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CGL Dispatch



NEW JERSEY APPELLATE COURT EXAMINES SUBCONTRACTOR'S INSURANCE POLICY AND DETERMINES "ADDITIONAL INSURED" CLAUSE PROVIDES ONLY "EXCESS" COVERAGE

In Jeffrey M. Brown Associates, Inc. v. Interstate Fire & Casualty Company, No. A-2325-08T2, 2010 N. J. Super. LEXIS 108 (N.J. Super. Ct. App. Div. June 23, 2010), New Jersey's Appellate Court unanimously reversed the trial court's determination that a subcontractor's insurance policy provided primary coverage. Although the subcontract required the subcontractor to secure primary coverage for the general contractor, the appellate court determined that the language of the policy controlled and the extent of coverage afforded to the additional insured under the policy was "excess over any other insurance."

In a decision that the New Jersey Appellate Court has approved for publication, the court applied the clear language of an insurer's policy and held that despite agreement in a subcontract that required the named insured-subcontractor to obtain primary coverage for the additional insured-general contractor, the subcontractor's policy cannot be construed to expand the scope of coverage provided under an additional insured endorsement if the issuer of the policy was not provided notice of the subcontract's terms.

Subcontractor CAP Services obtained general liability insurance coverage from Interstate Fire & Casualty Company. The Interstate

GL policy contained an additional insured endorsement that afforded additional insured coverage to "any entity the Named Insured is required in a written contract to name as an insured...but only with respect to liability arising out of work performed by or on behalf of the Named Insured for the Additional Insured." The additional insured endorsement specifically provided that "[t]he insurance afforded by this provision shall be excess over any other insurance."

Subsequent to obtaining the Interstate GL policy, CAP entered into a subcontract agreement with Jeffrey M. Brown Associates, Inc. (JMBA) that provided:

See Tressler Success page 2 for conclusion

[CAP] shall procure and maintain, at its own expense, insurance....[CAP's] policy must name Owner and [Brown] as additional insureds and shall be the primary policy.

During the project, a sidewalk bridge collapsed and allegedly injured three CAP workers. Those individuals brought suit against the general contractor JMBA and others. JMBA and its insurer Zurich, in turn, filed a declaratory judgment action against Interstate for a declaration that Interstate's policy afforded primary coverage to JMBA.

On cross motions for summary judgment, the trial court ruled in JMBA/Zurich's favor. It determined that Interstate's policy afforded primary coverage to JMBA and it directed Interstate to 1) reimburse defense costs and fees incurred by JMBA in the defense of the underlying personal injury suits, 2) assume the defense of JMBA, 3) pay any settlement incurred or judgment entered against JMBA in the underlying personal injury suits and 4) pay counsel fees, pursuant to R.4:42-9(a)(6) to JMBA/Zurich for prosecuting the declaratory judgment action against Interstate.

The appellate court reversed. In determining whether the Interstate policy issued to subcontractor CAP provided primary coverage to the general contractor JMBA, the court examined the specific provisions of the Interstate policy and the Zurich policy issued to JMBA. The Interstate policy afforded additional insured coverage to JMBA "but only with respect to liability arising out of work performed by or on behalf of the Named Insured [CAP] for the Additional

Insured." The additional insured coverage under the Interstate policy provided "[t]he insurance afforded by this provision shall be excess over any other insurance." The Zurich policy issued to JMBA, on the other hand, as detailed in the "Other Insurance" clause set forth in the CG 00 01 10 01 form, provided primary coverage "except when b. below applies." The excess provision in Paragraph b provided:

This insurance is excess over:

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operation for which you have been added as an additional insured by attachment of an endorsement.

The Court held that since the Interstate policy provided JMBA with excess coverage, it was not "other primary insurance available to you [JMBA]."

In arriving at its decision, the appellate court distinguished the case of Pennsville Shopping Center Corp. v. American Motorists Insurance Co., 315 N.J. Super. 519 (App. Div. 1998) certif. denied, 157 N.J. 647 (1999) which had routinely been utilized in New Jersey by landlords, general contractors and their respective insurers to argue that when interpreting additional insured coverage the court should look not only at the extent of the additional insured coverage afforded in the policy but also the contract, subcontract or lease which required additional insured coverage be obtained. Indeed, JMBA and Zurich here argued that the subcontract between JMBA and CAP requiring "primary" coverage controlled the additional insured

coverage afforded by Interstate. Finding that there was no ambiguity in the additional insured endorsement of the Interstate policy issued to CAP, i.e. that the Interstate policy additional insured endorsement had an "excess other-insurance clause", the court held there was no need to consider the subcontract and reversed the trial court's order granting summary judgment in favor of JMBA/Zurich.

