

## OUTSIDE COUNSEL

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*Insurance Policy Exclusions and Construction Projects*

An insurance company's decision to deny coverage to its insured is not generally favored by the courts. However two recent decisions from the Second Department signify a change in the willingness to validate an insurer's denial of coverage. As detailed below, in each case, the insurance company successfully enforced a carefully worded exclusion contained in its policy which left contractors without insurance for a construction accident.

Construction contracts typically require subcontractors to purchase comprehensive commercial liability insurance policies which name owners and general contractors as additional insureds. Such insurance procurement provisions are intended to provide owners and general contractors with insurance that will indemnify them should an accident occur on the construction site. Insurance companies, however, often seek to limit their liability by issuing comprehensive commercial liability policies which contain exclusions from or exceptions to coverage. Thus, although dubbed policies for "comprehensive" coverage, comprehensive liability policies frequently contain provisions which identify several types of losses to which insurance coverage does not apply.

When an insurer relies on an exclusion to avoid coverage, courts scrutinize the exclusionary provision before giving it effect. The insurer bears the burden of establishing that the exclusion applies in a particular case and that it is not subject to any other reasonable interpretation.<sup>1</sup> To be enforceable, the exclusionary language must be specific and clear.<sup>2</sup> Any ambiguity in the language will be drawn most strongly against the insurer.<sup>3</sup> Exclusions must not be extended by interpretation or implication but rather strictly and narrowly construed.<sup>4</sup> Also, an insurer must give notice of its decision to disclaim coverage based on an exclusion as soon as reasonably possible or risk waiving the right to rely on the exclusion altogether.<sup>5</sup>

**'Guachichulca v. Tauber'**

If an insurer satisfies the hurdles outlined above, courts shall accord an exclusion its plain and ordinary meaning which must not be disregarded in an attempt to find an ambiguity where none exists.<sup>6</sup> Recently, insurers have had success enforcing exclusion provisions in a construction setting leaving contractors without coverage.

One such example is a decision from the Appellate Division, Second Department entitled *Guachichulca v. Laszlo N. Tauber & Associates LLC*.<sup>7</sup> In *Guachichulca*, Venezia Interiors Corp., as general contractor, hired Ideal Kitchen Ventilation Inc. as a subcontractor in connection with a certain construction project. Ideal purchased a general liability



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insurance policy from First Mercury Insurance Co. which contained an exclusion for bodily injury claims to an employee of an insured if the injury occurred in the course of employment.<sup>8</sup> This is commonly known as an "employee exclusion."

Plaintiff, Walter Guachichulca, an Ideal employee, was injured during the course of his employment at the construction site. Plaintiff commenced an action seeking damages for personal injuries against, among others, Venezia as general contractor. Venezia, in turn, commenced a third-party action against First Mercury seeking a declaration that First Mercury was obligated to defend and indemnify it as an additional insured under the insurance policy issued to Ideal.

First Mercury moved for summary judgment dismissing all claims against it based on the policy's exclusion. The Supreme Court, Kings County denied the motion on the grounds that "issues of fact exist."<sup>9</sup>

The Second Department reversed and held that neither Ideal nor Venezia were entitled to coverage. The court explained that since plaintiff was injured during the course of his employment at the construction site, coverage was not available because the plain meaning of the exclusion "was to relieve First Mercury of liability when an insured or additional insured was sued or indemnification was requested for damages arising out of bodily injury to an employee sustained in the course of employment."<sup>10</sup> As such, neither Ideal nor Venezia were covered by the First Mercury policy, a result probably not anticipated by either party when the construction contract was signed.

**Success With Exclusion Provision**

Another example of an insurer successfully enforcing an exclusion provision contained in its comprehensive policy is found in another decision from the Second Department, *Wilson v. Sirius America Ins. Co.*<sup>11</sup> In *Wilson*, K.J. Gold LLC, as general contractor, hired a plumbing subcontractor in connection with a certain construction project. K.J. purchased a commercial general liability policy from Sirius America Insurance Co. The policy contained a rather unique endorsement that excluded from coverage bodily injury arising out of work performed by a subcontractor on K.J.'s behalf *where there is no prior written and signed contract entered into between K.J. and the subcontractor which requires the subcontractor to indemnify and hold K.J. harmless in the event of a loss, including any loss suffered by an employee of the subcontractor.*<sup>12</sup> It was undisputed that K.J. never entered into a written hold harmless/indemnification agreement with its plumbing subcontractor.

