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COURT OF APPEALS

STATE OF NEW YORK

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SIERRA,

Appellant,

-against-

No. 216

4401 SUNSET PARK, LLC, et al.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
October 22, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

MATTHEW S. LERNER, ESQ.  
GOLDBERG SEGALLA, LLP  
Attorneys for Appellant  
8 Southwoods Blvd., Suite 300  
Albany, NY 12211

COREY M. REICHARDT, ESQ.  
BRILL & ASSOCIATES, P.C.  
Attorneys for Respondent  
111 John Street, Suite 1070  
New York, NY 10038

Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 216, Sierra v. 4401  
2 Sunset Park.

3 Counselor, do you want any rebuttal time?

4 MR. LERNER: Two minutes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
6 Go ahead. You're on.

7 MR. LERNER: May it please the court, my  
8 name is Matthew Lerner and I represent Scottsdale  
9 Insurance Company. It is our position that  
10 Scottsdale Insurance Company met and complied with  
11 Insurance Law 3420(d). Notice to GNY was noticed to  
12 4401 and to Sierra Realty.

13 JUDGE PIGOTT: Aren't - - - aren't we, you  
14 know, almost not - - - not quite the opposite of what  
15 we just went through, but this whole business about  
16 who you - - - who you - - - who are you going to call  
17 and who do you write to is at the bottom of this too,  
18 right? I mean, they're saying you - - - you may have  
19 told our carrier; you didn't tell us.

20 MR. LERNER: That's exactly it. The - - -  
21 the argument of my opposing counsel is you notified  
22 GNY, the primary insurer of - - -

23 CHIEF JUDGE LIPPMAN: Yeah, but don't you  
24 have to notify real parties-in-interest? Is that - -  
25 -

1 MR. LERNER: Well, there's an agency  
2 relationship between - - -

3 CHIEF JUDGE LIPPMAN: I understand.

4 MR. LERNER: - - - GNY and the  
5 policyholders. So in this case, if you notify the  
6 agent, you're essentially - - - not essentially - - -  
7 you are notifying 4401 and Sierra Realty. So in this  
8 case we complied with Insurance Law 3420.

9 And the important part of this is that this  
10 court has stated, time and time again, that the whole  
11 purpose of Insurance Law 3420(d) is to stop dilatory  
12 practices by insurance companies, and to inform the  
13 claimant or the injured party or the insured that  
14 there's been a disclaimer of coverage. That's not  
15 this case here.

16 This case deals with one insurance company  
17 trying to shift their obligation to another insurance  
18 company. That's not what - - -

19 JUDGE SMITH: And you're not saying the  
20 insured had no interest?

21 MR. LERNER: No, not at all. The insured  
22 was the purported additional insured.

23 JUDGE SMITH: So that makes this different  
24 from that Excelsior case, where the - - - where the  
25 Excelsior - - - where the claim had already been paid

1 and Excelsior was the only - - - I guess, whoever it  
2 was - - - the carrier, the primary carrier, was the  
3 only party left.

4 MR. LERNER: Part - - - yeah, yes. The  
5 Insurance Home (ph.) was the nominal party and the  
6 Fireman's Fund, in the Excelsior case, was the real  
7 party-in-interest. But there was still the  
8 discussion about 3420(d) and how - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but it's a  
10 different case, though, you'd admit that?

11 MR. LERNER: It's - - - it's different  
12 facts. And there was - - - there was a settlement.  
13 But the cog - - -

14 CHIEF JUDGE LIPPMAN: But it's different in  
15 terms of its meaning and who you're serving and what  
16 their relationship is, right?

17 MR. LERNER: No, I don't - - - I don't  
18 believe so. And the reason why I say this is  
19 because, who is the real party-of-interest in this  
20 case? We have GNY, who benefits from the shifting of  
21 the obligation of the defense and the indemnity - - -

22 JUDGE PIGOTT: Were you - - - were you  
23 going to be coinsurers? Or - - - or are you an  
24 access?

25 MR. LERNER: We were going to be - - - we

1 would be the primary insurer.

2 JUDGE PIGOTT: Primary.

3 MR. LERNER: We would be covering the - - -  
4 there would be additional insureds, essentially named  
5 insureds on our pol - - -

6 JUDGE PIGOTT: So GNY would be out?

7 MR. LERNER: GNY would be out, correct.

8 JUDGE GRAFFEO: How did you know that GNY  
9 was going to tell 4401 and Sierra that you had sent  
10 notice?

11 MR. LERNER: They have an obligation to  
12 them that they're their insurance company. They're  
13 an agent acting on the behalf of their insurers - - -  
14 I'm sorry, insureds.