The appellate court's decision included discussion of W9/PHC Real Estate LP v. Farm Family Cas. Ins. Co., 407 N.J. Super. 177 (App. Div. 2009) and Cosmopolitan Mutual Insurance Co. v. Continental Casualty Co., 28 N.J. 554 (1959), of which both address the priority of coverage.

TRESSLER COMMENTS

JMBA and its insurer Zurich have now filed a petition to the New Jersey Supreme Court seeking further review. There is, however, no automatic right to a review by New Jersey's highest court from a unanimous decision of the New Jersey appellate court. Rather, the petitioner needs to meet the requirements of the New Jersey Court Rules. We would anticipate a decision as to whether the court will accept the petition in approximately three to six months.



Prepared by Joanna Crosby, a partner in our Newark office.

Tressler LLP has launched its newest newsletter
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CALIFORNIA SUPREME COURT FINDS THAT A SEVERABILITY-OF-INTERESTS PROVISION CREATES AN AMBIGUITY WHEN READ IN CONJUNCTION WITH AN EXCLUSION FOR INTENTIONAL ACTS OF “AN INSURED.”

In *Minkler v. Safeco Ins. Co. of America*, No. S174016, 2010 Cal. LEXIS 5669 (Cal. June 17, 2010), the California Supreme Court was asked to reconcile an exclusion barring coverage for the intentional acts of “an” insured with the severability-of-interests provision contained in policies covering multiple insureds.

The underlying dispute arose out of allegations that Scott Minkler’s (“Minkler”) Little League coach, David Schwartz, sexually molested Minkler over a period of time beginning in 1987. Minkler filed suit in 2003 in California Superior Court against David Schwartz and Betty Schwartz, David’s mother, asserting numerous causes of action including sexual battery, intentional infliction of emotional distress, negligence, and negligence per se. As against Betty Schwartz, Minkler filed a claim for negligent failure to supervise David Schwartz as the sexual molestation also purportedly took place in Betty Schwartz’s home. David Schwartz tendered the defense of the underlying suit to Safeco, which issued numerous homeowners’ insurance policies, effective August 26, 1988 through August 26, 1995, to Betty Schwartz as the named insured and her son, David Schwartz, as an additional insured.

Pursuant to the terms of the policies, Safeco was under an obligation to defend and indemnify “an” insured for personal injury or property damage resulting from an occurrence. The policies contained an intentional acts exclusion which precluded coverage “for injury ‘expected or intended’ by ‘an’ insured, or was the foreseeable result of ‘an’ insured’s intentional act.” Of paramount importance was the use “an” in lieu of “the” in the exclusion. Under California law absent contrary evidence, exclusions apply collectively to bar coverage for all insureds with respect to a particular occurrence when the acts of “an” insured fall within the ambit of an exclusion. The policies’ conditions also incorporated a severability-of-interest clause directing that the insurance applied separately to each insured.

Relying on the intentional act exclusion, Safeco denied coverage and Minkler later obtained a default judgment against Betty Schwartz. Pursuant to a settlement agreement between Minkler and Betty Schwartz, Betty Schwartz assigned her

claims, not provided in the opinion, against Safeco to Minkler, and he agreed not to execute the judgment. Thereafter, Minkler filed the instant action against Safeco alleging breach of contract and tortious breach of the covenant of good faith and fair dealing. Minkler maintained that Safeco wrongfully denied coverage and the case was later removed to federal court. The district court granted Safeco’s motion to dismiss and held that the intentional act exclusion precluded coverage for Minkler’s claims against Betty Schwartz. Minkler appealed to the Ninth Circuit, which certified the question of the effect of the severability-of-interests provision on the intentional acts exclusion. Essentially, the California Supreme Court was asked by the Ninth Circuit Court of Appeals to determine whether the intentional acts exclusion barred coverage for claims that Betty Schwartz negligently failed to prevent the intentional acts of David Schwartz since the policies contained a severability-of-interests provision.

