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COURT CASTS DOUBT ON EFFECTIVENESS OF ADDITIONAL INSURANCE COVERAGE

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Property owners routinely require their contractors to name them as an “additional insured” on the contractor’s insurance policy before allowing any construction or maintenance work to be performed. General contractors require the same coverage from their subcontractors, and the same requirement exists in various other settings. The purpose of the additional insured status is not to provide basic coverage; the property owner (or the general contractor) already has its own insurance policy, which covers the same risks that would be covered by the additional insured coverage. The primary reason for requiring this coverage is to protect the insurance policy of the additional insured at the expense of the party granting the additional insured status (the “Grantor”). The owner seeks to shift the burden of loss to the Grantor’s insurance policy, thereby protecting the owner from the financial consequences of a bad claim history.

Although owners may believe that they will be fully protected by demanding such coverage from their contractors, the effect of additional

insured coverage has remained unclear in this State. In a recent Superior Court of New Jersey decision, the Court completely ignored the intentions and expectation of the parties. While, as a purely legal matter, the Court’s decision in *W9/PHC Real Estate LP v. Farm Family Casualty Insurance Company* (App. Div., May 20, 2009) (“*Farm Family*”) is technically correct, the holding upsets the practical reasons for obtaining additional insured status and creates tremendous uncertainty for the party receiving that status.

In *Farm Family*, a property owner and its property manager (the “Owner”) sought to be and were named as additional insureds under the liability insurance policy provided by their snow removal contractor. The snow remover had a policy with Farm Family. The Owner had a general commercial liability policy through Zurich. After a slip and fall suit for damages arising from negligent snow removal on the Owner’s property, the Owner sought defense and indemnification as an additional insured under the Farm Family policy. The Court denied that claim based on an analysis of the “other insurance” provisions of the respective policies.

While there are various types of “other insurance” clauses, they fall into two basic categories. One category provides that if two primary insurance policies apply to the same loss, the two insurers must allocate the loss between them. The other type of “other insurance” clause is known as an “excess coverage” clause. Such a clause provides that, if other primary insurance covers the same loss, it must be exhausted before the excess policy kicks in.

In the *Farm Family* case, the Farm Family policy procured by the snow remover was an excess coverage policy. The Zurich policy was an allocation type. As a result, the Court held that Zurich provided primary coverage and Farm Family provided excess coverage. Since the limits of the Zurich policy covered the personal injury loss, the Farm Family excess coverage was never reached, despite the intent of the parties to shift the insurance risk to the snow remover who had agreed to name the Owner as an additional insured.

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The *Farm Family* ruling places everyone involved in the process of obtaining additional insured status in a situation that, for all practical purposes, is impossible. A company seeking additional insured status (or its insurance broker or consultant) realistically cannot compare the “other insurance” clauses of its own policy with that of the Grantor’s, to see whether they are excess, allocation or some other type of coverage. The problem becomes even more complicated on large construction projects, where the owner may be named as an

additional insured on dozens of policies issued to the contractor and subcontractors working on the site.

It should be noted that the analysis used by the *Farm Family* court is not consistent with cases involving anti-subrogation provisions. In cases involving those clauses New Jersey courts have respected the decision made by the parties and have not reallocated the coverage between the policies. Owners may rightly believe that an “other insurance” clause in the grantor’s policy should not apply where the grantor has agreed to

name the owner as an additional insured. In view of the *Farm Family* decision, however, that expectation may not be realized. A party seeking additional insured status should consider an endorsement in its own policy stating that, regardless of any “other insurance” clauses, its policy is excess to the Grantor’s policy.

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