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The Search for Additional Coverage

"To become aware of the possibility of the search is to be onto something."
—Walker Percy

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In our roles as attorneys and counselors at law, we often find ourselves engaging in a search of one kind or another—the search for knowledge, the search for truth, the search for justice, and, sometimes, even the search for a parking spot close to the courthouse.

One of the most important searches a lawyer can conduct is the search for applicable insurance coverage. While this is especially, and most obviously, so with respect to attorneys representing plaintiffs who have suffered severe and permanent personal injuries as the result of accidents, inasmuch as, after all, the viability of most tort claims hinges on whether, and to what extent, the tortfeasor has liability insurance coverage, as the Appellate Division, Second Department has reminded us in an important recent decision in *Shaya B. Pacific LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*,[1] the search for additional insurance coverage is of great importance to defense counsel as well.

CPLR 3101(f)

There is no question that part of the job—and, indeed, the duty—of a plaintiff's attorney is to conduct diligent searches for available insurance coverage. CPLR 3101(f), which has been in effect since 1975, assists in that regard by providing that, "A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." Thus, most plaintiffs' attorneys will—and should—prepare and routinely serve a Notice for Discovery and Inspection demanding the production of copies of the actual insurance policies, including, at a minimum, the declarations and coverage pages thereof, or, at the very least, a verified statement identifying by issuing company, name of the insured, policy number, policy period and limits of coverage, all insurance agreements, including, but not limited to, policies of excess liability/umbrella coverage that may be applicable.

It has been held that disclosure under CPLR 3101(f) entitles the plaintiff to know even the number of claims brought against the defendant during the applicable policy period, the amount sought in each such claim and the total sums paid out against the aggregate limit of such policy, in cases where there is an aggregate limit.[2]

Questionnaire

In addition, in order to avoid the risk of erroneous, inaccurate or incomplete responses to such demands by defense counsel and/or insurance company representatives, who all too often, albeit presumably innocently, misstate or fail to disclose applicable coverage, it is good practice to require the defendant/insured personally to complete, execute and swear to the truth of a questionnaire relating to possible sources of additional insurance coverage.

Because there are several potential sources of additional applicable insurance coverage over and above the primary coverage of the offending vehicle, including an excess liability or umbrella policy; a nonowner operator's policy, which covers the named insured and spouse or other "family member" or "relative" residing in the same household as the named insured while operating a "non-owned" or "temporary substitute" vehicle; and an employer's business liability policy, which may also provide nonowned coverage for accidents occurring while an employee is using a personal vehicle on company business, we have developed two separate questionnaires—one for the vehicle owner and one for the vehicle driver. Very simply, the vehicle owner questionnaire asks, "Aside from the insurance coverage provided to you by [insurance company] at the time of the accident of [date], did you have any other excess or 'umbrella' insurance policies?" If the answer to this question is "Yes," the owner is asked to provide the name of the insurance company, the policy number, the dates of coverage and the amount of coverage.

The vehicle driver questionnaire is a bit more complicated. In it, the driver is asked the following questions: "(1) At the time of the accident, did you have any excess or 'umbrella' policies of insurance in your name, in the name of your spouse or in the name of any relative with whom you resided? (2) Did you own the vehicle which was involved in the accident of [date]? If your answer is 'No,' please answer the following questions: (a) At the time of the accident, did you own your own vehicle? (b) Did any relative residing with you at the time of the accident own a vehicle?" Again, if the answer to any of the foregoing is "Yes," the driver is asked to provide the name of the insurance company, the policy number, the name of the insured person/vehicle owner, the dates of coverage and the amount of coverage.

Finally, the driver is asked, "At the time of the accident, were you operating the automobile in connection with your employment?" If the answer is "Yes," the driver is then asked to provide the name and address of the employer and the purpose for which he or she was operating the vehicle at the time of the accident.

In order to avoid any potential problem under CPLR 3130(1), which provides that in an action for personal injury, injury to property or wrongful death predicated on negligence, "a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court," it is best that these questionnaires be served prior to the commencement of the action. Otherwise, while it is not at all clear that aforementioned questions would, in fact, be deemed interrogatories, it is advisable for the proponent to make clear, either in an accompanying cover letter or

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on the questionnaire itself that these questions are not intended to constitute formal discovery demands, but, rather, informal requests for information in the spirit of mutual cooperation.

In the event that defense counsel appears to be unwilling to cooperate in the search for insurance (a litigation posture that is less likely and less advisable following the *Shaya B. Pacific, LLC* decision, discussed below), and/or the defendants/insureds are not sufficiently forthright and forthcoming with the requested information, we suggest confronting the defendants with these very same insurance questions at their depositions.

Another Potential Source

It should be noted that there is an additional potential source of coverage or financial responsibility that may be looked to and may be a source of proper inquiry in the discovery process—the title owner of the vehicle may be different from the registered owner and may have additional coverage applicable to it. While at the present time, the issue of whether a lessor of vehicles or a rental car company may be held vicariously liable under Vehicle and Traffic Law §388 is somewhat in a state of flux—the Supreme Court, Queens County having declared unconstitutional the federal statute that eliminated such vicarious liability for such entities,[3] and that decision presently making its way through the appellate courts—there are or may be other situations in which the title is maintained by one other than the individual in whose name the plates were issued. Insofar as Vehicle and Traffic Law §125 defines an "owner" so as to include "a person, other than a lienholder, having the property in or title to a vehicle...," such person may also be liable and their insurance coverage may be applicable as well.