The California Supreme Court closely examined the language of the severability-of-interest provision since finding it created an ambiguity regarding the reach of the exclusion barring coverage for the intentional acts of “an” insured. The language of the severability-of-interests provision clearly and unambiguously directed that the coverage applied separately to each insured as though each insured procured an independent policy. Under the terms of the policy, the California Supreme Court held that Betty Schwartz reasonably expected Safeco’s policies to provide coverage for her acts independent of the acts of other insureds so long as her conduct did not fall within the scope of the intentional acts exclusion. The court found that merely because David Schwartz’s acts fell within the intentional act exclusion Betty Schwartz was not precluded from obtaining coverage as a result of the severability-of-interest provision. Stated otherwise, Betty Schwartz’s acts were to be analyzed independent of David Schwartz’s

acts and the proper application of the exclusion was several, not collective.

TRESSLER COMMENTS

Based upon the specific facts and policy language of this case, the California Supreme Court, following the minority rule among jurisdictions, refused to apply an intentional acts exclusion to an insured unless *that* insured committed the act that fell within the exclusion, in light of the severability clause in the policies. Therefore, careful reading of the policy language is required to determine whether an exclusion barring coverage for an insured’s intentional acts precludes another insured from obtaining coverage for the alleged negligent failure to prevent the intentional acts when a policy contains a severability-of-interest clause. Based upon *Minkler*, when evaluating application of an intentional acts exclusion for various insureds, an insured’s alleged acts are to be analyzed separately because an excluded act of one insured does not automatically preclude coverage for other insureds who did not commit the excluded act.



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WISCONSIN HIGHEST COURT FINDS THAT FOLLOW FORM EXCESS INSURER HAS A PRIMARY DUTY TO DEFEND WHEN THE PRIMARY CARRIER DENIES COVERAGE AND THAT EXHAUSTION OF UNDERLYING INSURANCE IS NOT NECESSARILY REQUIRED IN ORDER TO TRIGGER THE DEFENSE OBLIGATION

In [Johnson Controls, Inc. v. London Market](#), 2010 WI 52 (WI June 24, 2010), the Wisconsin Supreme Court held that an excess insurer which issued a follow form policy had a primary duty to defend, and that exhaustion of underlying insurance was not required in order to trigger the excess insurer's defense obligation. Rather, the excess insurer's duty to defend was triggered when the underlying insurer denied primary liability under its policy.

The insured, Johnson Controls, is a manufacturing company based in Milwaukee, Wisconsin. During the 1970's, it contracted with various insurers for a layered program of primary, umbrella, and umbrella excess commercial general liability policies. This appeal, however, specifically involved the follow form umbrella excess policy issued to Johnson Controls by London Market Insurers. The London Market excess policy sat above three successive policies issued by Travelers Indemnity Company ("Travelers").

In the mid-1980s, Johnson Controls started to receive notification that it had been identified as a potentially responsible party in connection with environmental contamination at various sites across the country. Johnson Controls asserted that it notified its insurers, seeking both defense and indemnification. Johnson Controls contended further that its insurers refused to provide defense and indemnification, justifying their refusal on the ground that their CGL policies did not cover environmental restoration and remediation costs imposed under CERCLA. As a result, in 1989, Johnson Controls filed suit against its insurers seeking a declaratory judgment that its insurers were obligated to provide a defense and indemnification under the terms of the various insurance policies. In 2003, the Wisconsin Supreme Court in this case, overturned [City of Edgerton v. General Cas. Co. of Wis.](#), 184 Wis. 2d 750, 517 N.W.2d 463 (1994), and held that an insured's costs for restoring and remediating damaged property (whether the costs are based on remediation efforts by a third-party or are incurred directly by the insured) constitute covered damages under applicable CGL policies, provided that other exclusions do not apply. [Johnson Controls v. Employers Ins. of Wausau](#), 2003 WI 108.

Thereafter, London Market moved for partial summary judgment contending that its policy was an indemnity-only policy that contained no promise of a defense. The circuit court concluded that London Market's follow form provision incorporated the duty to defend found in the Travelers policies. Further, it concluded that nothing in the policy suggested that the duty to defend was conditioned upon exhaustion of the underlying insurance. London appealed the circuit court's ruling. The Wisconsin Court of Appeals found that the issues were

a matter of first impression in Wisconsin, and therefore, certified the questions to the Wisconsin Supreme Court.

