APPLIED SPECIALTY UNDERWRITERS

CASUALTY SPOTLIGHT™

DECEMBER 2021, VOLUME 2

Applied Specialty Underwriters' Bi-Monthly Newsletter

Subscribe to this newsletter by emailing info@specialty.auw.com.

DECEMBER 2021, VOLUME 2

Contents

Recent Decisions and Relevant Insights

State-by-State Cases

NEW YORK

Appellate Court Affirms No Additional Insured Status Exists in Absence of Promise Within a Written Contract

In *Chipotle Mexican Grill, Inc. v. RLI Ins.* Co., 2021 N.Y. App. Div. LEXIS 6636 (2nd Dept. November 24, 2021), Chipotle Mexican Grill Inc. ("Chipotle") hired Piece Management, Inc. ("PMI") to perform rodent prevention services at a mall restaurant. An employee of PMI was injured when he fell from a ladder while performing such services. He thereafter filed a personal injury action against Chipotle. *Id*. at 4.

PMI had a general liability policy in place with RLI Insurance Company ("RLI") at the time of the accident. Chipotle tendered the claim for defense to RLI claiming additional insured status under the RLI policy, but RLI denied coverage. Chipotle thereafter filed a declaratory judgment action seeking a defense and indemnity from RLI. In the interim, the underlying action settled for $2,675,000. *Id*. at 4-5.

The RLI policy contained an endorsement which added as insureds under the policy:

> any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an addition insured on your policy. *Id*. at 7.

RLI moved for and was granted summary judgment by the trial court, which concluded (1) Chipotle was not specifically listed as an insured within the RLI policy; and (2) Chipotle was not an additional insured as required by written contract because there was no written contract with PMI. *Id*. at 5.

Sometime later, Fireman's Fund Insurance Company ("Fireman's Fund"), which issued an excess policy directly to Chipotle and paid a portion of the settlement, intervened in the coverage action. It sought a ruling that (1) Chipotle was an additional insured under the RLI policy; and (2) the Fireman's Fund policy was excess to the RLI policy. The trial court, finding this effectively a motion for reconsideration of its prior ruling, denied Fireman's Fund's request. Following the issuance of multiple orders, Chipotle and Fireman's Fund appealed this decision. *Id*. at 5-6.

In ruling in favor of RLI, the appellate court reiterated the clarity of the additional insured endorsement and a lack of proof of what qualifies as a "written contract":

Here, as noted, the additional insured endorsement of the RLI policy afforded coverage to parties that PMI agreed in writing in a contract or agreement to add as an additional insured on the policy. There was no written contract or agreement between the plaintiffs and PMI containing any requirement that PMI name the plaintiffs as additional insureds under the RLI policy. Therefore, RLI demonstrated its prima facie entitlement to judgment as a matter of law based upon its submissions.

In opposition, and in support of their motion for summary judgment, the plaintiffs failed to establish the existence of such contract or agreement, or to raise a triable issue of fact. The certificate of insurance proffered in opposition, listing the plaintiffs as additional insureds under the subject policy, was insufficient to alter the language of the policy itself, especially since the certificate recited that is was for informational purposes only, that it conferred no rights upon the holder, and that it did not amend, alter or extend the coverage afforded by the policy. Moreover, the Supreme Court correctly determined that PMI's vendor profile on ServiceChannel/FixxBook and Chipotle's vendor bulletin, which indicate that the client is typically listed as an additional insured, do not constitute agreements or contracts between Chipotle and PMI to name Chipotle as an additional insured. *Id*. at 8-9 (citations omitted).

While the *Chipotle* decision offers a faithful recitation of New York law on policy interpretation, it begs the question of what document, if any, Chipotle believed was to govern the services provided by PMI. Clearly, the court did not deem an online profile and/or a vendor bulletin as satisfying the "written contract" requirement (much less the necessary promise of additional insured coverage). Insureds need to be aware of the coverage implications in how they go about hiring contractors.

TEXAS

Insurer Denied Summary Judgment on Indemnity Where Amended Complaint Triggered Duty to Defend and There Was No Evidence of Collusive or Fraudulent Pleading

In *Seneca Specialty Ins. Co. v. Chappell*, 2021 U.S. Dist. LEXIS 227385 (E.D. Tex. November 24, 2021), the underlying plaintiff (Manuel) was seriously injured during an altercation with an employee at a lounge (Angels) in Jefferson County, Texas. She thereafter filed suit against Angels, its owner and the employee in state court, alleging her injuries were caused by an assault and/or battery. *Id*. at 1-2.