15 JUDGE GRAFFEO: And wh - - - is there a  
16 provision of the Insurance Law that places that  
17 obligation on them? Is it - - - is it in 3420(d)?

18 MR. LERNER: No, it - - -

19 JUDGE GRAFFEO: I mean, I don't see it.

20 MR. LERNER: I don't think it's statutory.  
21 It's at the agency - - -

22 JUDGE GRAFFEO: I don't see it there.

23 MR. LERNER: It isn't - - -

24 CHIEF JUDGE LIPPMAN: Why did - - - why did  
25 they send the notice, the primary insurer?

1 MR. LERNER: Why did - - -

2 CHIEF JUDGE LIPPMAN: Why did - - -

3 MR. LERNER: - - - why did GNY send - - -

4 CHIEF JUDGE LIPPMAN: Why are they the one?

5 Yeah, why were they the one to send?

6 MR. LERNER: Well, that's - - - they're the  
7 real party-in-interest. If 4401 and Sierra Realty  
8 had - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but the real  
10 party-in-interest in a very different context.

11 MR. LERNER: I'm sorry?

12 CHIEF JUDGE LIPPMAN: They're the real  
13 parties-in-interest in a different context. They're  
14 not the parties-in-interest in this case.

15 JUDGE GRAFFEO: They're not the ones who  
16 are going to be sued.

17 MR. LERNER: I'm so - - - they're the ones  
18 being sued; that's correct. But they have insurance.  
19 This is a - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but that - - -  
21 it's a consequence of whether these people, you know,  
22 are - - - are responsible, yes, there's a  
23 consequence. But the primary insurer is not the real  
24 party-in-interest.

25 MR. LERNER: Sure it is. It's - - - it's



1           There are two different entities with the same  
2           address. So will there be a rule? I think there are  
3           some cases where if Scottsdale would send to one  
4           address, does that count for both 4401 and Sierra, or  
5           does it count just for 4401? There's - - -

6                    JUDGE SMITH: But don't you have - - - I  
7           mean, you - - - you have a contract which - - - which  
8           says this - - - these people are additional insureds.

9                    MR. LERNER: Yes. There's a - - -

10                   JUDGE SMITH: I mean, should - - - don't -  
11           - - don't you have the obligation to find out their  
12           names and addresses and send them a notice? It's not  
13           that hard.

14                   MR. LERNER: Well, and this is a mistake  
15           that the Second Department made. We did not issue  
16           the certificate of insurance. That's a - - - that's  
17           a mistake in the court below. We learned - - - we  
18           had the certificate of insurance when it was sent to  
19           us by GNY.

20                   JUDGE PIGOTT: You didn't know that they  
21           were an additional insured until GNY served you with  
22           the notice?

23                   MR. LERNER: No, because what we - - - what  
24           we have in our CGL policy is called a blanket  
25           additional insured endorsement, so it basically has

1 broad language that says anyone who - - -

2 CHIEF JUDGE LIPPMAN: But then you knew,  
3 right?

4 MR. LERNER: We knew once we - - -

5 CHIEF JUDGE LIPPMAN: Once they served you,  
6 you knew.

7 MR. LERNER: Yes. Yes, Your Honor.

8 CHIEF JUDGE LIPPMAN: So again, as Judge  
9 Smith indicated, what's so difficult here? Why, from  
10 a policy perspective, shouldn't you serve the real  
11 parties-in-interest, which is a relatively simple  
12 task, isn't it?

13 MR. LERNER: It's a relatively simple task  
14 if you want to have a rule where you have an  
15 insurance company send out all letters to anybody  
16 who's carbon-copied - - -

17 JUDGE SMITH: Why - - -

18 MR. LERNER: - - - on the letter.

19 JUDGE SMITH: Could you have written back  
20 to GNY and said give me the name and address of your  
21 - - - of the - - - of our additional insureds?

22 MR. LERNER: We cou - - - I mean, we could  
23 have, but I think that it wouldn't - - -

24 CHIEF JUDGE LIPPMAN: It anyway - - - you  
25 don't need to do that. You need - - - you knew them,

1 right?