Upon review, the Wisconsin Supreme Court noted that although the London Market policy at issue did not contain a duty to defend provision, it contained a follow form provision that resulted in the incorporation of the duty to defend found in the underlying Travelers policies. The follow form provision provided that the London policy was "subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and Limits of Liability, and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Travelers policies] prior to the happening of an occurrence for which claim is made hereunder." The court reasoned that because the Travelers policies included a duty to defend, and the London policy was silent regarding the duty to defend, "a reasonable person in the position of the insured [c]ould interpret London Market's policy as incorporating the duty to defend found" in the underlying policies. Thus, the court concluded that London Market had a primary duty to defend Johnson Controls.

The court also determined that London Market's duty to defend was not conditioned upon exhaustion of the underlying Travelers policies. The court stated that there was "no immutable rule of law [in Wisconsin] requiring exhaustion of all primary policies before an excess insurer's duty to defend can be triggered." Rather, the issue depends upon the language of the individual insurance policy at issue. The court noted that according to the Travelers policies, Travelers' duties to defend and indemnify ended upon exhaustion of the limits of liability; however, the Travelers policies were silent regarding the question of when the duty to defend begins. The court relied upon the "other insurance" provision found in the underlying Travelers policies to resolve this issue.

The "other insurance" provision provided that: "[I]f the insurer affording other insurance to the named insured denies primary liability under its policy, Travelers will respond under this policy as though such other insurance were not available." The court reasoned that this provision demonstrated that if another insurer denied primary liability,

Travelers would respond as though the other insurance was not available. Accordingly, the court found that a reasonable person could interpret this provision as promising that, where the excess insurer had a contractual duty to defend, it would step in and provide a defense in the event that the primary insurer refused to do so.

The court held that the language of the "other insurance" provision was also incorporated into the London policy by the follow form provision. As a result, London was "required to respond under its policy as though such other insurance were not available in the event that the underlying insurer denie[d] primary liability under its policy – unless the policy expressly provided otherwise." The court found further that London's duty to defend was triggered when Travelers denied primary liability under its policy.

The court rejected London's argument that pursuant to the limits of liability provision, London's duty to defend did not "attach" until the limits of the underlying Travelers policies had been exhausted. The court found that even though London's duty to indemnify was conditioned upon exhaustion of the underlying Travelers policies, its duty to defend was not. Rather, pursuant to the "other insurance" provision, London was required to "respond under [its] policy as though such other insurance were not available" because Travelers "denie[d] primary liability under its policy." Accordingly, the Wisconsin Supreme Court remanded the case to the circuit court for further proceedings.

Significantly, the court declined the opportunity to adopt a general rule holding that excess insurers have a duty to defend when the primary carrier refuses to defend. Specifically, the court stated:

Some courts appear to have recognized a general rule that an insured that has purchased layers of coverage – including layers of contractual duty to defend – should not be left without a "prompt and proper defense[.]" [citations omitted] For example, the Washington Supreme Court stated: "[I]f a primary insurer fails to assume the defense, for any reason, the secondary insurer which

CALIFORNIA COURT OF APPEAL FINDS USE OF TERMS “UNDERLYING INSURANCE” IN EXCESS/UMBRELLA POLICY AMBIGUOUS AND HOLDS THERE IS AN IMMEDIATE DUTY TO DEFEND BY EXCESS/UMBRELLA INSURER

On April 30, 2010, the California Court of Appeal held that the duty to defend in an excess/umbrella policy did not depend on the exhaustion of underlying insurance in light of ambiguity in the policy. *Legacy Vulcan Corp. v. Superior Court*, 184 Cal. App. 4th 285 (Cal. Ct. App. 2010). On June 11, 2010, the court issued an opinion following rehearing, substituting the April 30 opinion. *Legacy Vulcan Corp. v. Superior Court*, 185 Cal. App. 4th 677 (Cal. Ct. App. 2010). The court cited additional language from the policy and provided further analysis regarding the excess/umbrella insurer’s duty to defend in light of the ambiguity that was found due to the use of the term “underlying insurance” both with and without qualification in the subject policy.

