action.”

- “In short, we conclude that under New York law, Century Surety, as Rukh's insurer, is liable to pay into the underlying settlement and exhaust its policy limits before Admiral, LIRR's insurer. We reach this conclusion notwithstanding the “Other Insurance” provision in the Century Surety policy that purports to qualify the policy as a “true excess policy” because the indemnity agreement in the underlying trade contract between Rukh and LIRR governs the resolution of this case.”



Have things gotten clearer?





THANK YOU – AS ALWAYS