2 MR. LERNER: We knew - - -

3 CHIEF JUDGE LIPPMAN: Who the real parties-  
4 in-interest were?

5 MR. LERNER: Well, the real party-in-  
6 interest - - -

7 CHIEF JUDGE LIPPMAN: The additional  
8 insureds, you knew who they - - -

9 MR. LERNER: One - - - well, once we were  
10 served with the - - -

11 CHIEF JUDGE LIPPMAN: Yeah.

12 MR. LERNER: - - - the tender letter. But  
13 by sending - - - sending a disclaimer to GNY, we were  
14 sending to the agent of 4401 and Sierra.

15 CHIEF JUDGE LIPPMAN: Okay, let's - - -  
16 let's hear from your adversary and then you'll have  
17 your - - - your rebuttal.

18 MR. LERNER: Thank you, Your Honor.

19 MR. REICHARDT: Good afternoon, may it  
20 please the court, Corey Reichardt, on behalf to the  
21 respondents, 4401 Sunset Park and Sierra Realty.

22 CHIEF JUDGE LIPPMAN: Counsel, what's the  
23 policy considerations here?

24 MR. REICHARDT: The policy - - -

25 CHIEF JUDGE LIPPMAN: Why should we rule

1 for you?

2 MR. REICHARDT: The policy considerations  
3 here are that specifically in the tender letter that  
4 was sent by GNY, GNY stated that counsel had been  
5 appointed to represent the additional insureds. They  
6 had - - - they had lawyers already. This is not a  
7 matter of who do I respond to, GNY, do I respond to  
8 them. They had attorneys already. And GNY had its  
9 own interest in sending a tender letter to - - - so  
10 that they didn't have to pay for a defense and  
11 indemnity. So that's - - -

12 CHIEF JUDGE LIPPMAN: Well, but their  
13 interests, so they're not really adverse to your  
14 interests, right?

15 MR. REICHARDT: They're - - - they're not  
16 adverse at that time, but they have their own  
17 interest. They're not doing so solely as an agent of  
18 the additional insureds. They're doing it so,  
19 because they don't want to have to pay a defense and  
20 indemnity here. And in the case law, in the industry  
21 - - -

22 JUDGE PIGOTT: Were you - - - were you  
23 copied on the letter that GNY sent to Sierra - - -  
24 sent to Scottsdale?

25 MR. REICHARDT: We were not copied on that

1 letter.

2 JUDGE PIGOTT: All right. So - - - so they  
3 get a letter from - - - from GNY saying we're  
4 tendering the defense, and they write back, and say,  
5 you're too late; we're not doing it. I mean, what -  
6 - - that - - - that makes commercially logical sense.

7 MR. REICHARDT: Yes, however, the statutory  
8 - - - the statute provides that 3420(a)(3) says  
9 anyone can give notice. The legislature has decided  
10 that anyone - - -

11 CHIEF JUDGE LIPPMAN: But - - - but why is  
12 it - - -

13 MR. REICHARDT: - - - the injured party can  
14 give notice - - -

15 CHIEF JUDGE LIPPMAN: - - - more fair - - -  
16 why is it fairer for - - - for them to have to notify  
17 you? These guys are your agent. They think they're  
18 responding to the people who - - - who sent the  
19 notice to them.

20 MR. REICHARDT: The - - -

21 CHIEF JUDGE LIPPMAN: Why is - - - why is -  
22 - - again, from a policy perspective, your argument  
23 is that - - - that the primary insurer's interest is  
24 not necessarily yours, that's why it's - - - it's - -  
25 - it is, you know - - - you should - - - you should

1 get the notice directly?

2 MR. REICHARDT: Well, from - - - from a  
3 policy point of view here, the insurer is not always  
4 aligned in interest with its insured. There's policy  
5 limits. There's exclusions.

6 JUDGE ABDUS-SALAAM: But they - - - they  
7 did, as the Chief Judge said, choose your counsel.  
8 So if they weren't aligned in interest with you,  
9 wouldn't it be unethical for their lawyer to continue  
10 to represent you?

11 MR. REICHARDT: I'm saying that at the time  
12 when the tender is made, their interests are aligned,  
13 but if we're going to start calling an insurance  
14 company an agent in fact, when there are many  
15 situations where there are many situations where  
16 their interests will not be aligned, especially when  
17 there's counsel already appointed.

18 JUDGE GRAFFEO: Well, if they have this  
19 general clause about additional - - - they cover  
20 additional insureds, in other fact patterns, is that  
21 company always going to know who the additional  
22 insureds are?

23 MR. REICHARDT: Well, yes, because when the  
24 tender is made, the tender is made usually with the  
25 summons and complaint. It says here are the

1 defendants. Usually they provide - - - and  
2 especially when you're dealing with construction  
3 contracts. Owners bargain for additional insured  
4 coverage.