The court emphasized that Transport Insurance Company’s duty to indemnify was not before the court, but noted that the policy language suggested that Transport has no indemnity obligation unless all underlying insurance has exhausted or, if there is no coverage for the claim under any of the Schedule A underlying policies, and the total policy limits of all “other” collectible underlying insurance did not exceed \$100,000, then Transport’s indemnity obligation was limited to amounts in excess of \$100,000.

With respect to the duty to defend, the court emphasized that the fact that the term “underlying insurance” was not defined was a problem, particularly given that the term was qualified in certain clauses (clauses (a) and (b) but not clauses (1) and (2)). Clause (1), referred to any personal injury, property damage or advertising injury “not within the terms of the coverage of underlying insurance” but within the terms of coverage of this insurance; and clause (2) referred to exhaustion of “limits of liability of the underlying insurance.” In contrast, clause (a) of the “retained limit” provision referred to “the underlying insurance listed

in Schedule A hereof, plus the applicable limits of any other underlying insurance collectible by the Insured.” Clause (b) of that provision qualified its reference to “the underlying insurance” by limiting it to the policies “listed in Schedule A.” The court reasoned that the existence of a Schedule of Underlying Insurance suggested that the unqualified term “underlying insurance” referred to that schedule.

Since Schedule A was entitled “Schedule of Underlying Insurance,” construing the term “underlying insurance” with Vulcan’s reasonable expectations, the court found it was objectively reasonable for Vulcan to conclude that the unqualified term “underlying insurance,” referred to the policy’s Schedule of Underlying Insurance and, absent contrary extrinsic evidence, encompasses only the policies listed in Schedule A. In that regard, since no extrinsic evidence was presented, the court noted that the right to present extrinsic evidence in further proceedings was neither waived nor expressly reserved. The court stated that the trial court should “in the first instance, decide the question and, if it decides to consider extrinsic evidence, should interpret

the policy in light of that evidence.”

TRESSLER COMMENTS

Given that the ruling by the court of appeal was based on unique policy language, the ruling may have limited application, particularly given the general rule in California that requires horizontal exhaustion. The opinion illustrates the importance of carefully reading and applying the policy provisions and discusses the interplay between excess and umbrella coverage.



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Primary Duty to Defend When Primary Carrier Denies Coverage continued from page 5

has a duty to defend should provide the defense[.] [citations omitted]. We need not and do not adopt a general rule to resolve this case, however, given that the language of the policies provides that London Market was required to assume the defense.”

A dissenting opinion was rendered by Justice Ziegler, which was joined by Justices Gableman and Roggensack. The dissent opined that the London policy was a pure excess indemnity contract that did not contain a duty to defend. The dissent also criticized the majority for transforming the London excess policy into a primary policy for purposes of the duty to defend. Finally, the dissent noted that the majority’s ruling

increases the likelihood that primary carriers will refuse to perform their obligations as it shifts costs to the excess carriers.

TRESSLER COMMENTS

This decision ignores the basic differences between primary and excess insurers. Clearly, excess insurers do not contemplate having to defend merely because a primary carrier breaches its duty to defend. Excess insurers will undoubtedly distinguish this decision by pointing out that the Wisconsin Supreme Court focused solely upon the specific language contained within the London Market follow form policy. As this was a 4-3 decision, the issue of an excess

insurer’s duty to defend could possibly be revisited in the future.



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ILLINOIS SUPREME COURT ALTERS THE “FOUR CORNERS RULE” TO ALLOW ALLEGATIONS IN AN INSURED’S COUNTERCLAIM IN THE UNDERLYING LAWSUIT TO TRIGGER A DUTY TO DEFEND

In *Pekin Insurance Company v. Wilson*, No. 108799, 2010 Ill. LEXIS 670 (Ill. May, 20, 2010), the Illinois Supreme Court held that Illinois law does not “limit the source of an insurer’s duty to defend ‘solely’ to the content of the underlying complaint in all cases.” The court considered allegations in the insured’s counterclaim in determining the duty to defend.

