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Expert Analysis

Additional Insured: What Is the Value of 'Worth?'

Can an additional insured endorsement for "liability arising out of" the work of the named insured be triggered where the named insured is neither the employer of the party injured nor a negligent party?

In 2008, the Court of Appeals, in *Worth Const. Co. Inc. v. Admiral Ins. Co.*,[1] stated that "[g]enerally, the absence of negligence, by itself, is insufficient to establish that an accident did not 'arise out of' an insured's operations." However, a number of recent and sharply divided appellate decisions interpreting *Worth* raise questions as to the role negligence may play in additional insured coverage.

This discussion will examine the *Worth* decision and then attempt to reconcile three 2009 Appellate Court cases that have addressed this issue; two from the First Department, wherein both the majority and dissent cite *Worth* in support of their positions, and one from the U.S. Court of Appeals for the Second Circuit.

The 'Worth' Decision

In *Worth* the Court was faced with a coverage question where the general contractor, Worth Construction Co., sought additional insured coverage from the insurer of a subcontractor, Pacific Steel Inc., that had fabricated and installed a staircase. An employee of the iron work subcontractor slipped on fireproofing on stairs installed by Pacific. The fireproofing had been applied to the stairs after Pacific completed that stage of its work by yet another Worth subcontractor. At the time of the accident, Pacific was not on the jobsite and was waiting to hear from Worth as to when to complete work on the stairs. The injured iron worker brought suit against Worth, Pacific and the fireproofing subcontractor.

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Pacific had procured a policy of insurance that contained an additional insured endorsement that provided Worth with coverage "but only with respect to liability arising out of [Pacific's] operations…."[2] Worth contended that because the accident happened on the staircase installed by Pacific, the accident arose out of Pacific's work as a matter of law thus triggering additional insured status.

Recent appellate decisions raise questions as to the role negligence may play in additional insured coverage.

In finding that additional insured coverage was not applicable, the Court noted "[t]he phrase 'arising out of' has been interpreted by the Court to 'mean originating from, incident to, or having connection with'… and requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided.'"[3]

The Court found that the allegation that the stairs had been negligently constructed was the only basis for asserting a connection between Pacific and the accident. Moreover, Worth ultimately admitted that Pacific was not negligent. Therefore, the Court held that the stairs were nothing more than the mere situs of the accident. As such, "it could no longer be argued that there was any connection between [the injured party's] accident and the risk for which coverage was intended."[4]

Differing Interpretations

The *Worth* decision repeatedly cites prior case law in discussing the relatively broad loss-to-risk nexus that is appropriate to consider the "arising out of work" additional insured endorsement. Accordingly, some commentators have maintained that *Worth* neither creates any new interjection of negligence into the analysis nor changes the standard of review for this endorsement.[5]

Moreover in contrast to the "arising out of work" endorsement, another common additional insured endorsement requires that the loss "arise out of the named insured's negligence." This wording clearly reflects an expressed intention to consider the named insured's negligence. Accordingly, a strict construction of policy language would not give negligence the same consideration to endorsements expressing different intent.

However, in finding that the loss did not arise out of the subcontractor's work, the Court in *Worth* did include a detailed discussion of Pacific's negligence which some subsequent opinions have given great deference. In addition, courts appear to be interpreting *Worth* differently and similar fact scenarios have resulted in different outcomes.

For example, the Appellate Division, First Department in *Regal Construction Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*,[6] cited but distinguished *Worth* in a case in which a coverage obligation was found to exist. The court, with one justice dissenting, determined that a construction manager should be entitled to coverage under the policy procured by prime contractor, Regal Construction Corp. The majority held that because Regal was responsible for all the demolition and rebuilding at the site, the case was not analogous to *Worth*[7] stating "…Regal's tasks could not be viewed in isolation as were those of Pacific, the staircase subcontractor in *Worth*."[8] The majority argued that the dissent placed unwarranted emphasis on the fact that the underlying complaint made no claims of negligence as against Regal, quoting *Worth*:

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> Generally, the absence of negligence, by itself, is insufficient to establish that an accident did not "arise out of" an insured's operations. The focus of a clause such as the additional insured clause here is not the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained.[9]

Accordingly, the negligence of Regal was not a factor in determining coverage.

This approach was reiterated two days later in the Second Circuit, in *Turner Constr. Co. v. Kemper Ins. Co.*[10] In *Turner*, the construction manager sought additional insured coverage from the carrier for the HVAC contractor for fire damage that occurred at the worksite. The installation of the air conditioning unit to be installed by the HVAC contractor required the removal of the existing roof and the installation of a new roof. The fire was started by an employee of the roofing subcontractor who was working on a portion of the roof that had been cut out for the installation of the units to be installed by the HVAC contractor.

The HVAC contractor had procured a policy of insurance with "arising out of" language. The court noted that "the phrase 'arising out of' is ordinarily understood to mean originating from, incident to, or having connection with. Thus, the phrase requires *some* causal relationship between the injury and the risk for which coverage is provided."[11] This court also cited *Worth* and determined that the accident arose out of the HVAC's work as the fire was started by a worker who was working on the roof that had been cut out for the installation of air conditioning units. This connection was sufficient to enforce coverage.

