



Recent Texas Cases Regarding Additional Insured Coverage - The New ISO Endorsement Under Judicial Scrutiny

Recently there have been two significant opinions, one from the Texas Supreme Court and one from the United States District Court for the Southern District of Texas, Houston Division, which address the scope of additional insured provisions that exclude coverage for sole negligence of an additional insured.

In *Evanston Insurance Company v. ATOFINA Petrochemicals, Inc.*, the Texas Supreme Court considered coverage under an excess liability policy issued by Evanston Insurance which followed a primary liability policy issued by Admiral Insurance. Both policies were issued to Triple S as the named insured. The claim arose out of the death of an employee of the contractor, Triple S, at the ATOFINA petrochemical facility. The wrongful death claims were alleged against both Triple S and ATOFINA. Ultimately, the claimants non-suited Triple S and settled with ATOFINA with no admission of liability. ATOFINA filed suit against Evanston, claiming coverage as an additional insured under the Admiral and Evanston policies. The Texas Supreme Court considered the following additional insured clauses:

The Admiral primary policy contained the following term:

WHO IS AN INSURED (Section II) is amended to include as an insured [ATOFINA], but only with respect to liability arising out of [Triple S's] ongoing operations performed for [ATOFINA], but in no event for [ATOFINA's] sole negligence.

The Evanston excess policy, under Section III.B.5, defined an "insured" as:

[a]ny . . . person or organization who is insured under a policy of "underlying insurance." The coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance.

Under Section III.B.6 of the excess policy, an "insured" was also defined as:

[a] person or organization for whom [Triple S has] agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by [Triple S] or on [Triple S's] behalf, or facilities owned or used by [Triple S].



ATOFINA maintained that it was entitled to coverage based upon the relatively broad wording in Section III.B.6. of the Evanston policy. The Texas Supreme Court, however, determined that Section III. B. 6. was modified by the language stating that “[t]he coverage afforded such insureds under this policy will be no broader than the “underlying insurance.” Because the underlying Admiral policy specifically excluded coverage for ATOFINA’s sole negligence, the Court found that the excess Evanston policy also excluded claims for sole negligence of the additional insured.

Perhaps the most significant aspect of this opinion was that, because the Court was unable to determine as a matter of law whether the claim arose from ATOFINA’s sole negligence, the Court could not rule on whether the Evanston policy excluded coverage for ATOFINA’s settlement of the underlying claim. As a result, the Texas Supreme Court remanded the case to the trial court for a determination of the respective liabilities of the parties. In order to obtain a declaratory judgment concerning coverage the parties that settled the suit to avoid trial are now forced to submit the case to the trier of fact to determine if ATOFINA was liable for the very claim it settled.

The June 2005 Legge Farrow Newsletter, entitled *Recent Amendments to Additional Insured Endorsements - A Compromise in Coverage*, analyzed the amended 2004 ISO additional insured endorsement CG 20 10 which excludes coverage for claims arising out of the sole negligence of the additional insured.

In June 2005 we anticipated that the 2004 ISO additional insured endorsement would create problems and that “...the determination of whether additional insured coverage will be afforded often may not be made until a finding or adjudication of liability is made.” It appears that the Texas Supreme Court has also recognized this problem in the *Evanston* opinion which involved a similar additional insured clause that excluded coverage for the sole negligence of the additional insured.

In *American Empire Surplus Lines Insurance Company v. Crum & Forster Specialty Insurance Company*, the United States District Court in Houston analyzed the scope of the 2004 ISO additional insured endorsement which reads:

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” caused, in whole or in part, by:

1. Your acts or omissions; or



2. *The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.*

There is no coverage for the additional insured for "bodily injury", "property damage" or "personal and advertising injury" arising out of the sole negligence of the additional insured or by those acting on behalf of the additional insured.

In the *American Empire* opinion, claims for personal injuries were brought by employees of a subcontractor, Multi Building, Inc. ("Multi"), against Multi and the premises owner Finger Companies ("Finger"). Crum and Forster ("Crum") had issued a CGL policy to Multi. Pursuant to the contract between them, Multi was required to name Finger as an additional insured on Multi's CGL policy. Finger's own insurer, American Empire, defended Finger and filed a declaratory judgment action against Crum, maintaining that Crum owed a defense to Finger as an additional insured.

Because the plaintiffs alleged negligence on behalf of both Multi and Finger, the Court did not have to deal with the sole negligence exclusion, but rather focused on how to determine if the injuries were "...caused, in whole or in part,..." by the additional insured, Finger.

Crum argued that the policy covered Finger only when Finger was found to be vicariously or derivatively liable for the acts of the named insured, Multi. Because the plaintiffs made allegations about Finger's direct, rather than vicarious, liability, Crum argued that Finger was not entitled to coverage as an additional insured. In response, Finger's insurer maintained that under ISO endorsement Finger is covered as an additional insured for injuries "caused, in whole or in part" by Multi, and that the Court did not have to consider whether Finger's liability played any role in causing the claim.

The Court held that Finger was entitled to coverage as an additional insured and refused to agree with Crum's restrictive reading of the ISO endorsement. The opinion states:

The Endorsement as written can be construed to cover situations where Finger and Multi are found jointly liable for their collaborative or jointly undertaken negligent conduct. ... The focus of the definition of additional insured coverage in the "whole or in part" sentence is on whether Plaintiffs allege a theory in the operative pleading in the Underlying Lawsuit under which Finger could be held liable for conduct by Multi that "caused" injury to a third party in any way. The sentence does not address the conduct of the other wrongdoer or wrongdoers, whether they be the additional insured (Finger) or not.



The Court did not rule on whether Finger would have been an additional insured had the plaintiffs alleged that Finger and Multi had committed wrongful acts entirely independent of the other. It is also important to keep in mind that this was a declaratory judgment action solely to determine the “duty to defend” and the Court did not make any finding concerning the duty to indemnify the additional insured.

Clearly, any intent to avoid unnecessary defense obligations to additional insureds through the use of the 2004 ISO Additional Insured Endorsement will be frustrated by the artful pleadings of plaintiffs that allege negligence on behalf of both the named and additional insured. In addition, any determination of an insurer’s duty to indemnify an additional insured under the 2004 ISO Endorsement will have to require some ultimate finding of whether the additional insured was jointly or solely liable for the underlying claim. This apparent necessity for a finding of liability seems to frustrate the intent of insurers and insureds involved in providing and obtaining additional insured coverage. It also appears that the sole negligence exclusion in the 2004 ISO Endorsement will likely preclude many insurers and insureds from obtaining a determination of coverage by way of summary judgment.

If you have any questions about this topic or any other questions concerning coverage under primary and excess liability, control of well, environmental impairment, builder’s risk, maritime employer liability/protection & indemnity/hull, fiduciary liability, directors & officers and/or errors & omissions insurance or subrogation matters, please contact any of the following Legge Farrow attorneys:

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