Terry Johnson initiated the underlying lawsuit against the insured, Jack Wilson, alleging assault, battery and intentional infliction of emotional distress. Johnson was assisting Wilson’s wife at Wilson’s place of business when Wilson arrived and began screaming at them while holding a steel pipe. Wilson struck Johnson with the pipe and cut Johnson’s hand with a knife. Johnson was able to restrain Wilson and he left Wilson’s business. Johnson filed a lawsuit against Wilson and ultimately amended his complaint to include a negligence count claiming Wilson breached his duty of ordinary care by failing to use tools of his employment in a safe manner. Wilson filed a counterclaim in the underlying lawsuit against Johnson alleging Johnson was the aggressor and Wilson was merely defending himself.

Wilson tendered his defense of the underlying lawsuit to Pekin Insurance Company (“Pekin”), which had issued a commercial general liability policy to Wilson and his business. Pekin filed a declaratory judgment action taking the position that coverage was barred for Johnson’s allegations against Wilson by “the intentional-act exclusion,” which excludes coverage for “bodily injury... expected and intended from the standpoint of the insured.” A “self-defense exception” to the intentional-act exclusion provides, “[t] his exclusion does not apply to ‘bodily injury’ resulting from the use of reasonable force to protect persons or property.” Pekin filed a motion for judgment on the pleadings taking the position that Johnson’s negligence claim “merely couched allegations of intentional conduct by Wilson in negligence terms.” On the other hand, Wilson took the position that Pekin’s motion for judgment on the pleadings should not be granted because “the possibility existed that the jury would find that his conduct was either negligent

or that ‘no untoward conduct’ occurred by Wilson toward Johnson.” The trial court held Pekin had no duty to defend Wilson against Johnson’s claims.

The appellate court, reversing the trial court, held Pekin had a duty to defend Wilson against Johnson’s allegations of assault, battery and intentional infliction of emotional distress. The appellate court found the allegations in Wilson’s counterclaim against Johnson triggered the self-defense exception to the intentional-acts exclusion.

In affirming the appellate court, the Illinois Supreme Court held that Illinois law does not “limit the source of an insurer’s duty to defend ‘solely’ to the content of the underlying complaint in all cases.” That is, the court found it was appropriate to consider the allegations in Wilson’s counterclaim in order to determine whether Wilson was defending himself and, therefore, the self-defense exception to the intentional-acts exclusion was applicable. The court further opined that “it is ‘unlikely’ that the underlying complaint would set forth allegations supporting a basis for defending Pekin’s insured under its self-defense exception.” The court reasoned that “unless Wilson, as the defendant-insured in the underlying lawsuit, is allowed to plead facts alleging that [Johnson’s] injury occurred through Wilson’s reasonable use of self-defense, there is no way for the self-defense exclusion to be triggered, and the coverage is illusory.”

Based upon its consideration of the allegations in Wilson’s counterclaim, the court held there was a genuine issue of material fact regarding whether the intentional acts of the insured were committed in self-defense. Therefore, Pekin’s motion for judgment on the

pleadings should not have been granted.

TRESSLER COMMENTS

This case calls into question the scope of the “four corners” rule for the duty to defend under Illinois law. Based upon the Illinois Supreme Court’s reasoning, it may be in the best interests of an insurer to anticipate the insured’s counterclaim or affirmative defenses to the underlying complaint when determining the potential for coverage. This decision is expected to spur a significant amount of litigation as Illinois courts are called upon to determine what extrinsic evidence can be used by insureds to trigger the duty to defend.



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THE SECOND CIRCUIT, APPLYING NEW YORK LAW, HOLDS THAT NY'S ANTI-SUBROGATION DOCTRINE BARS AN EXCESS INSURER'S INDEMNIFICATION CLAIM AGAINST A PRIMARY INSURER, WHERE BOTH INSURERS PROVIDED COVERAGE FOR THE CONTRACTUAL INDEMNITY CLAIMS AT ISSUE IN THE UNDERLYING LITIGATION

In [Ohio Casualty Insurance Company v. Transcontinental Insurance Company](#), no. 09-2794, 2010 U.S. App. LEXIS 7613 (2d Cir. April 14, 2010), excess insurer Ohio Casualty was not permitted to recover over \$6M paid toward a settlement from primary insurer Transcontinental.