However, the First Department subsequently addressed the issue again in *Bovis Lend Lease LMB Inc. v. Garito Contracting Inc.*,[12] with a different emphasis on negligence. Indeed, the majority appears to have applied a different standard in finding a similarly worded additional insured endorsement was not triggered. Two justices dissented, one of whom was in the majority in *Regal*.

In *Bovis*, general contractor Bovis Lend Lease LMB hired Garito Contracting Inc. to perform demolition work. Garito obtained a policy of insurance from Twin City Fire Insurance Co. which provided that Bovis would be entitled to coverage "only with respect to liability arising out of: …'[Garito's] work' for [Bovis]…or…acts or omissions of [Bovis] in connection with [its] general supervision of '[Garito's] work.'"[13]

Bovis sought coverage with regard to a personal injury action brought by the employee of another subcontractor who was injured when he fell through a hole in the floor that was created when Garito removed a garbage chute while performing demolition work. In the underlying action a jury found that Bovis was negligent and that such negligence was a substantial factor in the plaintiff's injury. The jury also found that Garito was negligent, but that such negligence was not a substantial factor in the injury.

The majority, also citing *Worth*, agreed with *Twin City* that the jury's findings as to Garito were as "conclusive as the admission by Worth that Pacific's activities were not a proximate cause of the underlying accident."[14] The jury's finding established, in the court's view that Bovis' liability did not arise out of Garito work or Bovis' supervision of Garito's work. In finding that the hole created by Garito was "merely the situs" of the accident the court stated, "[t]hus, as *Worth* makes clear, 'liability arising out of' a named insured's work is absent where, as here, the named insured is absolved of liability." Accordingly, while the majority cites to *Worth*, no mention is made of the language found therein where the Court of Appeals notes, as stated above, "the absence of negligence, by itself, is insufficient to establish that an accident did not 'arise out of' an insured's operations."

> The 'Worth' decision has left a measure of confusion in its wake as to the role of the named insured's negligence in considering 'arising out of work' additional insured endorsements.

The dissent in *Bovis* addresses the issue and points out that Garito, unlike Pacific, was actually found to be negligent. The dissent would find that the hole created by Garito was more than the mere situs of the accident. There was a connection between the accident and the risk for which coverage was intended.

Turner and *Bovis* each involved claimants who fell through openings created by named insured and similarly worded additional insured endorsements. Yet the courts appear to give different weight to the named insured's negligence to reach inapposite results. Can the cases be reconciled? Does it matter whether a named insured is found to be not negligent by stipulation or a fact finder? What happens to the duty to defend the presumptive additional insured triggered by mere allegations in pleadings once the named insured is found not to be negligent? Many questions remain.

Plaintiff's Employer

In 1994, the First Department held in *Consolidated Edison Co. v. Hartford Ins. Co.*,[15] that narrow construction and consideration of negligence were improper in interpreting an additional insured 'arising out of operations' endorsement which triggered coverage where the loss involved an employee of the named insured. This case has been cited favorably more recently[16] and neither the *Worth* decision nor the three ensuing cases discussed above involved a named insured employer. Thus, the employer status of the named insured would appear to still be a connection sufficient to trigger an 'arising out of work' additional insured endorsement without consideration of negligence.

Conclusion

The determination of whether the loss arose out of the named insured's work will necessarily involve a fact sensitive consideration of how close or remote the connection was between the named insured's work, the mechanism of the loss, and risk intended to be covered. However, as this discussion highlights, the *Worth* decision has left a measure of confusion in its wake as to the role of the named insured's negligence in considering 'arising out of work' additional insured endorsements.

Defense counsel and brokers accustomed to advocating for maximized coverage generally and a broad interpretation of the 'arising out of' language may, in any given scenario, have a non-negligent client who prefers not to have its additional insured endorsement triggered and not to pay anything from its policy.

The *Bovis* case attracted two dissenting opinions, thus, the matter can be appealed to the Court of Appeals as a matter of right. Clarity for the bench and bar may not be far around the corner. Certainty in this important area will surely be welcome by all. In the meantime, parties, their representatives, and carriers alike will continue to ponder the value of *Worth*.

1. 10 N.Y.3d 411, 416, 859 N.Y.S.2d. 101, 104 (2008).
2. Id. at 414 (brackets in original).
3. Id. at 415 (internal citations omitted).
4. Id. at 416.
5. "Narrow Decision Denies 'Additional Insured' Claim but Rule Remains—Insureds Negligence Is Not Necessary for Additional Insured Coverage," by Kevin Connelly, Common Law Journal, May 30, 2008.
6. 64 A.D.3d 461, 883 N.Y.S.2d 207 (1st Dept. 2009).
7. Id. at 463.
8. Id.
9. Id. at 463 (quoting *Worth*, infra note 1)
10. 2009 WL 2143215 (2d Cir.).
11. Citing *Turner Constr. Co. v. Kemper Ins. Co.*, 198 F.App'x 28 (2d Cir. 2006) (emphasis in original).
12. 2009 WL 2851933 (1st Dept).
13. Id.
14. Id.
15. 203 A.D.2d 83, 610 N.Y.S.2d 219 (1st Dept. 1994).
16. *Greater New York Mut. Ins. Co. v. Mutual Marine Office Inc.*, 3 A.D.3d 44, 769 N.Y.S.2d 234 (1st Dept. 2003).