The Mistaken "Necessary Party" Priority of Coverage Defense
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A troubling trend has begun to develop in the New York additional insured coverage litigation arena on the issue of priority of coverage. Disclaiming insurers who potentially owe additional insurance coverage, when confronted with a summary judgment motion, or even at earlier stages, have argued that until they have all available policies that may provide coverage, they cannot confirm their duty to defend. In the past, insurers have found support for this approach in *BP A.C. Corp. v One Beacon Ins. Group*, 8 N.Y. 3d 708 (2007), and more recently in *Paramount Ins. Co. v. Federal Ins. Co*., 174 A.D.3d 476 (1st Dep't 2019), which held that it was premature to determine priority of coverage as between two insurers, because the court did not have and must "consider all of the relevant policies at issue."

In *Paramount*, the underlying personal injury action alleged that the plaintiff fell at or near the premises owned by Paramount Insurance Company's ("PIC") insured and leased to Federal Insurance Company's ("FIC") insured. In its decision, while affirming the trial court's ruling that FIC had a duty to defend PIC's insured, the Court held that it was premature to make a determination as to priority of coverage between the PIC and FIC policies because policies issued to other defendants by other non-party insurers may affect FIC's obligations to PIC's insured. *See id.* at 477.

Taken at face value, the effect of *Paramount* is to make every potential insurer a "necessary party" for purposes of determining priority of coverage between two insurers, because determining priority of coverage of "all the relevant policies" also requires the presence of the insurers issuing those policies. *See Forty Second Assoc., Inc. v Natl. Fire Ins. Co. of Hartford*, 48 Misc 3d 1211[A], 2015 NY Slip Op 51042[U], *4 (Sup Ct, NY County 2015) ("National and Hartford will have to battle the matter of priority between themselves, which cannot happen here, as Hartford has not been brought into the suit."). This would create an intractable situation for those pursuing the disclaiming insurer.

Fortunately, when confronted with this argument, rather than considering it as an afterthought, courts have begun to reject it. In *Greater NY Mut. Ins. Co. v. State Natl. Ins. Co., Inc.*, 2019 NY Slip Op 33579[U] (Sup Ct, NY County 2019), Greater NY sought a declaration that State National was required to provide additional insured coverage to Greater NY's insured. In opposition, State National argued that a policy issued by another insurer, not a party to the action, was required to be exhausted before their policy was triggered. The trial court rejected the argument as the other insurer was "no longer a party to th[e] action and *need not be for the court to determine priority of coverage between*" State National and Greater NY. *Id.* at *14 (emphasis added). The court noted that State National, as always, "is free to seek equitable contribution as against [the non-party insurer] in [a] … declaratory judgment action." *Id.* at *14-15; *see also Interstate Fire & Cas. v Aspen Ins. UK Ltd.*, 2019 NY Slip Op 33189[U], (Sup Ct, NY County 2019) (rejecting insurer's motion to dismiss for failure to join necessary insurer's because "complete relief can be accorded to the existing parties without [the non-party insurers] inclusion" and if "defendant[] determine[s] that [the non-party insurers] are responsible for coverage, they may implead them in this matter or may seek contribution from them in a separate action").

As the *Greater NY* and *Aspen* courts correctly note, complete relief can be provided between the

litigating insurers without reviewing all other policies that potentially provide coverage. Requiring all potential policies places an undue burden on the insurer seeking coverage rightfully owed by the disclaiming insurer to prove a negative, *i.e.*, that no other policy exists that may provide coverage.