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Court negates effect of injury exclusion

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Last month, the 7th U.S. Circuit Court of Appeals issued an opinion holding that a broadly worded employee/contractor injury exclusion from a commercial general liability insurance policy was ambiguous and construed the effect of the exclusion against the insurer, such that coverage for a job-site injury to a contractor's employee was not encompassed within the exclusion.

In so doing, the court negated the effect of a commonly utilized workplace injury exclusion, which will upset the dynamic of insurance coverage under commercial general liability and employer's liability policies for construction work injuries.

While Judge Richard A. Posner for the 7th Circuit panel stated, based on his Google research, that the insurer in this case was likely the only insurer to use such a broadly worded exclusion, in fact, other insurers of construction risks have utilized the exclusion in policies dating back to the 1990s and there are reported cases from other jurisdictions construing (and upholding) the exclusion, none of which were mentioned in Posner's decision in *Atlantic Cas. Ins. Co. v. Paszko Masonry Inc., et al.*, Nos. 12-2405, 12-2485, slip op. at 8.

While the case was decided under Illinois law, the decisions of other jurisdictions were noted in other contexts, but not in the crucial context of reach of the exclusion or its use by other carriers.

Standard exclusions from commercial general liability coverage bar coverage for injuries to employees of the insured. Such injuries are generally compensated through the workers' compensation system and where there is a common-law suit by an employee not barred by employer immunity outside of workers' compensation law, the employer's liability portion of workers' compensation/employer liability policies exist to handle such employee claims.

Such standard employee injury exclusions (typically found in Section I. 2. e. of polices based upon insurance service office forms), bar coverage for injuries to employees of the insured, but do not bar coverage for injury to persons who are independent contractors of the insured or employees of such contractors. See, e.g., *St. Paul Re v. Baldwin*, 503 F. Supp. 2d 1255, 1262 (D.S.D. 2007); *Evanston Ins. Co. v. McChristian*, 561 F. Supp. 2d 683, 686 (E.D. Tex. 2007); *State Auto Mut. Ins. Co. v. Christie*, 2002 PA Super. 192 (2002).

Also, if the exclusion is written to apply to employees of the insured (as it is in standard insurance service office forms 1986 to 2004), rather than an or any insured, then the exclusion applies to injuries of the named insured's employees and not to employees of additional insureds or other parties at the job site. *Brile for Brile v. Estate of Brile*, 296 Ill. App. 3d 661 (2d Dist 1998); *Zaiontz v. Trinity Universal Ins. Co.*, 87 S.W. 3d 565, 567 (Tex. App. 2002).

It is where the employee injury exclusion is broadened beyond injuries to the insured's employees, to expressly encompass injuries to contractors and contractors' employees, as it was in *Atlantic Cas.*, that the interpretation of the exclusion presented the problems addressed in the Posner opinion.

The court found that the exclusion's definition of "contractor" to include parties' "providing services and/or materials of any kind" to the named insured, was ambiguous as applied to the work of the injured party's employer, Raincoat Services.

Although the decision below by U.S. District Judge Joan B. Gottschall found, in a decision the 7th Circuit found "incredibly terse"— that Raincoat Solution's bid and mock-up work qualified as "services" and that Raincoat did not need to have become a signed and compensated contractor when this work was presented to the named insured — the court held that the exclusion was also subject to a narrower interpretation and applied such interpretation to negate the effect of the exclusion to the injury in question, finding that the insurer could not avoid the duty to defend based thereon.

While Posner's decision may be quite reasonable given the possibly precontractual nature of the purported "services" in this case, what is troubling is the court's treatment of the exclusion as if it is not used by other insurers and has not been construed by other courts. To the contrary, the exclusion is utilized by carriers in the construction risk marketplace other than *Atlantic Cas.* and has been the subject of decisions dat-

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ing back more than a decade, none of which were recognized in the opinion.

See, e.g., *U.S. Underwriters Ins. Co. v. Congregation Kollel Tisereth*, 2004 WL 2191051 (E.D.N.Y. 2004); *CX Re v. Tech. Const. Servs.*, 2005 U.S. Dist LEXIS 42297 (S.D. Tex. 2005), aff'd, 194 Fed. App'x 237 (5th Cir. 2006); *Itnor Corp. v. Markel Int'l Ins. Co.*, 981 So. 2d 661, 662 (Fla. App. 2008); *U.S. Underwriters Ins. Co. v. 614 Constr. Corp.*, 142 F. Supp. 2d 491, 494-95 (S.D.N.Y. 2001); *Mt. Vernon Fire Ins. Cc. v. Futura Tech. Const. Corp.*, 1997 WL 419997 (S.D.N.Y. 1997); see also the numerous cases cited in *NVR Inc. v. Nat'l Indem. Co.*, 2010 N.J. Super. Unpub. LEXIS 2336, * 29-41 (N.J. Super. 2010).

Most of these cases have upheld the application of the exclusion, have not found it ambiguous and have declined to enforce it only in the presence of a "separation of insureds" provision which a court found conflicted with an exclusion applicable to insureds as well as additional insureds; *U.S. Underwrites Ins. Co. v. City Club Hotel, LLC*, 2003 U.S. Dist. LEXIS 7266 (S.D. N.Y. 2003).

Accordingly, practitioners relying on *Atlantic Cas.* workplace injury coverage cases should be aware of the full range of case law.