Seneca Specialty Insurance Company ("Seneca") issued a general liability policy to Angels for the relevant period. Upon receipt of the underlying complaint, Seneca denied coverage based upon an assault and battery exclusion within its policy. Manuel thereafter amended her complaint to omit allegations of assault and battery, basing her claims instead on theories of negligence. *Id.* at 2.

Three years later, Seneca filed a coverage action seeking a declaration that it owed Angels no defense or indemnity. It thereafter amended its complaint to drop its claim that it owed no defense, asserting it was then defending the amended (underlying) complaint. The only issue presented was whether Seneca owed the defendants a duty to indemnify based upon its view that Manuel's injuries were clearly caused by an assault and/or battery. *Id*. at 3.

Texas follows the "eight corners" rule, where the duty to defend is governed by comparing the insurance policy and the allegations of the most recent underlying complaint. *See, Century Sur. Co. v. Seidel*, 893 F.3d 328 (5th Cir. 2018). Texas recently embraced an exception to this rule where "an insurer owes no duty to defend when there is conclusive evidence that groundless, false or fraudulent claims against the insured have been manipulated by the insured's own hands in order to secure a defense and coverage where they would not otherwise exist." *Chappell*, *supra* at 13-14 (citing *Loya Ins. Co. v. Avalos*, 610 S.W.3d at 878 (Tex. 2020)).

Seneca asserted that if Manuel had not amended her petition, it would not have had a duty to defend (and thus no duty to indemnify). The court summarily rejected this argument on the grounds that Seneca presented no evidence to support the application of the *Loya* exception:

> To the extent Seneca argues that Manuel and the Underlying Defendants conspired to manipulate a groundless, false, or fraudulent claim against Seneca by amending the petition in the in the Underlying Lawsuit, the court is not persuaded. Manuel's "artful pleading" does not give rise to the exception described in (*Loya*). Rather, "[i]f [Seneca] 'knows [Manuel's] allegations [of negligence] to be untrue, its duty is to establish such facts in defense of its insured, rather than as an adversary in a declaratory judgment action.'" …

Because Seneca cannot establish that is has no duty to defend the Underlying Defendants, it cannot further prove that the same reasons that negate the duty to defend likewise negate any possibility it will ever have a duty to indemnify. Seneca also fails to provide "conclusive evidence" that any manipulation occurred. Thus, the court will not consider evidence outside of the eight corners rule and the court's analysis of Seneca's duty to defend remains unchanged. *Chappell, supra* at 14-15 (citations omitted).

An amended pleading that obviously targets coverage can be frustrating for an insurer. *Seneca* reminds us that an insurer's suspicion is not, by itself, enough to walk away from a defense and/or avoid indemnity. It needs proof of fraud or collusion or must defend the claim until all facts are resolved in litigation.

WASHINGTON

No Duty to Defend Owed General Contractor Where Insured Could Not Produce Evidence Contradicting Relevant Allegations of Complaint

In *Capital Specialty Ins. Corp. v. Griffin Custom Homes, Inc.*, 2021 U.S. Dist. LEXIS 226115 (W.D. Wash. November 23, 2021), Griffin Custom Homes, Inc. ("Griffin") was the general contractor on a residential construction project. Griffin hired a subcontractor, Sun City Builders ("Sun City"), to participate in building the home. Sun City in turn hired Pederson Construction ("Pederson"), which employed John Foth. *Id*. at 2-3.

Foth was injured when a ladder upon which he was standing collapsed at the construction site. He subsequently filed suit against Griffin and Sun City, alleging each was negligent with respect to safety conditions on site. Foth's complaint specifically alleged that Pederson was hired by Sun City and that he was an employee of Pederson. *Id*.

Griffin tendered the lawsuit to its general liability insurer, Capital Specialty Insurance Corporation ("Cap

Specialty"), which denied coverage based upon various contractor-based exclusions. Cap Specialty thereafter filed a declaratory judgment action against Griffin and Foth and each party moved for summary judgment on the duty to defend. *Id*. at 1-2.

