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Insurance Coverage Law Bulletin

September 1, 2015 Tuesday

SECTION: Pg. 3 Vol. 14 No. 8

LENGTH: 2944 words

HEADLINE: Two Small Words, One Great Divide;
PA Supreme Court Holds Exclusion to Be Ambiguous

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BODY:

Even the smallest words can carry controlling meaning. At least, that's what the Supreme Court of Pennsylvania held in Mutual Benefit Insurance Company v. Politsopoulos, where it joined the majority of other jurisdictions that have considered the issue in holding that a policy providing an exclusion for an employee of "the insured" meant an employee of the insured seeking coverage under the policy, but not of any of the other insureds under the policy, or even of the Named Insured.

This question, involving the interpretation of two seemingly straightforward words, has lingered in the insurance industry for over 50 years. In 1961, the Insurance Counsel Journal published an article by Norman Risjord and Jane Austin, titled "Who Is 'The Insured'" Revisited, which addressed just this question. Risjord and Austin explained that insurers had always intended the term "the insured" to refer only to the entity claiming coverage. However, at that time, nearly all courts that had addressed the issue had reached a different conclusion - holding that "the insured" could mean any of the insureds under the policy. "Ironically, this is the only known situation where many of the courts persist in erring in favor of the insurance companies." Norman E. Risjord and Jane M. Austin, "Who Is 'The Insured'" Revisited, 28 Ins. Counsel. J. 100, 101 (1961) (emphasis in original).

In order to clarify that "the insured" meant solely the insured seeking coverage, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau created a new condition called the "Severability of Interests" condi-

tion. That condition states that the insurance applies separately to each insured against whom claim is made or suit is brought. Therefore, the insured seeking coverage would necessarily be considered separately from any other insured.

THE POLITSOPOULOS CASE

To demonstrate how this scenario arises in real life, consider the facts of Politsopoulos. Leola Restaurant, the named insured, maintained a commercial general liability policy. The owners of the property where Leola Restaurant was located, Christos Politsopoulos and Dionysios Mikalopoulos (the "Property Owners"), were additional insureds. The claimant was an employee of Leola Restaurant who was injured when she fell down a set of stairs that had been negligently maintained by the Property Owners. She brought suit against the latter, who subsequently sought coverage as additional insureds. The insurer, Mutual Benefit Insurance Company, argued that the Property Owners were not entitled to indemnification pursuant to a policy exclusion for employees of "the insured." However, the Property Owners argued that Leola Restaurant was not "the insured" at issue, and therefore the claimant was not an employee of "the insured." They also argued that the separation of insureds (i.e., severability of interests) clause bolstered that argument because each insured would be considered separately from any other insured.

The trial court granted summary judgment in favor of the insurer because it found that it was bound by prior precedent, as set forth in Pennsylvania Manufacturers' Association Insurance Co. v. AETNA Casualty & Surety Insurance Co. There, the Pennsylvania Supreme Court had held that the phrase "the insured" in a motor vehicle liability policy referred not only to the insured against whom relief was sought but to any insured under the policy. In that case, the court had rejected an argument that a severability of interests clause applied to undermine a broad application of the employers' liability exclusion. However, the Politsopoulos trial court also stated that if it were not for the existence of binding precedent, it would have held the opposite: "The use of the phrase 'the' insured rather than 'any insured' or 'an' insured, particularly in a policy which contains a severability of interests clause, demonstrates that the interests of the different insureds were intended to be several rather than joint. ... At the very least, the use of 'the' insured rather than 'the named insured' or 'any insured' makes the term ambiguous, and thus necessarily interpreted against ... the insurer." Mut. Benefit Ins. Co. v. Politsopoulos, J-85-2014, at **4-5 (Pa. 2015).

The Appeal

On appeal, the Pennsylvania Superior Court found a way to distinguish Politsopoulos from Pennsylvania Manufacturers' Association Insurance Co. in order to hold in favor of the Property Owners. The insurer appealed, and the Pennsylvania Supreme Court accepted the appeal and rejected the reasoning of the Superior Court. In conducting its analysis, however, it did not find the existence of the separation of insureds clause to be particularly persuasive. "As a general rule, neither a separation-of-insureds clause nor its analogue, a severability-of-interests provision, is to be interpreted in a manner that would subvert otherwise clear and unambiguous policy exclusions." Id. at 10. Therefore, while the separation of insureds clause could reinforce a particular interpretation, it could not be used to contradict otherwise unambiguous policy language. (This conclusion is somewhat ironic given that, according to Risjord and Austin, the point of the severability of interests condition was to reinforce the principle that "the insured" means only the insured seeking coverage - in other words, this condition had been drafted specifically to answer this very question.) Despite the court's disregard of the separation of insureds clause, it did reach what Risjord and Austin would have argued is the "correct" conclusion.