5 JUDGE PIGOTT: Right, but it - - - but can  
6 you see the point? I mean, LM Interiors has got  
7 Scottsdale. You've got GNY. All right? LM  
8 Interiors says we'll name you as an additional  
9 insured. They don't know that. Scottsdale doesn't  
10 know that. They just have this general - - -

11 MR. REICHARDT: Well, Scottsdale - - -  
12 Scottsdale provides a - - - an additional insured, a  
13 blanket endorsement that's purchased.

14 JUDGE PIGOTT: I know. I'm almost done.  
15 So - - - so they don't know that you're - - - that  
16 you're one of the additional insured until GNY writes  
17 and says we've got this situation. We don't think we  
18 cover it; you do, because you've named them as an  
19 additional insured. They write back to them, and  
20 say, no, we're not, because it's untimely. What's -  
21 - - who's missing in the notice?

22 MR. REICHARDT: Well, when Scottsdale  
23 offers a blanket additional insured endorsement, it's  
24 on notice that they were insuring the contractor, and  
25 that contractor is going to enter into construction

1 contracts with owners that are going to become  
2 additional insureds on their policy.

3 JUDGE PIGOTT: Exactly.

4 MR. REICHARDT: So at that point then,  
5 Scottsdale's on notice by the fact that they offer  
6 that endorsement. That when they get a tender from a  
7 primary insurer, that there are additional insureds  
8 and that they need to act pursuant to 3420(d) and  
9 disclaim directly to those additional insureds.  
10 Otherwise why - - - they get the benefit of selling  
11 that endorsement to - - - to contractors.

12 Contractors purchase insurance from Scottsdale - - -

13 CHIEF JUDGE LIPPMAN: So should they not  
14 even bother to - - - to get back to the primary  
15 insurer?

16 MR. REICHARDT: They don't have to. And  
17 actually, this is the same reason why - - -

18 CHIEF JUDGE LIPPMAN: So they don't really  
19 matter in your perspec - - - from your perspective.  
20 The primary insurer really doesn't matter. They're  
21 on notice of this whole business. They know who the  
22 - - - the real party-in-interest is. They serve  
23 them, and it really doesn't matter what they do or  
24 don't do with the primary insurer.

25 MR. REICHARDT: It doesn't matter, and

1 actually the - - - the law recognizes that, because  
2 3420(d) doesn't apply between insurers. So the law  
3 already recognizes that.

4 JUDGE SMITH: But why - - - why is the  
5 letter - - - the primary carrier's letter not show a  
6 copy to it - - - to its end, Scottsdale's insureds?

7 MR. REICHARDT: I don't know why it's not -  
8 - - it wasn't copied to their named insureds and the  
9 additional insureds - - -

10 JUDGE SMITH: It might have solved the  
11 whole problem. Then they could have - - - they could  
12 have CC'd the same people on the reply, and we  
13 wouldn't be here.

14 MR. REICHARDT: But - - - but the letter -  
15 - - in the body of the letter itself, it said that  
16 there was already counsel appointed for the  
17 additional insureds. So they already had the lawyers  
18 for the additional insureds. They had an answer - -  
19 -

20 JUDGE SMITH: Would that have been adequate  
21 notice, to send it to the - - - that lawyer?

22 MR. REICHARDT: Ab - - - I don't know what  
23 could be more adequate notice than we have retained  
24 counsel to answer the complaint. Please acknowledge  
25 our tender, and we'll arrange to have the coun - - -

1 have counsel substituted to your counsel.

2 JUDGE SMITH: No, I mean, would that have  
3 been an adequate disclaimer, if they had said - - -  
4 if they had disclaimed to the law - - -

5 MR. REICHARDT: To the attorneys? Yes,  
6 under the law that - - - to the attorneys, that would  
7 have been an adequate disclaimer. And the attorney's  
8 information was right there on that piece of paper,  
9 and I submit that this is a clerical error that  
10 Scottsdale is looking to - - - to throw 3420(d) on  
11 its head due to a clerical error by a claims person  
12 here.

13 JUDGE PIGOTT: Well, was - - - was LM  
14 Interiors rep - - - being represented by Scottsdale  
15 at this point?

16 MR. REICHARDT: They were insureds.  
17 Scottsdale disclaimed to LM Interiors for late  
18 notice.

19 JUDGE PIGOTT: Right. So - - - so  
20 Scottsdale was not in this case at this point.

21 MR. REICHARDT: At - - - at the time, I do  
22 not believe so. I think that was their first notice  
23 of the loss, when GNY sent a tender letter.

