Importance of Providing The Policy to the Court—Redux

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In this edition of our column, we revisit an issue we addressed for the first time almost two years ago—the critical importance in insurance litigation of furnishing copies of the subject insurance policy to the court.[1] Although, as we then noted, the obligation to provide the court with the opportunity to read and analyze the policy it is being asked to construe is, or should be, obvious, it is all too often observed in the breach. Thus, in numerous cases, the courts have denied petitions to stay arbitration or motions for summary judgment made by insurers where a copy of the pertinent policy was not furnished.[2]

In those cases, the courts recognize that the existence and submission of the policy are essential elements of the movant's burden of proof.[3] As the court aptly stated in *Allstate Ins. Co. v. Ganesh*, 8 Misc.3d 922 (Sup. Ct. Bronx Co., 2005), "Without the insurance contract itself, any recitation of the contract's terms through testimony or other documents in evidence is rank hearsay and contrary to the best evidence rule."[4]

Since the publication of that article, several cases have dealt with various aspects of the obligation to submit a copy of the insurance policy, in somewhat different contexts, and with interesting and differing results. Indeed, as will be demonstrated below, further research on this issue has revealed a line of cases holding that in certain, albeit limited, circumstances, a copy of the policy need not actually be produced.

Recent Cases

In *Knight v. MVAIC*, 62 AD3d 665 (2d Dept. 2009), the court rejected the plaintiff's contention that he was a "qualified person" entitled to the protection provided by the Motor Vehicle Accident Indemnification Corporation pursuant to Ins. L. §5208(a), because the motorcycle he was operating at the time of his accident was owned by an individual who "had coverage for bodily injury [but] did not have coverage for uninsured motorist or no-fault benefits, since (such coverage is) not required under the No-Fault Law for motorcycles."

The court noted that, contrary to the plaintiff's assertion, motorcycles are not exempt from the requirement that the owner obtain uninsured motorist coverage, and that, indeed, if such an endorsement is not expressly included in a policy it will be implied (citing *Matter of St. John, as Admin. of Estate of Kenyon*, 105 AD2d 530, 532 [3d Dept. 1984]). Since the plaintiff "failed to proffer evidence sufficient to establish that he was uninsured, as he did not submit the policy of insurance pertaining to the motorcycle, and, thus, failed to support his assertions regarding the scope of coverage under that policy," the court granted MVAIC's motion to dismiss the complaint.

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In *West 64th Street, LLC v. Axis U.S. Insurance*, 63 AD2d 471 (1st Dept. 2009), in response to the contentions by the plaintiff property owner that the contract between it and the maintenance contractor that performed work on its premises required that the owner be listed as an additional insured under the contractor's policy, the contractor's insurer produced both a copy of the policy, pursuant to which coverage was to be afforded to any person or organization "that the insured is required by written contract to name as an additional insured," and a copy of the written contract between the parties, which did not, in fact, contain such an "additional insured" requirement. Thus, in this case, it was the production of the policy (together with other documentary evidence) by the insurer that established the absence of coverage for the Plaintiff.

Zaccari v. Progressive Northwestern Ins. Co., 35 AD3d 597 (2d Dept. 2006), was an action against the insurer to satisfy a judgment obtained against its insured on default in an action to recover damages for personal injuries sustained by plaintiff, acting as a rescuer, while pulling an individual out of a burning car. The insurer moved for summary judgment, relying upon the fact that it had disclaimed coverage prior to the entry of the judgment on the grounds that plaintiff's injuries did not arise out of the ownership, maintenance or use of a vehicle, and late notice by the insured.

No copy of the insurance policy or admissible evidence of its terms or limits was produced by the insurer in support of its motion. The Supreme Court denied the motion, and granted plaintiff's cross-motion for summary judgment in his favor on the ground that the disclaimer was untimely. The insurer subsequently moved to renew and reargue, but again failed to provide a copy of the insurance policy or any admissible evidence of its terms.

