

ALERT

Preserving Your Additional Insured Status

By Robert D. Chesler

The New Jersey Appellate Division has issued a decision that contains an essential lesson for anyone seeking additional insured status, while at the same time finding the insurance broker not liable when a certificate of insurance proves ineffective to achieve the additional insured's goals. *State-Operated School District of the City of Paterson v. Evans*, Docket No. A-5089-16T (N.J. App. Div. Oct. 22, 2018).

The case concerned a school district that contracted with a bus company. The contract required the bus company to maintain auto, general liability and workers compensation insurance in required amounts. It also required the bus company to provide a certificate of insurance stating that the school district was an additional insured. The bus company complied. The contract was silent as to whether the bus company's insurance was primary or excess to the school district's insurance.

When a fatal accident occurred, the school district presented the claim to the bus company's auto insurance company, American Alternative Insurance Corp. (AAIC). That company's insurance policy had an "other insurance clause" that stated:

Any coverage provided hereunder shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless contract or agreement specifically requires that this insurance be primary in which case any other insurance available to the additional insured shall be considered excess and non-contributing.

As a result, AAIC took the position that its insurance was excess and presumably the school district's insurance was primary. AAIC was apparently successful, resulting in a claim by the school district against the bus company's insurance broker for misrepresentation.

The critical lesson here is that in any contract in which a party desires to be named as an additional insured, that party must include in the contract that its policy shall be excess and non-contributing to any insurance policy on which it is named as an additional insured. Failure to do so can defeat the entire purpose of the additional insured protection by placing the additional insured's insurance first in line.

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The school district sued the bus company's insurance broker for misrepresentation. The court found that no misrepresentation had occurred. The contract required the certificate of insurance to list the school district as an additional insured, and the certificate did so. The court held that "there was no incorrect information or misstatement on the Certificate pertaining to the AAIC policy." Additionally, the court stated that a plaintiff's reliance on a representation is an element of a claim of misrepresentation, and the deposition testimony established that no one at the school district had read the certificate of insurance, much less relied upon it.

In New Jersey, any time the insurance company denies coverage, the policyholder will look to the insurance broker. The insurance broker is a fiduciary, and third parties can sue it. *Aden v. Fortsh*, 169 N.J. 64 (2001); *Carter-Lincoln Mercury v. EMAR Group*, 135 N.J. 182 (1994). The school district brought a novel cause of action against the broker, and it failed. However, insurance brokers in New Jersey can expect policyholders to continue holding them responsible for any errors in coverage they help the policyholders obtain. ▲

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