The Cap Specialty policy included a form labeled "Amendatory Endorsement — Contractors," which set forth in relevant part:

5. EXCLUSION — NON-EMPLOYEE LABOR

This insurance does not apply to "bodily injury" or "personal and advertising injury" to, or medical expenses for, any person who participates in the course of work performed by you, who is not employed, subcontracted or being compensated in any way by you.

6. EXCLUSION — CONTRACTED PERSONS

This insurance does not apply to "bodily injury" . . . or medical expense sustained by any person who is:

4. Contracted with you or with any insured for services; or

b. Employed by, leased to or contracted with any entity that is:

c. Contracted with you or with any insured for services; or

d. Contracted with others on your behalf for services. *Id*. at 3-4.

The policy also included the following endorsement which excludes coverage for "Bodily Injury to Independent Contractors":

It is agreed that this insurance does not apply to "bodily injury" to:

(1) Any independent contractor or the "employee" of any independent contractor while such independent contractor or their "employee" is working on behalf of any insured; or

(2) The spouse, child, parent, brother, sister or other family member of any such independent contractor or "employee" of the independent contractor as a consequence of (1) above.

This exclusion applies:

(3) Whether the insured may be liable as an employer or in any other capacity; and

(4) To any obligation to share damages with or repay someone else who must pay damages because of the injury. *Id*. at 4.

Griffin conceded that the allegations of the complaint by themselves fit within the terms of the Contractors and Independent Contractors exclusions. However, it argued that an exception to the standard "eight corners" rule applied, where:

> [I]f the allegations of the complaint conflict with facts known to the insurer or if the allegations are ambiguous, facts outside the complaint may be considered. However, these extrinsic facts may only be used to trigger the duty to defend; the insurer may not rely on such facts to deny the defense duty. *Id*. at 8 (citing *Expedia, Inc. v. Steadfast Ins. Co*., 329 P.3d 59, 64-65 (Wash. 2014)).

Casualty Spotlight

Specifically, Griffin raised questions as to Foth's employment status with Pederson (including a lack of payment records) and uncertainty with respect to Pederson's status as an approved subcontractor. *Griffin, supra* at 10-11. The district court rejected such arguments, finding (1) no facts supporting Griffin's view of the allegations; and (2) no plausible reading of the complaint that could suggest the possibility of coverage:

> The appropriateness of this result is demonstrated by an absence of facts demonstrating a relationship that would not exclude the Foth Litigation from the policy's coverage. Capital's argument is, in part that the Foth Litigation would fall within one of the exclusions, no matter the precise facts. If Mr. Foth was not an employee of Pederson Construction, where does that get Griffin? Griffin could not argue that Mr. Foth was an employee of or contracted with Griffin or Sun City Builders, as he would then be a "contracted party." And Mr. Foth could not have been authorized to work on the construction site by Sun City Builders, as his injury would otherwise be excluded under he non-employee labor exclusion. Accordingly, Griffin would need facts establishing that Mr. Foth was not participating in construction on the project. But there is not a hint of evidence supporting this argument. Thus, a jury could not reasonably conclude that Mr. Foth voluntarily went to the building site – presumably with no notice of any arrangement between Pederson Construction and Sun City Builders – and then taken no part in the work on the project before being injured. Mr. Foth's motivation to proceed in this manner is wholly unsupported by the record and plainly contradicted by the complaint in the Foth Litigation. *Id*. at 12-14.

While the *Griffin* decision fairly describes how extrinsic evidence can be used by an insured to trigger a duty to defend, it likewise speaks to the lengths some insureds may go to "muddy" allegations that clearly bar coverage. The larger lesson of *Griffin* is that an insured should clearly understand the scope of policy exclusions as applied to its business before placing coverage.

Federal Appellate Cases

THIRD CIRCUIT

Indemnity Must Follow the Duty to Defend for Insurer That Wrongfully Denied Coverage for Claim That Ultimately Settled

In *Liberty Mut. Ins. Co. v. Penn Nat'l Mut. Ins. Co*., 2021 U.S. App. LEXIS 34378 (3rd Cir. November 18, 2021), a worker (Gonzalez) was killed when a large concrete panel at a construction site collapsed on top of him. Cost Company ("Cost") was the masonry subcontractor on site, who contracted with Pittsburgh Flexicore ("Flexicore") to manufacture, furnish and deliver the panels. The subcontract required Flexicore to indemnify Cost for any losses resulting from Flexicore's acts or omissions and obtain general liability insurance naming Cost as an additional insured. *Id*. a 1-2.