Excess insurer, Ohio Casualty Insurance Company, ("Ohio Casualty"), and primary insurer, Transcontinental Insurance Company ("Transcontinental") each paid amounts on behalf of their mutual insureds to settle a wrongful death claim. Ohio Casualty sought indemnification from Transcontinental on the theory that the settlement amounts represented employers' liability claims that were covered under Transcontinental's primary policy, but that were excluded under Ohio Casualty's umbrella policy. The Second Circuit found that the settlement amounts resolved contractual indemnity claims, not employers' liability claims. Because contractual indemnity claims were covered under the Ohio Casualty umbrella policy, New York's anti-subrogation doctrine prevented Ohio Casualty from shifting the coverage burden to Transcontinental.

Ohio Casualty's claim arose out of an accident involving Richard Werson who died as a result of bodily injuries he sustained during an accident at a construction site in New York City, operated by his employer Wildman & Bernhardt Construction Co. Mr. Werson's survivors brought a wrongful death action against Downtown Development, Inc., ("Downtown"), the property owner. Downtown filed a third-party complaint for contribution and indemnity against Wildman based on Wildman's written agreement to indemnify Downtown for any claims arising from injuries occurring on the job site.

Transcontinental provided coverage to Wildman under two primary insurance policies: (1) a general liability policy with limits of \$1 million, which also provided coverage to Downtown as an additional insured (the "General Liability Policy"); and (2) a workers' compensation and employers' liability policy with no aggregate limits, which did not provide coverage to Downtown (the "WC/EL Policy").

Ohio Casualty provided coverage to Wildman, and to Downtown as an additional insured, under an umbrella insurance policy with limits of \$9 million in excess of the two

underlying Transcontinental policies (the "Umbrella Policy"). The Umbrella Policy specifically provided coverage for damages arising from an employee's bodily injury claims to the extent the insured assumed liability under an "insured contract," such as the indemnification agreement between Wildman and Downtown. The Umbrella Policy provided coverage for workers' compensation or employers' liability claims only to the extent the claimant employees "are not subject to New York Workers' Compensation law."

Transcontinental defended Downtown in Mr. Werson's wrongful death action under the General Liability Policy. The action settled, with Transcontinental paying \$1 million (its limits under the General Liability Policy), and Ohio Casualty paying \$6.07 million under the Umbrella Policy. Transcontinental and Ohio Casualty appear to agree that liability in the underlying action rests with Wildman.

After settlement, Ohio Casualty brought this action against Transcontinental, seeking indemnification for its \$6.07 million settlement payment. Ohio Casualty asserts that "standing in the shoes" of its additional insured, Downtown, it is entitled to indemnification from Transcontinental as Wildman's primary insurer, because Wildman was liable for Mr. Werson's death. Ohio Casualty argued that the claims against Mr. Werson's employer Wildman were employers' liability claims covered under Transcontinental's WC/EL Policy, but not covered under Ohio Casualty's Umbrella Policy. As an employee injured on the job, Mr. Werson was "subject to New York Workers' Compensation law."

Transcontinental filed a motion for summary judgment. The Southern District of New York granted the motion, finding that Ohio Casualty had an obligation to provide coverage for Wildman under the Umbrella Policy.

The Second Circuit affirmed. It interpreted the Umbrella Policy, which provides coverage

for employee claims "not subject to New York Workers' Compensation law," to mean that the Umbrella Policy does not cover claims for which the employer is liable *by law*. This interpretation is consistent with New York law, which requires insurers to provide limitless coverage for workers' compensation claims, and for liabilities imposed on an employer by law.

However, the Second Circuit found that the settlement in the underlying action resolved *contractual indemnity claims* between Downtown and Wildman, not employer liability claims. Accordingly, coverage was owed under the Ohio Casualty policy. New York's anti-subrogation doctrine bars insurers from seeking contribution from their own insured for damages arising out of a covered risk. Ohio Casualty sought reimbursement from Transcontinental for its insured Wildman's liabilities. Under the anti-subrogation doctrine, this was prohibited, because Ohio Casualty provided coverage for these liabilities.

TRESSLER COMMENTS

Although this case relied on New York's anti-subrogation doctrine, the court engaged in the same analysis applied in most indemnification, contribution, and subrogation actions between insurers: whether and to what extent coverage is owed under the insurers' respective policies. For those interested in the legal distinction between subrogation and contribution, [Transcontinental Insurance Company v. Insurance Company of the State of Pennsylvania](#), 56 Cal. Rptr. 3d 491 (Cal. Ct. App. 2007) provides an interesting discussion of the issue under California law.