Plaintiff, Stephen Wilson, an employee of the plumbing subcontractor, was injured during the course of his employment at the construction site. Wilson and his wife commenced an action to recover damages for personal

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Continued on page 6

# Insurance Policy Exclusions and Construction Projects

Continued from page 4

injuries against, among others, K.J. as general contractor. K.J. tendered the *Wilson* action to Sirius for defense and indemnification. Sirius, however, disclaimed coverage on the grounds that coverage was excluded since K.J. never entered into a written hold harmless/indemnification agreement with the plumbing subcontractor.

Ultimately, K.J. defaulted and judgment was entered in plaintiffs' favor against K.J. Plaintiffs then commenced an action against Sirius, as K.J.'s general liability insurer, to recover on the judgment.<sup>12</sup> The Supreme Court, Orange County granted plaintiffs' motion for summary judgment and denied Sirius' cross-motion for summary judgment on the ground that the exclusion violated General Obligations Law §5-322.1 which prohibits indemnification for one's own negligence and was void as against public policy.<sup>14</sup>

The Second Department reversed and held that Sirius was not obligated to satisfy plaintiffs' judgment against K.J. The court held that the exclusion contained in Sirius' policy did not violate General Obligations Law §5-322.1 since, by its own terms, §5-322.1 "shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer." The court further explained that since K.J. never entered into a written hold harmless/indemnification agreement with its plumbing subcontractor, as required under the policy, coverage did not exist for bodily injury sustained by plaintiff as the subcontractor's employee.

The Second Department recognized that if K.J. had actually obtained a written hold harmless/indemnification agreement from its subcontractor, that under certain circumstances, that agreement could be found void under §5-322.1 if it called for indemnification for K.J.'s own negligence. Significantly, however, the Court held that the invalidity of any indemnification agreement between K.J. and its subcontractor would not have relieved Sirius from its obligation to provide coverage to K.J. under the terms of its insurance policy. Instead, the invalidity of any indemnification agreement between K.J. and its subcontractor would have only cut off Sirius' ability, as subrogee of its insured K.J., to enforce the indemnification provision against the subcontractor.

## 'Guachichulca' and 'Wilson'

In *Guachichulca*, since the general contractor was denied coverage under the policy obtained by the subcontractor,

the general contractor could presumably still seek coverage from its own insurance carrier. In comparison, the impact of the denial of coverage to the general contractor in *Wilson* was far greater since the denial came from its own primary insurer.

Both *Guachichulca* and *Wilson* serve as valuable reminders to the bar and the construction industry at large that tort and contractual relationships between owners, general contractors, subcontractors and their employees are separate and distinct from insurance relationships and that the insurance coverage one contracts for is not always the coverage actually purchased. Further, while it is common practice in the construction industry for certificates of insurance to be accepted as proof that insurance procurement provisions contained in construction contracts have been satisfied, these one-page certificates do not spell out the actual terms of the insurance policy and thus are not proof that appropriate insurance has been obtained. Moreover, certificates of insurance, which often state that they are issued for informational purposes only, are not proof that insurance was in fact actually purchased.<sup>15</sup>

## Obtain Copy of Policy Itself

Accordingly, in order to determine if the appropriate insurance coverage has in fact been obtained for a particular construction project, parties are better served by obtaining a copy of the insurance policy itself and analyzing its provisions to determine what impact the policy terms and exclusions will have in the event an accident occurs at the construction site. Often, however, policy terms and exclusions are analyzed for the first time after a loss has occurred, which unfortunately for insureds is too late.