Gonzalez's widow brought a wrongful death and survival action against Cost and Flexicore (among others). Allegations against Cost included a negligent failure to maintain adequate safety measures at the site. Allegations against Flexicore asserted negligence in failing to insure the panels conformed to specifications, negligent design and the negligent failure to provide proper warnings and instructions as to their use. *Id*. at 3.

Penn National Mutual Insurance Company ("Penn National") issued a general liability policy to Flexicore for the relevant period. Cost tendered the lawsuit to Penn National for defense and indemnity, but it denied coverage. Specifically, it argued (1) the subcontract between Cost and Flexicore did not unambiguously agree to indemnify Cost for its own negligence; and (2)

Cost's status as an additional insured ended when Flexicore's operations for Cost were completed. *Id*. at 3-4.

Liberty Mutual Insurance Company ("Liberty") defended Cost under a general liability policy in place at the time of the accident. It subsequently settled the action on behalf of Cost and filed a declaratory judgment action against Penn National seeking reimbursement for the amounts paid in defense and indemnity. The District Court granted Liberty's motion for summary judgment, finding that (1) Cost was an additional insured under the Penn National policy (and thus owed a defense for the underlying claims); and (2) Penn National could not challenge indemnity given the underlying liability claims were settled without adjudication. Penn National appealed both orders. *Id*. at 5-6.

The Penn National policy contained an automatic additional insured provision within a Completed Operations endorsement. It designated as an additional insured:

> Any person(s) or organization(s) …with whom you are required by written contract… to name as an additional insured for the "products-completed operations hazard", but only with respect to liability for "bodily injury" … caused, in whole or in part, by "your work, at the location or project designated and described in the contract ... performed for that additional insured and included in the products-completed operations hazard. *Id*. at 3.

The Court of Appeals quickly dispatched Penn National's argument that Cost was not entitled to a defense under its policy. Beyond noting that (1) Cost was clearly an additional insured; (2) the underlying complaint alleged the decedent's injuries were caused, in part, by Flexicore's work; and (3), the products-completed operations hazard includes all bodily injury occurring away from premises Flexicore owns or rents arising out of "its work", the court found that the allegations could specifically be tied to products-completed operations coverage:

> The *Ramirez* Amended Complaint alleged that Flexicore manufactured and *delivered* the concrete panels to the Grandview Project and that Gonzalez's bodily injury results from Flexicore's "work," i.e. its "failure to provide warnings." see also App. 105 (Amended Complaint asserting that "Flexicore negligently failed to have proper warnings or instructions concerning [the concrete panels'] use, and the [concrete panels were] negligently designed".) Because the allegations demonstrate that there is a possibility that the Penn National policy covers the claim, the District Court correctly held that Penn National had to defend Cost in the *Ramirez* action. *Id*. at 8-9. (emphasis added).

In addressing indemnity, the appellate court noted Pennsylvania does not allow factual issues that would have been decided in the underlying action (had it not settled) to be litigated in the coverage action:

> Unlike the duty to defend, the duty to indemnify requires a determination that the policy actually covered the claim at issue. This rule, however, does not mean that insurers may present all factual issues associated with the tort case for resolution as part of the insurance coverage action. Rather, where the underling tort case has been settled, the insurers may seek resolution of only the factual disputes that would *not* have been resolved had the underling tort suit been tried. Thus, where the coverage suit raises factual disputes about coverage that would have also been addressed in he settled underlying litigation, such disputes cannot be resolved in the coverage action. *In such a situation, Pennsylvania law provides that the duty to defend itself triggers the duty to indemnify*. *Id*. at 10 (citations omitted) (emphasis added).

