

Client Alert

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First Circuit Limits Scope of CGL Policy's Employer Liability Exclusionary Endorsement

In a decision of import to employers and contractors in particular, the First Circuit Court of Appeals has limited the scope of a commercial general liability policy's "employer liability" exclusionary endorsement, finding that in the case of contractors and subcontractors, the exclusion applies only to bodily injury claims brought by persons who have contracted directly with the policyholder. *United States Liab. Ins. Co. v. Benchmark Constr. Servs., Inc.*, No. 14-1832 (1st Cir. August 12, 2015) ("*Benchmark*").

Background

Benchmark Construction Services, Inc., ("*Benchmark*") was hired as general contractor for a residential renovation project in Newton, Massachusetts. Benchmark utilized architect Thomas Huth to assist with project design. Huth contracted with Sara Egan d/b/a Painted Design to perform decorative paint services, and Egan assigned the work to her employee Sarah Bailey. Benchmark had no direct contract with Huth, Egan or Bailey. Bailey's work was not performed under a contract with any of Benchmark's contractors or subcontractors.

Bailey sued Benchmark in Massachusetts state court for negligence after she fell from a scaffolding and suffered injuries. Benchmark sought a defense and indemnity from its general liability insurer, United States Liability Insurance Company ("*USLIC*"), under a CGL policy that USLIC issued to Benchmark. USLIC denied coverage, based on a policy endorsement containing an exclusion that purportedly barred coverage for work-related bodily injury to contractors and subcontractors arising out of services for which any insured may become liable.

USLIC commenced a declaratory judgment action against Benchmark concerning the scope of the exclusion. The trial court granted summary judgment in favor of USLIC, finding that the term "contractor" unambiguously included "anyone with a contract." It ruled that Bailey's negligence suit was covered by the exclusion because her employer, Egan, had a contract with Huth. On appeal, Benchmark contended that the term "contractor" was ambiguous and should be interpreted narrowly to include only those with whom it had a contract.

Holdings

The First Circuit panel, which featured former US Supreme Court Justice David H. Souter, reversed the summary judgment award and remanded the case for further proceedings.

The First Circuit found the exclusionary language to be ambiguous in two ways. First, the court found the phrase "for which any insured might be liable" to be ambiguous because it was unclear whether the phrase pertained to "bodily injury" for which "any insured" might be liable, or "services" for which "any insured" might be liable. The court looked to controlling Massachusetts law for guidance. Applying that law, the court found that a general contractor's potential liability for a subcontractor's work is limited to circumstances where the general contractor retains the right to control the subcontractor's work. Here, where Benchmark did not hire Egan or Bailey and their work was not within Benchmark's control, the

court found that Bailey's negligence suit fell outside the scope of the exclusion and that Benchmark, therefore, was entitled to a defense and indemnity under the policy.

Second, the court rejected the lower court's interpretation of the term "contractor," finding it also to be ambiguous since the term was undefined in the policy and subject to more than one reasonable interpretation. The court adopted Benchmark's interpretation of the term, finding that the term includes only those who were hired directly by the policyholder but who were not considered employees.

Implications

Benchmark is significant to employers and contractors as well as anyone engaging the work of a contractor or subcontractor. The decision reiterates that so-called "employer liability" exclusions do not broadly apply to all persons engaged for employment under any circumstances. Rather, these exclusions, like all exclusions, must be applied narrowly according to their plain terms. And when those terms are ambiguous, the exclusions must be construed in favor of coverage. In *Benchmark*, that meant that the exclusionary provision would bar coverage only for bodily injury claims brought by individuals that contract directly with the policyholder.

Benchmark should give confidence to general contractors and other entities that rely on the work of multiple entities and individuals that may nonetheless be only tangentially related to the scope of the general contract and over whom the policyholder may exercise little if any control. Further, *Benchmark* reiterates that insurers may not base a denial of coverage on a policy provision that is susceptible to more than one reasonable interpretation.

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