1. See, *Seaboard Sur. Co. v. Gillette Co.*, 64 NY2d 304, 476 NE2d 272, 486 NYS2d 873 (1984).

2. *Id.*

3. See, *Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co.*, 60 NY2d 390, 457 NE2d 761, 469 NYS2d 655 (1983).

4. See, *Seaboard Sur. Co.*, supra.

5. See, *First Financial Ins. Co. v. Jetco Contracting Corp.*, 1 NY3d 64, 801 NE2d 835, 769 NYS2d 459 (2003).

6. See, *Duncan Petroleum Transport Inc. v. Aetna Ins. Co.*, 96 AD2d 942, 466 NYS2d 394 (2d Dept. 1983), *aff'd*, 61 N.Y.2d 665, 460 N.E.2d 229, 472 N.Y.S.2d 88 (1983).

7. *Guachichulca v. Laszlo N. Tauber & Associates LLC*, 37 AD3d 760, 831 N.Y.S.2d 234 (2d Dept. 2007).

8. The provision entitled "employees, persons and organizations exclusion endorsement" provided in pertinent part:

It is agreed that this insurance does not apply to "Bodily Injury,"\*\*\*\*to:

(1) An "employee" of any insured...

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(d) arising out of or in the course of, or as a consequence of, employment by any insured;

(e) arising out of or in the course of, or as a consequence of, association with any insured.

This exclusion applies:

(1) Whether any insured may or may not be liable as an employer or in any other capacity; and

(2) To any obligation to contribute to, share damages with, repay or indemnify someone else who must pay damages because of the "Bodily Injury,"...; and

(3) To all "claims" and "suits" by any employee of any insured...because of "Bodily Injury,"...including, but not limited to damages for care and loss of services, whether occurring before or during their employment or association with any insured or occurring after such employment or association has terminated;

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It is the intent of this endorsement to exclude from this insurance all claims, demands or suits as above described. There shall further be no duty or obligation on the part of the Company under this insurance to respond to, investigate or defend anyone, including, but not limited to any insured, his or its agents, servants or "employees" or any third-parties for any such claims, demand or suit.

9. *Guachichulca v. Laszlo N. Tauber & Assoc., LLC*, 2006 WL 5365885 (Trial Order) (N.Y.Sup. Feb. 6, 2006) (NO. 33107/03).

10. *Guachichulca*, supra, 37 AD3d at 762.

11. *Wilson v. Sirius America Ins. Co.*, 44 AD3d 754, 844 N.Y.S.2d 349 (2d Dept. 2007).

12. The provision entitled "Injury and Liability Resulting From or Caused by the Work of a Contractor, Subcontractor and/or Sub-Subcontractor Including Without Limitation Injuries to the Employee of a Contractor, Subcontractor and/or Sub-Subcontractor" provided in pertinent part:

A. This insurance does not apply to "bodily injury" arising out of work performed on behalf of the Named Insured by a contractor, subcontractor and/or sub-subcontractor of the Named Insured that provides labor, services and/or materials with respect to any construction, alteration, demolition or repair of real property or any structures...thereon:

1. when there is no prior written and signed contract entered into between the Named Insured and the contractor, subcontractor and/or sub-subcontractor requiring the contractor, subcontractor and/or sub-subcontractor to indemnify and hold harmless the Named Insured to the fullest extent permitted by applicable law in the event of a loss, including, but not limited to, any claim, suit, cost or expense arising out of any loss suffered by an employee of the contractor, subcontractor and/or sub-subcontractor, regardless of whether the Named Insured is partially negligent and excluding only liability created by the Named Insured's sole and exclusive negligence...

13. Insurance Law §3420(a)(2) provides that an action may be maintained against an insurer under the terms of the policy provided a judgment obtained against an insured remains unsatisfied for 30 days from the serving of notice of entry of the judgment.

14. General Obligations Law §5-322.1 prohibits its owners and contractors from indemnifying themselves against liability for bodily injury or property damage attributable to their own negligence.

15. See, *ALIB Inc. v. Atlantic Casualty*, \_\_\_ NYS2d \_\_\_, 2008 WL 2521093 (1st Dept. June 26, 2008); *Gonnerman v. State*, 48 AD3d 517, 852 NYS2d 253 (2d Dept. 2008).