The court held that, within the context of a commercial general liability policy that makes use of both the definite and indefinite articles, interpretation of the term "the insured" is, at the very least, ambiguous and therefore may be read as relating to the particular insured against whom a claim is asserted. In other words, the injured party in Politsopoulos would have needed to have been the employee of the Property Owners for the exclusion to apply. The fact that she was an employee of the named insured was not sufficient to meet the requirements of the exclusion, where the named insured had not been the insured seeking coverage. Technically, in so holding, the court did not overturn Pennsylvania Manufacturers' Association because that case involved motor vehicle insurance and the court's holding in Politsopoulos was limited to commercial general liability insurance.

OTHER JURISDICTIONS

The court also acknowledged in its opinion that this decision brings Pennsylvania law in accord with the majority of other jurisdictions to have considered this issue. For example, in Costco Wholesale Corp. v. Liberty Mut. Ins. Co., the U.S. District Court for the Southern District of California considered California, Connecticut and Pennsylvania law with regard to the employer's liability exclusion. It held that there was an actual conflict of laws: Under both Connecticut and California law, "the insured" meant the insured seeking coverage, but under Pennsylvania law, the exclusion would preclude coverage where the injured party was an employee of any insured. "In the current legal landscape, Pennsylvania belongs to a small minority of states that interpret employer's liability exclusions broadly to bar coverage for lawsuits brought by employees of any named insured." *Costco Wholesale Corp. v. Liberty Mut. Ins. Co., 472 F. Supp. 2d 1183, 1202 (S.D. Ca. 2007)*. In fact, the court noted that out of the 14 states addressing the issue, Pennsylvania was the only state with a rule that precluded coverage where an injured individual is the employee of any insured rather than just the insured seeking coverage. Id. (The other states interpreting "the insured" to mean only the insured seeking coverage included California, Connecticut, Massachusetts, Washington, New Jersey, New York, Ohio, Colorado, Florida, Maryland, Minnesota, Texas, and Virginia.)

The Costco court concluded that Connecticut law applied and that under Connecticut law "[w]here the named insured's employee sues an additional insured under a policy containing a severability clause, the scope of the employer's liability exclusion is confined to the employee of the insured who seeks protection under the policy." *Id. at 1207*.

Costco was not the only case to note that Pennsylvania had been in the minority. In Michael Carbone, Inc. v. General Acc. Ins. Co., the U.S. District Court for the Eastern District of Pennsylvania recognized that "the vast majority of jurisdictions which have addressed the issue are congruent - and hold that the severability doctrine or a separation of insureds clause modifies the meaning of an exclusion phrased in terms of 'the insured.' ... These cases hold that the exclusion will only be effective if it applies with respect to the specific insured seeking coverage." *937 F. Supp. 413, 418 (E.D. Pa. 1996)*. In reaching that conclusion, the Carbone court cited decisions from courts in Colorado, Florida, Maryland, Minnesota, Ohio, Texas, and Virginia.

Pennsylvania joined the majority of jurisdictions when its supreme court held in Politsopoulos that an exclusion as to the employee of "the insured" was only triggered where the injured party was an employee of the insured actually seeking coverage.

'ANY INSURED' OR 'AN INSURED'?

The question therefore becomes how should an insurer phrase an exclusion if the intention of the parties is to exclude employees of all insureds. While there seems to be general consensus regarding exclusions worded in terms of "the insured," there has been no similar methodology employed where the policy refers to the employee of either "an insured" or "any insured." The analysis may be further complicated depending on whether a separation of insureds clause is included in the policy.

In considering the issue of how to interpret the phrase "the insured," some courts have noted that if the parties meant for the exclusion to apply where any insured was involved, then they could easily have used either the phrase "any insured" or "an insured" in order to make that intention unambiguous. For instance, in Maryland Cas. Co. v. American Fidelity & Cas. Co., the court stated: "But does 'the insured' mean either 'any insured' or 'an insured'? If so, why did the policy not say 'any insured' or 'an insured,' either of which would have clearly excluded the liability if any insured's employee were insured ..." *217 F. Supp. 688, 691 (E. D. Tenn. 1963)*. Unfortunately, the situation is not at all as clear as it was made out to be, with courts reaching different interpretations of what it means for an exclusion to refer to "an insured" or "any insured." The situation is further complicated, as discussed below, when considering the presence of separation of insured clauses, with some courts finding such clauses controlling in the analysis and others discounting them entirely.

Courts are generally consistent in holding that the term "any insured" precludes coverage where the exclusion would apply to any of the insureds as opposed to just the insured seeking coverage. See *BP America, Inc. v. State Auto Property & Cas. Ins. Co., 148 P.3d 832 (Ca. 2005)* ("The overwhelming number of courts addressing policy language similar to that at issue here, determined as a matter of law, that the term 'any insured' in an exclusionary clause is unambiguous and expresses a definite and certain intent to deny coverage to all insureds - even to innocent parties."). However, there is a split between those jurisdictions where a severability clause is interpreted to render the word "any" as superfluous and thus preclude application of the exclusion, and those jurisdictions where the word "any" unambiguously requires application of an exclusion any time any insured engages in behavior that would trigger it.