While the court noted an insurer in a declaratory judgment action may always seek to resolve facts that have no bearing on liability, that simply wasn't the case here:

> Here, by contrast, the District Court property concluded that because the *Ramirez* litigation involved multiple claims against multiple defendants, covered by multiple insurers, the settlement made it impossible to determine the precise basis of Cost's and Flexicore's liability. That is, determining actual coverage here would require a court to decide whether Flexicore was liable for its "work," such as its "failure to provide warnings" or liable under a different negligence or products liability theory not covered by the policy. Because such factual disputes cannot be decided in this multiparty, multiclaim case without factfinding in the underlying *Ramirez* litigation, Pennsylvania law requires Penn National's duty to indemnify follows its duty to defend Cost. *Id*. at 11-12.

The *Liberty* case demonstrates the consequences an insurer may face in wrongfully denying a duty to defend. While not technically estoppel, Pennsylvania law may produce the same result for an insurer given most liability cases settle prior to trial. A prudent insurer might lean toward defending the "close case" and/or seek a quick resolution of the duty to defend prior to being placed in this situation.

NINTH CIRCUIT

No Coverage Owed for Apartment Building Fire Where Insured Did Not Disclose Building on Application and "Reasonable Expectations" Did Not Contemplate Coverage

In *Atain Specialty Ins. Co. v. Dignity Housing West*, 2021 U.S. App. LEXIS 35740 (9th Cir. December 3, 2021), the insured, Dignity Housing West, Inc. ("Dignity") was a nonprofit corporation working to provide low income housing in Oakland, California. It completed an application for insurance with Atain Specialty Insurance Company ("Atain"), while describing itself as a housing developer with only 200 square feet of office space. Though the application asked whether Dignity conducted any "lodging operations including apartments," Dignity did not disclose the three apartment buildings it owned and maintained. *Id*. at 1.

After Atain issued a CGL policy to Dignity, a deadly fire occurred at an apartment building owned by Dignity, resulting in multiple fatalities. Several lawsuits were brought against Dignity, which were tendered to Atain for defense. Atain initially accepted the tender, but subsequently withdrew and filed a declaratory judgment action asserting it owed Dignity no defense or indemnity. It based its argument on (1) what was disclosed in the application; and (2) the fact the policy listed only the rented space as that which was "owned, rented or occupied by the insured." Dignity counterclaimed that Atain breached its duty to defend and acted in bad faith in refusing to accepting the tort plaintiffs' settlement offer. *Id*. at 1-2.

The district court granted summary judgment in favor of Atain, concluding the policy clearly did not cover the apartment building that burned and, if it did, omissions within Dignity's application entitled Atain to rescission. The 9th Circuit summarily affirmed summary judgment on coverage without reaching rescission, noting the facts were clear and met all "reasonable expectations" of the parties:

> On Dignity's insurance application, it disclosed only 200 square feet of office space and represented it was a tenant. The Commercial General Liability Supplemental Declarations page of the policy lists that space as the only

premises that Dignity owns, rents, or occupies. In a deposition however, a Dignity officer stated that Dignity actually owned the building where the office was located. Information in policy declarations controls the scope of insurance coverage, so if the declarations indicate that the policy does not provide coverage, "no further review of the policy is necessary." Because nothing in the Declaration supports the view that the policy applied to any of Dignity's three undisclosed apartment buildings, the policy did not cover the San Pablo building.

The premium Dignity paid further supports the conclusion that coverage is limited to its office. Dignity paid $360 to receive commercial general liability coverage for a year. A $360 yearly premium could not reasonably be expected to pay for general liability insurance for dozens of apartments in three separate buildings. *See Herzog v. National Am. Ins. Co*., 465 P.2d 841, 843 (Cal. 1970) (noting that the parties "reasonable expectations" suggested by "relatively small premiums" did not contemplate extended coverage. *Dignity Housing, supra* at 2-3 (further citations omitted).

The *Dignity Housing* decision is a textbook example of an insurer issuing a policy consistent with the risk presented by the insured. There was no evidence of a mutual mistake and/or a unilateral mistake on the part of the insurer. The reasonable expectations of the parties were met, even if it left the underlying plaintiffs without the ability to collect what they fairly may have been owed.