24 CHIEF JUDGE LIPPMAN: Okay, what else,  
25 counselor, anything?

1 MR. REICHARDT: Just - - - just in terms of  
2 the real party-in-interest, as I was saying before,  
3 the - - - well, the Excelsior case, as Your Honor  
4 corrected noted, is completely different. And  
5 actually in Greater New York v. Chubb, that came out  
6 of the First Department last year, it specifically  
7 said that Excelsior doesn't apply here, because in  
8 Excelsior, when the 3420(d) argument was made - - -  
9 which was made, by the way, on the eve of trial,  
10 which was one of the reasons why the - - - the court  
11 rejected it. They said, at this point, Fireman's  
12 Fund had funded - - - had funded the settlement and  
13 they were solely going to get - - - they were solely  
14 looking to recoup their money.

15 But the First Department in Greater New  
16 York v. Chubb said this case is different, because  
17 right now there's a potential verdict in excess of  
18 the policy. So the real party-in-interest, arguably,  
19 must fail as a matter of law, and the 3420(d) is  
20 specific that it is not a two-way street like  
21 3420(a)(3) that allows anyone to give notice. The  
22 legislature said no, anyone could give the notice,  
23 but if you want to disclaim, there's only one way to  
24 do it, and that's the insurer.

25 JUDGE PIGOTT: If Scottsdale had sent you

1 the notice, what would you have done - - - you, being  
2 your client?

3 MR. REICHARDT: If Scottsdale had sent us  
4 the notice? We could have challenged the - - - we  
5 could have challenged the late notice disclaimer. We  
6 could have - - -

7 JUDGE PIGOTT: You could do that - - - you  
8 could do that afterwards too, right? I mean - - -

9 MR. REICHARDT: We can do it afterwards,  
10 but this legislature has said that as - - - as an  
11 insured, we're entitled to know that immediately.

12 JUDGE PIGOTT: So the on - - - the - - -  
13 your - - - your defense is ha - - - we would have  
14 challenged Scottsdale's disclaimer had we been timely  
15 told. GNY was timely told. However long it took GNY  
16 to tell us, it doesn't make any difference. We just  
17 - - - we - - - that letter had to be directed to us  
18 and not them, and therefore, we need not challenge  
19 the disclaimer, because they can't - - - they didn't  
20 properly disclaim.

21 MR. REICHARDT: Well, yes, we could have  
22 challenged the disclaimer. We also could have  
23 potentially sought other recourse against LM  
24 Interiors if they violated any - - - any - - -  
25 because LM Interiors was also disclaimed upon for

1 late notice, and there's - - - if there's a  
2 contractual indemnity provision, there may be  
3 recourse then against LM Interiors for not complying  
4 with its insurance obligation which would provide it  
5 for no indemnification for contractual indem - - -  
6 for a contractual indemnity claim by the owners.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. REICHARDT: Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks, counsel.  
10 Counselor, rebuttal?

11 MR. LERNER: Yes. Talk about turning  
12 3420(d) on its head. This court stated in Zappone,  
13 this is not going to be a technical trap for  
14 insurers, and that's exactly what's happened here.  
15 This wasn't a clerical - - -

16 CHIEF JUDGE LIPPMAN: Did you make a  
17 clerical error here? That's the way your adversary  
18 describes what happened.

19 MR. LERNER: We did make - - - not make a  
20 clerical error. The - - -

21 CHIEF JUDGE LIPPMAN: What happened?

22 MR. LERNER: What happened was is that the  
23 claims exam - - - the claims examiner or the person  
24 in the position who wrote that letter believed that  
25 when he was writing it to GNY, GNY was the agent of -

1           - - of 4401 and Sierra Realty. In the GNY tender  
2 letter, it's stated - - -

3           CHIEF JUDGE LIPPMAN: Their point is that  
4 the - - - the primary insurer's interest is not  
5 necessarily theirs, and at some point, clearly, it  
6 may not be necessarily theirs.

7           MR. LERNER: At that point the primary - -  
8 - I didn't hear that; I'm sorry.

9           CHIEF JUDGE LIPPMAN: I'm saying their  
10 point is that the primary insurer's interests are not  
11 necessarily their interests, and at some point that  
12 may be decidedly the case.

13           MR. LERNER: They have a fiduciary duty to  
14 their policyholder to pass on information that's  
15 dealing with coverage. I - - - I disagree with that.