After judgment was entered against the insurer in an amount in excess of $400,000, it moved to modify and limit the judgment to $100,000, which was the applicable limit of the policy. Attached to the motion to modify, for the first time, was a copy of a facsimile of an uncertified and unauthenticated declaration sheet for the policy at issue. The court denied both motions, holding that the insurer had failed to make a showing or create a question of fact regarding the nature and extent of its coverage, since » Page 7

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it failed to provide the insurance policy or its terms or limits to the court.

Notwithstanding plaintiff's arguments in opposition to the insurer's appeal, inter alia, that "by failing to produce its policy or any admissible evidence thereof Progressive failed to demonstrate that the insureds or Zaccari breached the policy's terms or that Zaccari's injuries did not arise from a covered incident,"[5] the Appellate Division, Second Department, reversed, granted the insurer's motion for summary judgment and denied plaintiff's cross-motion. In so holding, the court found that "on its motion for summary judgment Progressive met its initial burden of establishing that the subject insurance policy's coverage was limited to accidents arising out of the use or operation of the motor vehicle," and that "Progressive also met its initial burden of showing that the Plaintiff's injuries were not covered under the use and operation clause of its policy."

There is no indication in the decision as to how or where such a showing was made in the absence of a copy of the policy itself. Indeed, it appears that the court's conclusion may have been based simply upon the fact that the subject policy was an auto policy, a fact established by plaintiff's own allegations regarding coverage. Still, the source of any specific policy provisions remains a mystery. It is notable, however, that the court did refer to the fact that in opposition to the motion, plaintiff did not offer any proof, or ever contend, that the subject insurance policy "was not limited to accidents arising out of the use or operation of the vehicle."

Question Presented

This decision raises interesting questions: Is a copy of the policy required only when there is an actual dispute about its contents? If so, is it necessary to produce a copy of the policy where the policy provisions at issue are compulsory—mandated either by law or regulation?

No-Fault Cases

Several recent decisions have addressed this question in the context of the no-fault law.

In *SZ Medical P.C. v. State Farm Mut. Auto. Ins. Co.*, 9 Misc.3d 139 (A) (App. Term, 1st Dept. 2005), an action by a health care provider to recover first party no-fault benefits for medical services rendered to its assignors, the court granted plaintiff's motion for summary judgment and rejected the defendant insurer's contention that plaintiff was not entitled to judgment because its assignors failed to submit to examinations under oath. This determination was based upon the fact that although the No-Fault Mandatory Personal Injury Protection Endorsement under 11 NYCRR §65-1.1(d) expressly required such examinations, the insurer failed to establish that the policy in effect actually contained the endorsement authorizing such examinations.

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Interestingly, the court noted that "Although Plaintiff's claims were submitted after the April 5, 2002 effective date of the revised insurance regulations, the provisions of said regulations are not applicable to claims until new or renewed policies containing the revised endorsement are issued [citations omitted]. Consequently, absent a showing that the subject policy contained a no-fault endorsement permitting EUOs, defendant cannot rely on the revised regulations to argue that plaintiffs vitiated coverage by failing to comply with a condition precedent." The clear, albeit unstated, implication of this decision is that where the insurer can establish that the new, revised mandatory no-fault endorsement was in effect, it would not need to provide a copy of the actual endorsement.

This point was clarified by the Appellate Term in *Eagle Chiropractic, P.C. v. Chubb, Indem. Ins. Co.*, 19 Misc.3d 129 (A) (App. Term, 9th and 10th Jud. Dists. 2008). There, the defendant insurer sought partial summary judgment on the ground that plaintiff's claims were submitted beyond the 45-day deadline set forth in the Mandatory PIP Endorsement. Plaintiff argued in opposition that the insurer did not establish that the 45-day deadline was contained in the Endorsement that was part of the applicable automobile insurance policy.

