NEW YORK COURT OF APPEALS ROUNDUP:

ADDITIONAL INSURED'S RIGHT TO DEFENSE, HIGH-LOW AGREEMENTS, DRIVING WHILE INTOXICATED, AND CONFRONTATION CLAUSE

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The Court of Appeals clarified an insurer's duty to defend an "additional insured" on the same basis as the named insured on a policy, in a decision we discuss this month.

We also discuss the Court's ruling on the disclosure to the trial court and the other parties of a "high-low agreement" between a plaintiff and defendant, although the opinion did not specify how trial courts should handle disclosure to the jury of such agreement and their terms.

In addition, we discuss decisions in two criminal cases. In one, the Court held that "driving while intoxicated" applies to alcohol intoxication only, not impairment due to drugs. In the other, a majority of the Court found that the decedent's excited utterance at the scene of a shooting in response to police interrogation was not testimonial, and thus could be admitted into evidence without violating the defendant's Sixth Amendment right of confrontation.

Coverage of Additional Insured

In *BP Air Conditioning Corp. v. One Beacon Insurance Group*, the Court was asked to determine whether an additional insured's entitlement to a defense under a Comprehensive General Liability policy was contingent upon a determination in the underlying personal injury action that the named insured was responsible for the condition that allegedly caused the accident. In an opinion by Judge Carmen Beauchamp Ciparick, the Court unanimously held that the coverage was not contingent, and thus the additional insured was entitled to a defense to the same extent as the named insured.

The case arose in the common context of a construction project and an ensuing personal injury action brought by a worker injured at the job site. The worker (Mr. Cosentino) sued Henegan Construction Co., the general contractor, which brought into the case as third-party defendants BP Air Conditioning (BP), the HVAC subcontractor, and BP's subcontractor, Alfa Piping (Alfa).

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Mr. Cosentino then sued BP and Alfa as direct defendants. The case presented a fact question as to which of the contractors, or perhaps other parties, should be held liable for the condition that allegedly caused Mr. Cosentino's injury. Pursuant to a contract, Alfa obtained coverage for BP as an additional insured, under its policy with One Beacon. When One Beacon declined to defend BP, BP sued for its right under Alfa's policy to a defense to the Cosentino action and for reimbursement of its past defense costs. BP later moved for summary judgment, which was granted by the motion court and affirmed in a 3-2 decision in the Appellate Division, First Department.

The relevant language in the additional-party endorsement of the Alfa policy provided that a "person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured." As read by the dissent in the Appellate Division, such endorsement would activate coverage only upon a showing that the cause of Mr. Cosentino's injury, in whole or in part, was Alfa's actions at the construction site. The Court of Appeals disagreed. There was no condition precedent to coverage, and the obligation to provide a defense required no showing that the cause of Mr. Cosentino's injury was work performed by Alfa.

The Court also reaffirmed the principle that the duty to defend is very broad and therefore a defense must be provided whenever the complaint suggests a reasonable possibility of coverage. If any of the claims alleged in a complaint fall within the risk of loss insured against, coverage will lie and the merits of the complaint are irrelevant; what the insured has purchased is litigation insurance, and the insurer is liable for the cost of defense even when it may not ultimately be obligated to indemnify the insured for losses.

The Court flatly rejected One Beacon's attempt to create a different standard for coverage to lie in favor of additional insureds, and stated that to do so would defy the well-understood meaning of the term "additional insured" as provided with the same protection as the named insured. Finally, the Court held that the same standard exists for named insureds and additional insureds in terms of an insurer's obligation to provide a defense.

High-Low Agreements - Now What?

Matter of Eighth Judicial Circuit District Asbestos Litigation was a case in which the Court granted leave to consider the issue of whether the trial court committed error when it failed to disclose to a defendant that the plaintiffs and the other defendant had entered into a typical high-low agreement (the agreement) under which, regardless of the verdict the jury returned against that defendant, the plaintiffs' recovery against it in the case would never be less than $155,000 and would be capped at $185,000.

In an opinion by Judge Eugene F. Pigott Jr., a unanimous Court held that the trial court had committed error by such nondisclosure, that the ruling prejudiced the rights of the nonagreeing defendant to be "treated fairly," and that the case should be remanded for a new trial on both liability and damages. In doing so, the Court left entirely to the discretion of the trial judge the effect that the agreement will have at trial, including whether it or its terms and conditions

should be disclosed to the jury.

We suggest that the Court's ruling may signal the death-knell of pretrial high-low agreements in multiple defendant jury cases, except where conditioned upon the freedom of the plaintiff to have such agreement deemed void if the trial court at the outset of the trial rules that the jury may be told of it, or the agreement is made after the trial court rules on that issue. Where such conditional agreements are entered into, the trial judge will surely face the plaintiff's in limine motion to avoid disclosure to the jury of its existence and, more importantly, its terms and conditions.

The underlying facts of the case are not complicated. Plaintiff Donald Reynolds was an employee for 35 years at an oil refinery in New York. In 2003, he was diagnosed with mesothelioma, a deadly lung disease. He sued 20 defendants, claiming his exposure to asbestos during his employment was the cause of his health problem. As the Court noted in its opinion, the trial judge had been effective in eliminating by settlement or otherwise all but two of the defendants. Prior to trial, plaintiffs entered in a high-low agreement with one of the remaining defendants. The trial court was told of the agreement; the other defendant was not. The jury returned a verdict for $3.75 million, apportioning 40 percent to the defendant that had entered into the high-low agreement and 60 percent to the other defendant. This judgment was reduced to $2.7 million. Pursuant to the agreement, the contracting defendant was liable for only $185,000, the cap. The noncontracting defendant (as reflected in the dissent in the Appellate Division) ultimately had judgment entered against it for $1.155 million.

