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Maryland Intermediate Appellate Court Finds Duty to Defend General Contractor Against Allegations of Negligence under Subcontractor's Insurance Policy

Maryland's Court of Special Appeals recently ruled in *James G. Davis Construction Corporation v. Erie Insurance Exchange*[1] that a subcontractor's insurer was obligated to defend the general contractor against allegations that it was negligent in its supervision of the subcontractor. In doing so, the court reversed the trial court's ruling that the general contractor was covered only for claims of vicarious liability for the subcontractor's actions.

The court also found that a certificate of insurance and accompanying "additional insured" endorsement issued to the general contractor were not binding on the insurer. The court held that the certificate's endorsement, which contained wording slightly different from the additional insured provision in the policy, did not bind the insurer because the certificate and endorsement had been prepared by an independent broker.

Background

Davis arose from alleged personal injuries following the collapse of scaffolding at a residential construction site. The scaffolding had been erected by a construction company during its work as a subcontractor for James G. Davis Construction Corporation ("Davis"), the project's general contractor. Both the construction company and Davis were sued for negligence associated with the scaffolding work.

Davis sought coverage as an additional insured under the subcontractor's commercial general liability policy, which had been issued by Erie Insurance Exchange ("Erie"). In relevant part, the policy covered additional insureds for "liability for 'bodily injury' . . . caused, in whole or in part, by 1. [the subcontractor's] acts or omissions; or 2. The acts or omissions of those acting on [the subcontractor's] behalf."[2]

Erie denied coverage on the grounds that the policy did not cover Davis, an additional insured, for Davis's own negligent acts. In Davis's subsequent suit for declaratory judgment, the trial court agreed, holding that the policy covered Davis only for claims of vicarious liability arising out of the subcontractor's performance. In so ruling, the court relied on the additional insured endorsement attached to the certificate of insurance Davis had received from the subcontractor. The certificate's endorsement described the coverage as being for "liability arising out of [the subcontractor's] ongoing operations performed for [Davis]," quite different from the policy language quoted above. Davis appealed.

Holding

The appellate court reversed. First, the court determined whether the certificate of insurance or the policy controlled the scope of coverage available to additional insureds. The court noted that the certificate – prepared by the subcontractor's broker – acknowledged that it was for "information only" and "d[id] not amend,

[1] No. 802 (Md. Ct. Spec. App. Oct. 28, 2015), *available at* http://www.courts.state.md.us/opinions/cosa/2015/0802s14.pdf.

[2] *Id.* at 3-4.

extend or alter the coverage afforded by the polic[y]. . . ."[3] Thus the language was not binding on Erie and should not have been used by the trial court as the basis for its analysis of coverage.

The court then considered whether the policy limited coverage to allegations of vicarious liability, as had been held by the trial court. In reversing that determination, the appellate court noted that "vicarious liability is an all or nothing proposition" because it attributes the totality of the wrongdoer's actions to an innocent third party, such that there cannot be "partial" vicarious liability.[4] And because the policy language included liability caused "in part" by the subcontractor's acts, coverage under the policy was not limited to claims of vicarious liability. It included the injured parties' claims that Davis failed to exercise reasonable care in its control of the construction site, its construction of the scaffolding, and its supervisory authority over issues of safety, among other things.[5] As such, Erie had a duty to defend Davis in the personal injury action.

Implications

Davis is notable for policyholders and those with additional insured endorsements for two primary reasons. First, the case is a reminder that certificates of insurance and attendant endorsements are not always prepared by the insurer, may not accurately reflect the nature of coverage, and may not amend the policy itself. Thus parties who believe themselves to be additional insureds should carefully read their certificates and attachments as well as any relevant policy provisions to ensure that the terms are consistent. Where they are not, the terms of the policy will likely control. Second, *Davis* illustrates the importance of reading all pertinent policy language and doing so in context. In *Davis,* coverage existed under the policy not just for liability caused by the subcontractor's actions; it also extended to liability caused "in whole or in part" by the subcontractor's actions. This seemingly minor distinction proved critical in this instance, where Davis sought coverage against claims of its own negligence, not just negligence by virtue of its vicarious liability for the acts of the subcontractor. Skilled coverage counsel can help insureds avoid overlooking such language during coverage disputes and litigation.

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Contacts

Walter J. Andrews
wandrews@hunton.com

Lon A. Berk
lberk@hunton.com

Lawrence J. Bracken, II
lbracken@hunton.com

John C. Eichman
jeichman@hunton.com

Syed S. Ahmad
sahmad@hunton.com

Michael S. Levine
mlevine@hunton.com

Sergio F. Oehninger
soehninger@hunton.com

Jennifer E. White
jewhite@hunton.com

[3] *Id.* at 12-13.

[4] *Id.* at 16.

[5] *See id.* at 18-19.