UM/SUM Coverage

Of course, the plaintiff's attorney is also duty bound to seek and find the additional coverage that may be afforded to her clients through uninsured/underinsured/supplementary uninsured (SUM) motorist coverage. In *Campagnola v. Mulholland, Minion & Roe*,[4] the plaintiffs successfully sued their attorney for malpractice for failing "to determine and ascertain whether additional insurance coverage for bodily injury was available to the plaintiffs in the form of underinsured motorist benefits." There, the law firm was held liable for settling a bodily injury action for $10,000 and issuing general releases, notwithstanding the fact that there was a potential $100,000 SUM claim which they failed to make. [Adding salt to the wound, the court rejected the attorneys' contention that the amount of the plaintiff's damages should be reduced by the amount of the contingency fee they would have had to pay if the full amount of SUM coverage had, in fact, been paid.]

The 'Shaya B. Pacific' Case

Thus, the picture is very clear from the perspective of plaintiff's counsel. What about the other side of the coin? What are the duties of defense counsel with respect to finding additional liability coverage for their clients?

In a fascinating, and highly significant recent decision, the Second Department addressed the role of defense counsel in the *Shaya B. Pacific* case. As framed by the court, the principal issue in that case was "whether a law firm, retained by a primary carrier to defend its insured in a pending action, has any obligation to investigate whether the insured has excess coverage available and, if so, to file a timely notice of excess claim on the insured's behalf."

The case involved a construction site accident in which the underlying plaintiff was injured while performing demolition work at Shaya B. Pacific's property. Pacific's primary insurer,

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Lloyd's of London, retained the Wilson, Elser firm to defend Pacific in the personal injury action that followed. The limits of Lloyd's policy were $1 million, and Pacific was being sued for $52.5 million. Thus, Lloyd's wrote to Pacific and advised it that it had the right to engage its own counsel, at its own expense, to work together with Wilson, Elser. Lloyds also advised Pacific that "you may wish to check with your insurance agent to determine if any excess insurance coverage is in force. If so, we would urge you to quickly notify any excess insurance carrier of this suit situation."

Almost three years after the underlying action was commenced, and after the plaintiff was awarded summary judgment on the issue of liability under Labor Law §240(1), Wilson, Elser, on behalf of Pacific, tendered the case to National Union Fire Ins. Co. for further defense and indemnity under an excess policy. That insurer had issued a commercial umbrella policy to another entity, which was not a party to the underlying lawsuit, and it was not known what, if any, relationship Pacific may have had to that entity or, more importantly, its policy. Shortly after receiving this claim, National Union timely disclaimed coverage on the ground of late notice, and on the basis that it had no information to confirm that Pacific was an insured under its excess policy.

The underlying plaintiff subsequently obtained a judgment against Pacific for over $6 million. Thereafter, Pacific brought a legal malpractice and breach of contract action against Wilson, Elser, claiming that it was negligent in failing to advise National Union of the underlying action in a timely fashion.

In the context of a prediscovery motion to dismiss, the Second Department observed that Wilson, Elser would have been entitled to dismissal pursuant to CPLR 3211 (a)(1) if it could establish (1) that Lloyd's letter conclusively proved that the scope of its representation never encompassed any responsibility with respect to possible excess coverage—which it did not; or (2) that National Union's disclaimer letter conclusively established that Pacific was not an insured under its excess policy—which, again, it did not.

Turning to the essential question of the law firm's duty to ascertain whether the insured it was hired to represent had available excess coverage or to file a timely claim with the excess insurer on its client's behalf, the court concluded that "We cannot say, as a matter of law, that a legal malpractice action may never be based upon a law firm's failure to investigate its client's insurance coverage or to notify its client's carrier of a potential claim." The court then went further to hold that the very same conclusion applies even with respect to any attorney who is retained, not by the defendant directly, but by its carrier.

Thus, the warning has been sounded that a tortfeasor's defense counsel may be found guilty of malpractice, and, ultimately, be held personally liable, where counsel does not actively investigate to determine whether the party he or she represents has a source of excess liability insurance coverage.

Call to Action

More than 18 years ago, we suggested in these pages that a central registry should be set up in which all liability insurance policies issued by an insurance company would be listed and cross-indexed according to the insured's name, thus assuring that a diligent search for applicable insurance coverage would uncover all policies, even if written by different insurers. This registry, access to which could, if deemed necessary, be restricted to those who can demonstrate a genuine need for the information, e.g., a party involved in an actual litigation against a particular individual, could function for excess, umbrella and homeowner's policies in much the same way as the Department of Motor Vehicles' records currently function with respect to automobile liability policies, and would assist attorneys—both for plaintiffs and for defendants—in their important searches—for knowledge, truth, justice, and proper protection or compensation for their clients. We called upon the Legislature to consider this proposal then, and we do so again now that the search for insurance coverage has taken on even greater, more undisputed, significance.

1. __AD3d__, 827 NYS2d 231 (2d Dept. decided Dec. 19, 2006).

2. See *Kimbell v. Davis*, 81 AD2d 855 (2d Dept. 1981); *Folgate v. Brookhaven Memorial Hospital*, 86 Misc.2d 191 (Sup. Ct. Suffolk Co. 1976).

3. See Transportation Equity Act of 2005, 49 USC §30106, eff. Aug. 10, 2005 and *Graham v. Dunkley*, 13 Misc3d 790 (Sup. Ct., Queens Co. 2006).

4. 148 AD2d 155 (2d Dept. 1989), affd. 76 NY2d 38 (1990).