The Court of Appeals ruling mandates that such agreements be disclosed to the other parties and the trial court. How, if at all, the court permits the existence and/or terms and conditions of the agreement to be shared with the jury, will be the perplexing issue. There is no question that the nonagreeing defendant, if permitted to do so, can make use of such an agreement at every phase of the trial - from jury selection through requests to charge, and particularly during cross-examination - to great advantage.

While it is unclear how trial courts will rule with respect to whether and how high-low agreements are used with a jury, the Court's opinion is bottomed on the principle of fundamental fairness and the recognition that, if a high-low agreement is not disclosed to the jury, there is a distortion of the true adversarial relationship of the parties. It will be challenging for trial courts to find ways in which to accommodate such basic principles without disclosure, and it would appear that the answer will not be governed by CPLR 4533-b, which provides that proof of payment by or settlement with another joint tortfeasor shall be taken out of the hearing of the jury.

'Intoxication' and Drugs

At first glance, it might appear surprising that a young man who caused a fatal car crash allegedly by driving while high on an inhalant could not be charged with driving while intoxicated. A study of Chief Judge Judith S. Kaye's thorough opinion for the unanimous Court in *People v. Litto*, however, reveals that the Legislature limited the "intoxication" provisions of

Vehicle and Traffic Law §1192 to alcohol usage, and established a separate regime under that section for driving under the influence of drugs.

While driving a car, Mr. Litto picked up a can of "Dust-Off" and sprayed it into his mouth. Dust-Off contains difluoroethane, an aerosol commonly found in certain cleaning and other products. Forty-five seconds later, his vehicle veered into oncoming traffic, hitting another vehicle. One person was killed, and several were injured. The grand jury indicted Mr. Litto on 14 counts, including driving while intoxicated in violation of §1192(3), and vehicular manslaughter based upon the charged §1192(3) violation. At issue was the Supreme Court's dismissal of those two counts, which the Court of Appeals affirmed. The remaining counts of the indictment were upheld by the Supreme Court, however, including manslaughter, criminally negligent homicide, reckless endangerment, and reckless driving.

The prosecution could not have charged Mr. Litto under §1192(4), for driving "while ability impaired by drugs," because "drug" is defined for purposes of that statute as one of a number of listed substances. (The Court noted that, since the incident in this case, §1192 has been amended, inter alia, to add §(4-a), which prohibits driving while ability impaired by "the combined influence of drugs or of alcohol and any drug or drugs," and stated that it was not called upon here to determine the meaning of "any drug" in (4-a). A future argument that "any drug" encompasses substances not on the list of a "drug," however, would seem to be quite strained.)

In concluding that "intoxication" does not include impairment by any substance other than alcohol, the Court relied upon the common understanding of the term, principles of statutory construction, and legislative history going back to 1910 when the predecessor to §1192 was enacted, and proceeding through amendment of the law over time. That history reflects that the Legislature did not want to criminalize driving while inadvertently impaired by a prescription drug with side-effects not known to driver, and thus limited criminal liability to impairment under specifically enumerated drugs.

The Court acknowledged that the goal of the Legislature might be advanced by including drugs within "intoxication," but that was not the approach the Legislature chose to take to achieve its ends.

Confrontation Clause - Excited Utterance

In *People v. Nieves-Andino*, the Court divided over the admission into evidence, under the excited-utterance exception, of a statement made by a victim to an officer who arrived at the scene of the shooting. The defendant argued that because the statement was testimonial, his rights under the confrontation clause had been violated. The Court, in an opinion by Judge Eugene F. Pigott Jr., disagreed.

Jose Millares was shot on the street. Minutes later, two officers arrived and found him lying on the ground, bleeding, and moaning in pain. A crowd of on-lookers had gathered around. Officer Doyle went to the aid of the victim, while his partner began to examine the ground for

shell casings. Officer Doyle summoned an ambulance, next asked Mr. Millares for his name, address and telephone number, and then inquired what had happened. The victim stated that he had been shot by "Bori" (as defendant is called). At Officer Doyle's request, Mr. Millares furnished Bori's address. Later, an eyewitness came forward and identified defendant as the shooter.

The majority and minority were in agreement over the correct legal test, set forth in *Davis v. Washington*, 126 SCt 2266 (2006). Whether statements made in response to police inquiry are "testimonial," and thus may not be admitted into evidence if the declarant is unavailable to be cross-examined, depends upon whether the circumstances "objectively" indicate that the "primary purpose" of the interrogation was to assist the police in meeting an "ongoing emergency," or instead to establish past events relevant to possible criminal prosecution.

The majority reasoned that, because Officer Doyle did not know the shooter's whereabouts when he began questioning the victim, the circumstances indicate that the officer "reasonably assumed" the emergency was ongoing and acted primarily to prevent harm. Although a police interrogation that begins with such a purpose may "evolve" to have another purpose, the record did not establish that to be the case here.

Judge Theodore T. Jones Jr. authored the dissent, in which Judges Carmen Beauchamp Ciparick and Robert S. Smith joined. Like the majority opinion, it rejected the bright-line test urged by defendant, that if an assailant has left the crime scene and thus no longer poses a threat to the victim, the primary purpose of police questioning can never be to deal with an ongoing emergency. But in this case, the dissent argued, the objective facts indicated that Officer Doyle's primary purpose was not to deal with an ongoing emergency: his partner was searching the area for evidence rather than an assailant, and Officer Doyle's own conduct demonstrated that he was seeking to learn what had happened, as opposed to what was happening. The dissent considered the constitutional violation to be harmless error, however, in light of the other evidence.