16           JUDGE ABDUS-SALAAM: Why didn't you just  
17 send a disclaimer to their lawyer, the - - - a lawyer  
18 had been appointed for them. Why didn't you just  
19 send it to them - - - to the lawyer?

20           MR. LERNER: In this case, the lawyer was  
21 staff counsel, but I - - - to answer the question, we  
22 sent it to GNY. The staff counsel and GNY had the  
23 same address, but our argument is not - - - our  
24 argument was that sending it to G - - - our argument  
25 is that sending it to GNY was sufficient.

1 JUDGE SMITH: Suppose - - - I mean - - -

2 JUDGE GRAFFEO: Mr. Lerner, what would be  
3 the rule you want us to state in this case?

4 MR. LERNER: A disclaiming insurer complies  
5 with Section 3420(d) in response to a tender letter  
6 when it timely sends the written disclaimer letter to  
7 the tendering insurer rather than the purported  
8 additional insureds. That would be the rule.

9 JUDGE SMITH: And that would - - - I mean,  
10 in this case, that rule would - - - would the - - - I  
11 don't see any great inequity in applying that rule,  
12 but isn't there - - - if we'd make that the universal  
13 rule, aren't there going to be some cases where there  
14 are insureds out there with real interest, who might  
15 have - - - may have exposure well beyond their policy  
16 limits and may be good for the money, who never hear  
17 about the disclaimer?

18 MR. LERNER: That, again - - -

19 JUDGE SMITH: Should - - - shouldn't we  
20 have a rule that avoids that dan - - - I mean, isn't  
21 - - - isn't it best to have one rule, fits all,  
22 everybody knows what the rule is. And isn't the best  
23 rule do what the statute says, send it to the  
24 insured?

25 MR. LERNER: I - - - I don't believe so.

1 When you have an agency relationship, it's the same  
2 thing as if Scottsdale would have sent it to - - - if  
3 Scottsdale would have sent it to 4401 and Sierra  
4 Realty's attorney. There's a - - - there's an  
5 obligation there to pass it on to either your client  
6 or the policyholder.

7 CHIEF JUDGE LIPPMAN: But you're depending  
8 on that application, rather than your own acts that  
9 make clear that you meet your responsibilities?

10 MR. LERNER: I don't understand, Your  
11 Honor.

12 CHIEF JUDGE LIPPMAN: You're depending on  
13 them to pass it on, instead of you doing what you're  
14 suppose to under the statute?

15 MR. LERNER: It's not - - -

16 CHIEF JUDGE LIPPMAN: Why?

17 MR. LERNER: I don't read the statute as -  
18 - - as being - - - not being able to have that agency  
19 relationship. If you're - - - if you're sending it  
20 to the attorney, the attorney has an obligation to  
21 tell - - -

22 CHIEF JUDGE LIPPMAN: No, but you didn't  
23 send it to the attorney, right?

24 MR. LERNER: But I'm saying,  
25 hypothetically, if you send it to the attorney, the

1 attorney has an obligation to tell his clients that  
2 there's - - - that there's been a disclaimer - - -

3 JUDGE GRAFFEO: You're saying it's  
4 comparable to sending it to the attorney, if you send  
5 it to the primary insurer?

6 MR. LERNER: Yes, Your Honor.

7 Just one last thing, again, going to the  
8 policy of why the 3420 was enacted. It wasn't  
9 enacted to have - - - be a technical trap to  
10 insurers. It was - - -

11 JUDGE PIGOTT: Well, yeah, but you're  
12 almost making it one. In other words, if we stick  
13 with insured, which is what it says, it seems to me  
14 we're in a safe harbor protecting the insureds. I  
15 think lawyers would get upset if insurance companies  
16 were communicating with their clients unbeknownst to  
17 them.

18 So including the lawyer within that makes  
19 some sense, but saying that an agent or a broker or  
20 someone else's notice - - - you know, we've got so  
21 many cases going the other way, saying that that  
22 doesn't work.

23 MR. LERNER: We're not - - - I'm not saying  
24 agent or broker. I'm saying primary insurance  
25 company.

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JUDGE PIGOTT: Okay.

MR. LERNER: The primary insurance company.

CHIEF JUDGE LIPPMAN: Okay, counsel.

MR. LERNER: Thank you.

CHIEF JUDGE LIPPMAN: Thanks. Thank you  
both, appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Sierra v. 4401 Sunset Park, LLC, No. 216, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

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