With respect to the impact of a severability of interests clause on the interpretation of whether "any insured" is limited to the insured seeking coverage, some jurisdictions have adopted the viewpoint that a severability of interests clause does not change the meaning of "any insured." In Carbone, the court considered the historical purpose of the severability of interests clause in informing the interpretation of "the insured." *Michael Carbone, Inc. v. General Accident Ins. Co., 937 F. Supp. 413 (E.D. Pa. 1996)*. However, it held that the same clause would not change the interpretation of "any insured." *Id. at 423*. The court reasoned that to hold otherwise would result in a tortured construction surrounding the word "any." *Id. at 417*. A holding to the contrary, reasoned the court, would render the word "any" superfluous. *Id. at 421*. The court analyzed cases from Louisiana, Colorado, and Missouri that also concluded that a severability of interests clause does not inform the interpretation of "any insured," for the same reasons. *Id. at 420-22*. "In short, the bulk of the courts which have addressed the issue have held that an exclusion worded 'any insured' unambiguously expresses a contractual intent to create joint obligations and preclude coverage to innocent co-insureds." Id. (citing additional cases from Connecticut, Louisiana, and New York).

The Carbone court acknowledged, however, that there are states in which courts have held the opposite: that a severability of interests clause does inform the interpretation of whether "any insured" is limited to the insured seeking coverage. The court cited Alaska, Florida, and Massachusetts as having adopted that approach. For instance, in Worcester Mut. Ins. Co. v. Marnell, the Massachusetts Supreme Judicial Court acknowledged that it was rendering the word "any" superfluous by giving controlling weight to the severability of interests clause. However, it argued that to adopt the contrary position, by disregarding the severability clause, would render the entire clause superfluous. *Worcester Mut. Ins. Co. v. Marnell, 398 Mass. 240, 245 (1986)* A Florida court also adopted this reasoning in Premier Ins. Co. v. Adams, stating that it is preferable to render a single word rather than an entire clause superfluous. *Premier Ins. Co. v. Adams, 632 So.2d 1054, 1057 (Fla. Dist. Ct. App. 1994)*. The Premier Ins. court also noted that the interaction between the use of the words "any insured" and the severability of interests clause created an ambiguity and therefore must be strictly construed against the insurer thus mandating coverage. Id.

Further complicating the issue is the fact that some courts have held that a severability of interests clause is inapplicable where the language refers to "any insured," but applies where the language refers to "an insured," thus distinguishing between the two phrases. For example, an Arizona court held that "the phrase 'any insured' in an exclusionary clause means something more than the phrase 'an insured.'" *American Family Mut. Ins. Co. v. White, 65 P.3d 449, 457* (Ariz. Ct. of App. 2003). The American Family court distinguished the two on the basis that "an insured" refers to one object, presumably much as "the insured" refers to a single entity, whereas "any insured" refers to one or more objects. Therefore, the presence of the severability of interests clause renders the reading of "an insured" ambiguous, thus mandating coverage, whereas "any insured" unambiguously precludes coverage where any insured engaged in the excluded activity. Similarly, a Connecticut court rejected the argument that "an insured" is synonymous with "any insured," as being "completely without merit." Nationwide Mut. v. Mazur, No. CV 98-0489231S, 1999WL417346, at *9 (Conn. Super. Ct. 1999).

Despite these cases distinguishing between "an insured" and "any insured," many courts have held that the two terms are synonymous and therefore the applicability, or lack thereof, of the severability of interests clause is the same under either terminology. See, e.g., *Phillips v. Estate of Greenfield, 859 P.2d 1101 (Okla. 1993)* (holding that use of the phrase "an insured" precluded coverage where an injury arose out of the use of a motor vehicle operated or owned by any of the insureds); see also *Brumlee v. Lee, 963 P.2d 1224 (Kan. 1998)* (holding that "an" and "any" are both inherently ambiguous and therefore both subject to application of the severability of interests clause).

CONCLUSION

While the courts' interpretations of severability of interest or separation of insureds clauses are varied, the case law has become increasingly clear as to the difference between the terms "the insured" and "any insured." Therefore, if an underwriter desires to preclude coverage only for the insured seeking coverage, it should use the phrase "the insured." If the underwriter desires to exclude coverage for any insured, it should use the term "any insured." The underwriter may want to avoid entirely use of the phrase "an insured" because it is not clear whether a court will hold that those words are more akin to "the insured" and thus apply a severability of interests clause, or whether they are synonymous with "any insured."

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LOAD-DATE: September 3, 2015