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TEXAS SUPREME COURT RULES THAT CONTRACTUAL LIABILITY EXCLUSION BARS COVERAGE FOR A PROPERTY DAMAGE CLAIM WHEN THE SOLE BASIS FOR THE SETTLEMENT OF THAT CLAIM WAS BREACH OF CONTRACT

The Texas Supreme Court, in [Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London](#), No. 08-0246, 2010 Tex. LEXIS 407 (Tex. June 4, 2010), held that a contractual liability exclusion in an excess policy barred coverage where the only basis for the insured's liability for the property damage claim was an agreement by the insured that it would be responsible for that damage.

Gilbert Texas Construction ("Gilbert"), a general contractor, contracted with Dallas Area Rapid Transit Authority ("DART") to construct a light rail system. The contract required Gilbert to protect the worksite and surrounding property and imposed a duty to repair any damage. During construction, an adjacent building was flooded. The building's owner, RT Realty ("RTR"), sued DART, Gilbert and other entities involved in the construction, asserting various tort claims in addition to a claim for breach of contract as a third-party beneficiary of the construction contract between Gilbert and DART.

Gilbert's primary insurer assumed Gilbert's defense and appointed defense counsel. Gilbert also had excess coverage through Underwriters at Lloyd's London ("Underwriters"). Underwriters sent a series of reservation of rights letters to Gilbert citing the contractual liability exclusion.

On cross motions for summary judgment in the underlying action, the trial court granted Gilbert's motion for summary judgment on the tort claims, holding that Gilbert had governmental tort immunity from those claims. That left only the breach of contract claim. Gilbert subsequently settled the breach of contract claim for \$6.175 million and sought coverage from Underwriters. When Underwriters refused to pay based on the contractual liability exclusion, Gilbert filed a declaratory judgment action against Underwriters. On cross motions for summary judgment, the trial court ruled that the contractual liability exclusion did not bar coverage. The court of appeals reversed and rendered judgment for Underwriters, holding that the breach of contract claim fell within the contractual liability exclusion and that Underwriters had not waived, and was not stopped from asserting, its coverage defenses.

The contractual liability exclusion at issue barred coverage for bodily injury and property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." On appeal to the Texas Supreme Court, Gilbert, citing several authorities, contended that in order to give

meaning to the word "assumption," the liability assumed must be that of another person or entity. Gilbert argued that if the exclusion were read to apply to all liabilities sounding in contract, the word "assumption" would be rendered superfluous. In other words, Gilbert urged the court to read the exclusion to say, in effect, that the exclusion applied to property damage "for which the insured is obligated to pay damages by reason of the assumption of another's liability in a contract or agreement." Gilbert argued that the contractual liability exclusion did not apply because Gilbert's liability arose from its own breach of contract, not from liability of another person that Gilbert had assumed. Underwriters argued that the court should not judicially rewrite the exclusion by inserting the word "another's" into the exclusion.

The court sided with Underwriters, holding:

The exclusion bars coverage for liability of a third party that is assumed, such as that assumed by an indemnity agreement. But had it been intended to be so narrow as to apply only to an agreement in which the insured assumes liability of another party by an indemnity or hold-harmless agreement, it would have been simple to have said so. The parties' intent is governed by what they said in the insurance contract, not by what one side or the other alleges they intended to say but did not.

Because the tort claims had been dismissed, and because the only claim which Gilbert had settled was for breach of contract and neither exception to the exclusion applied, the court ruled that Underwriters owed no coverage obligation for the settlement.

The court also rejected Gilbert's estoppel and waiver arguments. The court held that under the cooperation clause of the policy, Underwriters had a right to associate with Gilbert and Argonaut in defending the underlying suit, even in the absence of a duty to defend. Underwriters did not have a duty to defend Gilbert and did not retain or assign Gilbert's defense counsel.

Furthermore, Underwriters provided Gilbert with reservation of rights letters putting Gilbert on notice of the contractual liability exclusion. Thus, the court held that Underwriters did not waive any rights and was not estopped from relying on the contractual liability exclusion.

TRESSLER COMMENTS

The Texas Supreme Court's decision in [Gilbert](#) applied a straight-forward and common sense approach to policy interpretation, rejecting the argument that it should, in effect, rewrite the policy by reading into it words that were simply not there.



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