HOUSTON FEDERAL COURT HOLDS EXCESS CARRIER MUST INDEMNIFY ITS ADDITIONAL INSURED

Newsbrief

23 SEP 2015

Houston Federal District Court Judge Kenneth Hoyt recently held a commercial liability carrier was required to defend and indemnify its additional insured under circumstances in which its named insured was not held liable for the loss. In *L-Con, Inc. v. CRC Ins. Servs., Inc.*, No. 4:13-CV-1526, 2015 WL 5021985 (S.D. Tex. Aug. 24, 2015), L-Con and Oiltanking entered into a Master Service Agreement (MSA) which included certain welding services by L-Con. The MSA required L-Con to name Oiltanking as an additional insured on its policies and obtain at least $1 million in primary coverage and $3 million in excess coverage. It also required that L-Con's insurance be primary to Oiltanking's own coverage. L-Con obtained $2 million primary coverage from American Contractors (ACIG) and $17 million in excess coverage from Interstate. Meanwhile, Oiltanking had a package policy provided by Lloyd's of London which included $5 million in primary coverage and $46 million in excess coverage.

An explosion during a welding project caused a death and severe injuries to several L-Con employees. The claimants sued only Oiltanking and not L-Con, presumably because L-Con was protected from suit by the worker's comp bar. ACIG agreed to defend Oiltanking as an additional insured, and the claimants obtained a $21 million judgment against Oiltanking. Presented with the excess judgment, Interstate refused to defend or indemnify Oiltanking, asserting three main arguments:

1. Oiltanking was not an additional insured under its policy because Oiltanking had been found solely negligent for the claimants' damages, and thus the loss did not "arise out of" L-Con's work for Oiltanking as required by the additional insured endorsement.

2. L-Con's employees were insureds by definition under the terms of L-Con's policies, and therefore this suit by one insured against an additional insured violated the Cross Suits exclusion.

3. The Interstate policy, by its Other Insurance clause, was excess to all other coverage available to Oiltanking and therefore Oiltanking's own carrier must exhaust its $5 million primary coverage before Interstate's coverage is triggered, and the two excess carriers must share the loss on a *pro rata* basis.

On cross motions for summary judgment, the court rejected the first two arguments. First, the court noted that the "arising out of" standard in the additional insured endorsement is a broad "but-for" causal connection and *does not*

require a finding of actual liability on the part of the named insured. The court also noted in this regard that L-Con had never been sued or designated as a responsible third party and thus the jury had no opportunity to assign any liability to L-Con, implying the court did not intend to let a strategic decision by the claimants stymie the parties' contractual intentions. Looking to the terms of the MSA as authorized by the policy itself and *In re Deepwater Horizon*, the court concluded there was "no doubt" that the loss arose out of L-Con's welding work for Oiltanking and thus Oiltanking was entitled to additional insured status.

Second, the court rejected the Cross Suits exclusion, observing that in this case L-Con's primary policy, which controlled the terms of the Interstate policy, allowed L-Con to choose to designate its employees as insureds. L-Con denied ever exercising this option and Interstate could not present any evidence that L-Con had done so. Therefore, the employees were not insureds and their suit against Oiltanking did not violate the Cross Suits exclusion. (The court's analysis did not give any hints as to what it might have done if the employees had been defined insureds.)

As to Interstate's third argument, the court concluded the competing Other Insurance clauses in the Interstate policy and Oiltanking's policy were mutually repugnant under the standard set out by *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.,* 444 S.W.2d 583 (Tex. 1969), and thus both must be ignored. As a result, the court concluded Interstate and Oiltanking's primary layer must share the loss on a *pro rata* basis, and Oiltanking's excess layer would be triggered when its primary layer is exhausted. Although this outcome implies L-Con may have violated its contractual obligation to obtain primary and non-contributing coverage in favor of Oiltanking, it appears the parties did not raise this issue in the context of these summary judgment motions. The court also held that in light of Interstate's policy terms which reduced the limits of its additional insured coverage to the minimum required by written contract, Interstate was only required to provide the $3 million of excess coverage required by the MSA and not its full $17 million.

Editor's note: We expect all aspects of this ruling will likely be appealed to the Fifth Circuit.