In ruling in favor of the insurer and granting its motion, the court observed that the Endorsement was required to be included in policies issued or renewed after April 5, 2002, and that pursuant to Ins. L. §3425(a)(8), the policy period for newly issued and renewed automobile policies is one year. "Since an automobile insurance policy which contained the prior version of the Endorsement would have expired no later than in April 2003 [citation omitted], the automobile insurance policy applicable to the claims at issue in the instant case [which involved an accident that occurred on November 12, 2004] was required to contain the current Endorsement which sets the 45-day time limit for the submission of claims (Insurance Department Regulations) [citations omitted] and Defendant need not prove that the instant automobile insurance policy contained such Endorsement."

More recently, in *Dana Woolfson LMT v. GEICO*, 20 Misc.3d 948 (Civil Ct. N.Y. Co. 2008), the court held that the insurer was not required to introduce the insurance policy at trial to establish that the policy contained the Mandatory PIP Endorsement. The court explained that "once it is established that the policy was issued on or after April 5, 2002, then the new regulations must apply," and in this case, the parties stipulated that the new regulations were in effect at the time the policy was issued.

Interestingly, the court went on to state that "Even if the insurance policy lacked the Mandatory Endorsement, then the applicable provisions of the Insurance Law or the applicable regulation, which 'has the force of law' [citation omitted], are deemed to be part of the policy as though written into it. See also McKinney's Insurance Law §3103(a) (even if the policy or provision is 'in violation of the requirements or prohibitions of this chapter it shall be enforceable as if it conformed with such requirements or prohibitions'); *Trizzano v. Allstate Ins. Co.*, 7 AD3d 783 (2d Dept. 2004) (auto policy); *TAG 380 LLC v. ComMet 380 Inc.*, 10 NY3d 507 (fire policy). Where, as here, it is clear that the policy is subject to the new regulations, the Mandatory Endorsement is read into the policy and the Defendant is not required to produce it."

This concept was most recently reaffirmed in *Hastava & Aleman Assoc. P.C. v. State Farm Mutual Auto Ins. Co.*, 2009 WL 2595737, 2009 N.Y. Slip. Op. 51818 (U) (Civil Ct. Bronx Co. 2009), wherein the court rejected plaintiff's argument that "in order for Defendant to prevail on its motion, [its] policy itself should be included as part of the record instead of depending on the no-fault regulations under 11 NYCRR §65-1.1," and observed that "in the case at hand, Defendant is not required to include its written policy as part of the record because its defense [of the EUO 'no-show'] is found in the Endorsement. Thus, the Mandatory Endorsement applies whether or not the written insurance policy actually contains it. ...It would therefore be duplicative to submit a copy of the policy because its legislative intent was to read the Endorsement into all policies [post April 9, 2002] [citing *Eagle Chiropractic, P.C.*, supra]."

Different Context

In *Estee Lauder Inc. v. One Beacon Ins. Group, LLC*, 62 AD3d 33 (1st Dept. 2009), the court applied the concept of reading certain provisions into a policy in a different context. There, the insurer attempted to argue that "where, as here, the existence of coverage has not been established because the insurance policy is missing, ...an insurer cannot waive its right to disclaim coverage" [by failing to issue a timely and specific disclaimer]. Although the court agreed that "where the issue is the existence or nonexistence of coverage (e.g., the insuring clause and exclusions) the doctrine of waiver is simply inapplicable," it noted that "[i]t does not follow, however, that when an insurer asserts that no policy was in effect during the relevant period, an untimely notice defense to coverage need not be timely asserted."

As noted by the court, the duties of an insurer to disclaim

> coverage in a timely, specific and nonselective manner are not imposed solely by the terms of the contract of insurance. Rather, those duties are imposed by law.[6] Thus, "at least where the policy is silent on the subject, the conditions of reasonable-notice-of-occurrence and reasonable-notice-of-claim are implied into every insurance contract (see *Olin Corp. v. Insurance Co. of N. Am.*, 743 F.Supp. 1044, 1051 [S.D.N.Y. 1990] (construing New York law), affd. 929 F.2d 62 [2d Cir. 1991]).[7] Thus, knowledge of the policy's actual terms is not necessary to assert such defenses to coverage."