ELEVENTH CIRCUIT

Property Owner/Developer Was Not a Statutory Employer of Injured Worker and Therefore Entitled to Additional Insured Coverage Under Contractor's Policy

In *Endurance Am. Specialty Ins. Co. v. L. Pellinen Construction Co*., 2021 U.S. App. LEXIS 33587 (11th Cir. November 12, 2021), Mattamy Florida, LLC and Mattamy Orlando, LLC (collectively "Mattamy") owned parcels of land in Kissimmee, Florida upon which they were constructing single family homes. Mattamy hired L. Pellinen Construction Inc. ("Pellinen") to do framing and sheathing work on one of the homes. Pellinen itself hired a subcontractor to help with the framing of the house, which employed Esdras Ambrocio ("Ambrocio"). While working on roof trusses at the home, Ambrosio fell and was severely injured. *Id*. at 2.

After paying hundreds of thousands of dollars for his care, Ambrocio's employer's workers compensation insurer filed a personal injury action in his name against Pellinen, Mattamy and others involved in the construction of the home. The complaint alleged that (1) the Mattamy defendants were the owners and developers of the property; (2) Mattamy was involved in the purchase and storage of the trusses; (3) Pellinen and Mattamy oversaw construction; and (4) Mattamy and Pellinen failed to provide a safe workplace and/or properly supervise the work. *Id*. at 8.

Casualty Spotlight

Endurance Specialty Insurance Company ("Endurance") issued a general liability to Pellinen at the time of the accident. Mattamy tendered the defense to Endurance claiming it was an additional insured under the policy. Endurance denied the defense, asserting Mattamy did not qualify as an additional insured under the policy and/or that various exclusions barred coverage. *Id*. at 2-3.

Endurance filed a declaratory judgment action seeking a ruling it had no duty to defend or indemnify Pellinen or Mattamy. On cross-motions for summary judgment, the district court granted Mattamy's motion by finding it was an additional insured under the Endurance policy and the exclusions raised by Endurance did not apply. Endurance appealed. *Id.* at 3-4.

The court of appeals initially examined the district court's finding that Mattamy qualified as an additional insured under the Endurance policy. The additional insured endorsement provided that:

> Any entity required by written contract… to be named as an insured is an insured but only with respect to liability arising out of…" your work" for the additional insured, or acts or omissions of the additional insured, in connection with their general supervision of "your work." *Id*. at 7.

In ruling for Mattamy, the court of appeals focused on the allegations of the complaint as compared to Florida's rules of construction:

> [T]hough vague, (the allegations) are sufficient to bring Ambrocio's lawsuit within the coverage provided by the policy for liability arising from the Mattamy defendants' "general supervision" of work done by Pellinen or on its behalf, or of materials furnished in connection with such work. Under Florida law, "if the complaint, fairly read, contains any allegations which could fall within the scope of coverage, the insurer is obligated to defend the entire action," even if the complaint leaves some doubt as to the nature or validity of the harms alleged, or includes allegations that fall outside the scope of coverage. *Id*. 8 (citations omitted).

Endurance thereafter argued a factual dispute existed as to whether a valid written contract was in place as required by the endorsement. Though the contract was signed and included a promise of additional insured coverage, it was not dated. Mattamy presented an affidavit as to when the contract was signed, how purchase orders governed project work, and when Mattamy issued purchase orders to Pellinen governing work at the home prior to Ambrocio's injury. *Id*. at 9-10.

In rejecting Endurance's claim that a factual question existed as to the effective date of the contract, the court focused on the lack of any record supporting this conclusion:

> No genuine issue for trial exists here – the Mattamy defendants presented affidavit evidence that Mattamy Orlando entered into the agreement with Pellinen in December of 2015, before Ambrocio's accident, and that Mattamy Orlando and Pellinen were operating under the contract in December of 2016 when the accident occurred. Endurance presented no evidence to the contrary. This state of the record "could not lead a rational trier of fact to find for the non-moving party," so "there is no 'genuine issue for trial.'" *Id*. at 10-11 (citations omitted).

The court then addressed the applicability of the Worker's Compensation and employer's liability exclusions in Endurance's policy. While the parties agreed that Ambrocio was not actually employed by Mattamy, Endurance argued that Ambrocio was a "statutory employee" of Mattamy under Florida law, thus triggering the applicability of both exclusions. The Florida Workers Compensation Act provides that any

"contractor" in the construction industry who sublets any part of his or her "contract work" is liable for the payment of worker's compensation to the subcontractor's employees (as well their own). *Id*. at 10-11 (citing *Fla. Stat*. § 440.10 (1)(b)).

