Pa. Justices Clarify Meaning of ‘Insured’ in Liability Exclusion

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In its recent decision in *Mutual Benefit Insurance v. Politsopoulos,* No. 60 MAP 2014, May 26, 2015, the Pennsylvania Supreme Court resolved a longstanding issue concerning the continued viability of the holding in *Pennsylvania Manufacturers' Association Insurance v. Aetna Casualty and Surety Insurance,* 426 Pa. 453 (1967), regarding the interpretation of the term "the insured" and the applicability of "separation of insureds" language to that analysis. The *Politsopoulos* case also serves as a good reminder of the importance of making certain when drafting agreements involving indemnification provisions and insurance requirements that the obligations are clearly spelled out. This makes it much easier to obtain insurance that is sufficient to satisfy the needs of the parties and is co-extensive with the indemnification requirements in the agreement.

The *PMA* case involved a "severability of insureds" clause that provided in relevant part that "the term 'the insured' is used severally and not collectively." This was a precursor to separation of insured provisions that are common in current policies and typically provide that the insurance applies separately to each insured against whom a claim is brought. The issue is then how these provisions interact with other policy provisions. One of the more common questions, and what was at issue in both *PMA* and *Politsopoulos,* is how the severability provision interacts with the "employer liability exclusion." Employer liability exclusions are designed to exclude situations that implicate workers' compensation laws and insurance. They typically exclude coverage for any claims made by or on behalf of an employee of the insured. However, where an unrelated party is added to an insurance policy as an additional named insured, the interplay of the definition of "insured," the separation of insured provision and the employer's liability provision is often unclear.

The dynamic is what you would expect: Insurers often take the position that the employer's liability exclusion bars claims by the employee of any insured against any insured (whether or not the insured is actually the employer); insureds typically take the opposite position, that the exclusion only applies to claims by an employee against his or her employer. The typical scenario is one where the hypothetical Acme Inc. enters into a contract with the hypothetical Beta Corp., under which Acme is obligated to add Beta to its general liability policy as an additional named insured. An accident happens whereby employees of Beta are injured. The injured parties then sue Acme. Another scenario is where employees of both companies are injured and employees of Beta sue Acme, while the employees of Acme sue Beta.

In the *PMA* case, the Pennsylvania Supreme Court decided this issue in the context of an auto liability policy. The court focused on the term "the insured" as used in the employer's liability exclusion and concluded essentially that this meant "any insured" as defined by the policy. The court in *PMA* also found that the severability of insured provision did not operate to override the terms of an unambiguous exclusion. The effect of the court's 1967 decision in *PMA* has continued to be felt even as policy language changed and other jurisdictions reached differing conclusions.

While the Superior Court in *Luko v. Lloyd's London,* 573 A.2d 1139 (Pa. Super. 1990), distinguished the *PMA* case primarily on the basis of different policy language, as noted in *Politsopoulos,* other courts were reluctant to follow *Luko's* lead, and *PMA* continued to be followed by federal courts, lower state courts and courts from other jurisdictions applying Pennsylvania law.

It was in this setting that the court revisited these issues in *Politsopoulos,* which involved a claim by the employee of the named insured against an additional insured for injuries sustained on the premises where the named insured operated its business. The named insured was a restaurant that leased the premises where the restaurant was located, and the additional named insured was the owner/landlord who was required by the lease to be added as an additional insured to the restaurant's insurance. The insurance company denied the claim on the basis of the policy's employer's liability exclusion, which stated in relevant part that the policy did not provide coverage pertaining to liability for an injury to "an employee of the insured arising out of and in the course of employment by the insured." In seeking a declaratory judgment on the issue, the insurer relied on the *PMA* case. The additional insured argued that the severability of insureds provision in *PMA* was distinct from and, therefore, not applicable to the separation of insureds provision in the policy at issue, which it argued should be judged on the specific language used.

The court in *Politsopoulos* sidestepped the issue to a degree by noting that the separation of insureds provision as a general rule cannot be interpreted in such a manner as to subvert otherwise clear and unambiguous policy exclusions. The court found the proper focus is on the policy's use of "insured" with both the definite and indefinite articles "the" and "any" or "an." Relying on the reasoning of the lower court (which had reluctantly followed *PMA,* noting what it saw as outdated and flawed reasoning in finding for the insurer) and other jurisdictions addressing the issue, the court found that where a general liability policy variously uses the definite and indefinite articles, this, as a general rule, creates an ambiguity such that "the insured" may reasonably be interpreted as signifying the particular insured against whom a claim is asserted. The court then emphasized that in this context the separation of insured provision only reinforces that understanding. Accordingly, the court found that the employer's liability exclusion was ambiguous and as such must be interpreted in favor of coverage. That is, the employer's liability exclusion only

applied to claims brought by employees of "the insured" against whom the claim is directed.

The *Politsopoulos* decision brings clarity to the issue of interpreting "the insured" when used in policy exclusions under Pennsylvania law. It also provides both insurers and insureds alike with a better understanding of what to look for when offering and choosing coverage. The other takeaway from the case is looking beyond the holding to how this situation might have been avoided in the first place. Whether it is under a lease, a service contract, or a construction contract, indemnification and insurance provisions are commonplace. However, the particular details and requirements of these provisions often are not clearly spelled out. Important considerations that are not always addressed include: whether the insurance to be maintained must provide coverage for the indemnity obligations that are assumed in the agreement; the particular coverages that are to be included in the policy; and whether the indemnity obligation is limited or capped by the amount of insurance. It is also necessary to take into consideration the limits of insurance, and how many other similar contracts the parties are involved in. If you are to be named as an additional insured, you will also want to be notified in the event that the policy is canceled or the limits are eroded by claims that you are not involved with. By clearly delineating these items in your agreements, you reduce the risk of having the courts decide the scope of your agreements.

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