Question Remains

While the foregoing cases are interesting and instructive, it seems to us that they disregard a significant principle of insurance law—the recognition by the law that a party may, at its option, contract to do more than it is otherwise legally obligated to do. Specifically, an insurer may insert provisions in its policy that are more favorable to the insured than it is required by statute to do. Cf., Vehicle & Traffic Law §311(4)(a) ("Nothing contained in such regulation or in this article shall prohibit any insurer from affording coverage under an owner's policy of liability insurance more liberal than that required by said minimum provisions"); Insurance Law §3420 (which sets forth provisions that must appear in liability insurance policies unless a provision equally or more favorable to the insured is inserted); *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*, 41 NY2d 84 (1976) ("[T]he [Disability Benefits Law] fixed a floor, not a ceiling; it contained no prohibition against granting disability benefits in excess of those mandated by the DBL, thereby to supplement and exceed the legislatively mandated minimum.") Under such circumstances, rare though they might be, the more favorable provisions of the policy would be deemed controlling.

Thus, the question remains, to the extent that it is possible (albeit admittedly not likely) that an insurer might (either intentionally or inadvertently[8]) provide more or better coverage than required even by a mandatory, prescribed, endorsement, should the court simply assume that they did not do so, which is effectively what is accomplished by exempting the insurer from producing a copy of its actual endorsement? Might not the better policy be to continue to insist upon production of a copy of the actual policy even in cases involving mandatory endorsements, so that the court and the opposing parties may have the opportunity to compare the actual endorsement to the prescribed form? Measuring the minimal burden such a requirement imposes upon the insurer, against its possible benefits to the truth finding function of the courts, to say nothing of the possible benefits to the insured (and injured parties), strongly suggests an affirmative answer to this question.

At the very least, parties involved in insurance litigation are—and remain—well advised to furnish the court with a copy of the policy whenever possible.

1. See Dachs, N. and Dachs, J., "Importance of Providing the Policy to the Court," NYLJ, Nov. 2, 2007, p. 3, col. 1.

2. See e.g., *New York Central Mutual Fire Ins. Co. v. Marchesi*, 238 AD2d 135 (1st Dept. 1997), lv. to appeal denied, 90 NY2d 806 (1997); *New York Central Mutual Fire Ins. Co. v. Julien*, 298 AD2d 587 (2d Dept. 2002); *Allstate Ins. Co. v. Ganesh*, 8 Misc.3d 922 (Sup. Ct., Bronx Co. 2005); *Zurich American Ins. Co. v. Argonaut Ins. Co.*, 204 AD2d 314 (2d Dept. 1994); *Guishard v. General Security Ins. Co.*, 32 AD3d 528 (2d Dept. 2006), aff'd, 9 NY3d 900 (2007); *Empire Ins. Co. v. Ins. Corp. of New York*, 40 AD3d 686 (2d Dept. 2007).

3. See *Creinis v. Hanover Ins. Co.*, 59 AD3d 371, 381 (2d Dept. 2009) lv. to appeal denied, 12 NY3d 710 (2009) (Carni, J., concurring in part and dissenting in part).

4. See *Schozer v. William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 (1994). See also, *DeCristi v. Liberty Mutual Ins. Co.*, 8 Misc.3d 1027(A) (Sup. Ct. Kings Co. 2005).

5. See Brief for Plaintiff-Respondent, 2005 WL 4112065 (8/14/06).

6. 62 AD3d at 35.

7. See also, *Rowell v. Utica Mut. Ins. Co.*, 77 NY2d 636 (1991); *Michigan Mut. Ins. Co. v. Miller*, 170 AD2d 102 (2d Dept. 1991).

8. See Dachs, N. and Dachs, J., "The Importance of Reading the Policy," NYLJ, July 19, 1995, p. 3, col. 1, and discussion therein of *Maxwell v. State Farm Mutual Auto Ins. Co.*, 92 AD2d 1049 (3d Dept. 1993), and *Mostow v. State Farm Ins. Cos.*, 88 NY2d 321 (1996), for examples of the inadvertent provision by the insurer of more favorable terms than required (or intended).