While Endurance contended Mattamy was acting as a "contractor" based upon the allegation Mattamy was involved in overseeing construction, the court noted this was not consistent with Florida law as applied to property owners:

> A "contractor" in this context is one who has "incurred a contractual obligation to a third party, a part of which obligation the [contractor] has delegated to or sublet to a subcontractor whose employee is injured. An entity does not become a "contractor" under the statute merely by entering a contract with a subcontractor; instead, under the plain language of the statute, the contractor must have a primary contractual obligation to a third party, a portion of which he "sublets" to another…
>
> A property owner does not take on the role of a "contractor" and statutory employer merely by acting as its own general contractor, by hiring a subcontractor, or by participating in a construction project on its property. *Pellinen*, *supra* at 12-13. (citations omitted).

Endurance further argued that Mattamy should be judicially estopped from claiming it was not a statutory employer because it claimed it was entitled to worker's compensation immunity in the underlying tort case. Under Florida law, judicial estoppel may only apply where (1) a party ***successfully*** maintains a position in a legal proceeding; (2) attempts to make a completely inconsistent position in a subsequent proceeding; (3) takes such a position to the prejudice of an adverse party; and (4) subject to some exceptions, the parties are the same in both actions. *Id*. at 14 (citing *Salazar-Abreu v. Walt Disney Parks and Resorts, U.S. Inc*., 277 So. 2d 629 (Fla. Dist. Ct. App. 2018)). Given there was no evidence Mattamy successfully argued immunity in the underlying case, it was not estopped from taking a contrary position in the coverage case.

Finally, the court rejected Endurance's argument that a "Multi-Unit Construction Project" exclusion barred coverage for Ambrocio's lawsuit. The provision barred coverage for bodily injury or medical expenses associated with the original construction of a "multi-unit construction project," defined as "any condominium, cooperative, townhouse or "housing development" where the completed project will exceed 10 "residential units." A "housing development" was itself defined as a "series of separate dwellings being constructed on a single contiguous parcel of land." *Pellinen, supra* at 16.

Endurance contended the exclusion applied because the home where Ambrocio was injured was part of a "housing development" exceeding 10 residential units. The court rejected this position given the evidence presented on the issue did not align with the application of the exclusion.

> Although the argument has intuitive appeal, the policy's definition of "housing development" does not fit the evidence that Endurance presented about the subdivision and the home where Ambrocio's accident occurred. That evidence indicated that while the subdivision included dozens of homes, the homes were not all "being constructed on a single contiguous parcel of land." Instead, by the time construction began, (Mattamy) had divided (the subdivision) into many separate parcels of land, and each home – including the home where Ambrocio was working when he fell – was being constructed on its own parcel. …
>
> Even if we accept Endurance's reading of its policy language as reasonable, we cannot agree that its interpretation is the only reasonable one. As Endurance recognizes, (the subdivision's) "parent parcel" was subdivided into lots, each lot was identified as a separate "parcel" in county land records, and each lot or county "parcel" had a single home built on it. These facts make the Mattamy defendants' construction – that (the subdivision) was not a "housing development" as defined in the policy because each home in the subdivision was built on its own separate "parcel of land" – as reasonable as Endurance's. And where two reasonable interpretations of an undefined policy term exist, Florida law requires that we "resolve the ambiguity in favor of the insured." *Id*. at 17-18 (citations omitted).

The *Pellinen* decision affirms the general rule in Florida that a property owner is not a "contractor" or statutory employer when engaged in construction on its own land. One can understand where Endurance may have been frustrated by Mattamy taking a contrary position in the tort case to avoid liability. That said, the rulings on additional insured status and the application of the multi-unit construction exclusion appear sound.

Casualty Spotlight

APPLIED SPECIALTY UNDERWRITERS

Contact Us

Chris Day, President
chris@specialty.auw.com
312-350-2208

Jim Pinderski, Chief Legal Officer
jpinderski@specialty.auw.com
224-223-2234

Applied Specialty Underwriters provides unique and customized General Liability and Excess Liability products via appointed wholesalers.

Applied Specialty Underwriters is a unit of Applied Underwriters, Inc., an independent and privately-owned company. All of the insurance carriers used by Applied Specialty Underwriters are rated A (Excellent) by AM Best, financial size XI.

Applied stands behind the financial responsibilities of all its consolidated operating companies and has over 1,000 employees globally.