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MARCH 2019 TEXAS INSURANCE LAW UPDATE

FIFTH CIRCUIT FINDS A DUTY TO DEFEND FOR DAMAGES RESULTING FROM INSURED'S ACTS WHERE POLICY PROVISION DOES NOT SPECIFICALLY EXCLUDE SAID ACTS

In *World of Life Church of El Paso v. State Farm Lloyds*, --Fed.Appx.--, No. 18-50108, 2019 WL 1324845 (5th Cir. Mar. 22, 2019), the Fifth Circuit addressed the question of whether an insured's conduct was covered under the terms and conditions of a policy, triggering the insured's duty to defend and indemnify, and whether coverage was barred by a 'criminal acts' exclusion. In that case, Tom Brown ("Brown") served as president, chairman of board of directors and pastor of World Life of Church of El Paso ("WOL Church"). WOL Church was issued an insurance policy by State Farm Lloyds ("State Farm") which included a "duty to defend" clause specifically providing State Farm the "right and duty to defend any claim or suit seeking damages payable under this policy even though the allegations of the suit may be groundless, false or fraudulent." Furthermore, the policy included a Directors, Officers, and Trustees Liability Provision ("D&O Provision") pursuant to which State Farm agreed to pay for damages due to "'wrongful acts' committed by an insured solely in the conduct of insured's management responsibilities for the church." The term "wrongful acts" was defined as "any negligent acts, errors, omissions, or breach of duty directly related to the operations of your church." However, the D&O Provision of the policy included a "criminal acts" exclusion, which barred coverage for "…any dishonest, fraudulent, criminal or malicious act, including fines and penalties resulting from these acts."

Brown chaired a political committee called El Pasoans for Traditional Family Values ("EPTFV") and supported the passage of an ordinance providing that "…El Paso endorses traditional family values by making health benefits available only to city employees and their legal spouse and dependent children" ("Ordinance"). The voters approved the Ordinance in November 2010; however, the city council amended the Ordinance to restore benefits for those who lost same. Mayor John F. Cook ("Cook") voted in favor of the amendment. Subsequently, Brown and EPTFV made efforts to recall the election and remove Cook from office. Brown used the WOL Church's website to announce a recall campaign. Cook sued WOL Church in state court for violating Texas Election Code §§253.094(b) and 253.031(b) ("Texas Election Code") (which regulates corporate financial contributions for recall elections) by circulating recall petitions and raising money for the recall ("state court action"). The trial court temporarily enjoined further circulation of recall petitions; however, Brown intervened and persuaded the trial court to dissolve parts of the temporary restraining order and deny Cook's injunctive relief. Cook then appealed to the El Paso Court of Appeals, which reversed the trial court's order. The court found violations of Texas Election Code by WOL Church and that WOL Church improperly made contributions in connection with a recall election rather than contributing to a political committee. After an unsuccessful appeal by WOL Church to Texas Supreme Court, the trial court entered an order consistent with the El Paso Court of Appeals' decision, partially granting Cook's summary judgment motion and finding Brown and WOL liable to Cook for violations of Texas Election Code. WOL Church and Brown entered into an agreed judgment with Cook, accepting former's liability to latter for damages totaling $475,000.

Prior to El Paso Court of Appeals decision, WOL Church submitted a claim to State Farm for defense and indemnification in the state court action. However, following the El Paso Court of Appeals' decision, WOL Church and Brown withdrew as no fees were awarded. Almost a year later, WOL Church and Brown again submitted a claim for defense and indemnification to State Farm. State Farm denied any duty to defend or indemnify based upon Cook's third amended petition. More than three years later, WOL Church and Brown again tendered to State Farm based on Cook's fourth amended petition; however, State Farm still denied any defense or indemnification obligations on its part based on the allegations in Cook's fourth amended petition. Subsequently, WOL Church demanded $475,000 plus interest (as per agreed judgment) as well as $450,000 plus interest for attorney's fees. State Farm refused to reimburse and denied indemnification for Brown and WOL claiming that the policy did not cover their claim.

WOL and Brown sued State Farm, alleging breach of contract, unjust enrichment and bad faith insurance dealing in state court. State Farm removed the matter to federal court based upon diversity of citizenship and moved for summary judgment. The district court granted State Farm's motion, finding that State Farm had no duty to defend or indemnify Brown under the D&O Provision of the policy as Brown's actions were not "'directly related to the operations.'" The district court also held that whether the Election Code violations were intended by Brown was a question of fact. WOL and Brown then appealed to the Fifth Circuit. The Fifth Circuit reversed and ruled in favor of WOL and Brown, finding that State Farm had a duty to defend in the state court action.

In reaching its decision, the Fifth Circuit applied the long-standing Eight-Corners Rule to conclude that State Farm's duty to defend was triggered based on Cook's allegations and the policy's D&O provision. Specifically, Cook alleged that Brown violated the Election Code based on his role as director of WOL Church, causing the WOL Church to violate the Election Code; as such Brown's acts were directly related to the Church's operations. The court found that the D& O Provision did not give "…any indication that [WOL] Church 'operations' do not encompass voting rights work or other activities outside the realm of traditional church." Since the policy clearly covered acts related to "operations of your church," and not just that of a typical church, the court found that Brown's acts were within the realm of WOL's operations. The court emphasized that doubts as to allegations stating a cause of action within coverage are resolved in insured's favor.

Furthermore, the Fifth Circuit ruled that, contrary to State Farm's contentions, the criminal acts exclusion did not negate State Farm's duty to defend. The court noted that the Election Code does not specify that its violation is deemed a criminal act; therefore, since Cook alleged facts in support of potential *noncriminal* violation of the Election Code, State Farm's duty to defend was triggered and the criminal acts exclusion was inapplicable.

Finally, the Court distinguished between the duty to defend and the duty to indemnify, noting that the latter depends upon "'facts actually established,"" and emphasized that the burden to establish the duty to indemnify rests with the insured. With regard to State Farm's duty to indemnify, the court found that a question of fact existed as to whether Brown's actions were "directly related to the operations" of WOL. Although the district court found no duty to indemnify since Brown's "only evidence …that the recall election was a ministry of the Church" was his own self-serving statement(s), the Fifth Circuit ruled that Brown's affidavit, albeit self-serving, "set[s] forth material facts regarding whether his actions were directly related to the Church's operations," and as such, present a question for the jury. Also, Brown's unsworn disclaimer on the Church's website indicating that the only purpose of the recall was "'to help restore the rights of the voters'" does not "nullify his sworn affidavit." With regard to the criminal acts exclusions in the indemnification context, the Court ruled that State Farm carried the burden to prove the applicability of the exclusion. The Court noted that although the district court found a genuine issue of fact as to whether Brown's conduct was intentional, as per the Election Code, criminality requires "knowingly" committing the act, which is an issue the district court failed to address and must do so on remand.

TYLER COURT OF APPEALS FINDS ABATEMENT AND SEVERENCE OF EXTRACONTRACTUAL CLAIMS NECESSARY IN THE CONTEXT OF UIM CLAIM, AND THAT INSURER'S CONSENT CONDITIONED UPON INSURED'S WAIVER OF UIM BENEFITS DOES NOT CONSTITUTE BAD FAITH

In *American National County Mutual Insurance Company v. Tina Holland*, No. 12-18-00141-CV, 2019 WL 1272954 (Tex. App.—Tyler Mar. 20, 2019, no pet. h.), the Tyler Court of appeals addressed the issue of whether severance and abatement of extracontractual claims is necessary in a UIM claim and whether an insurer's consent to insured for settlement conditioned

upon a waiver of UIM benefits is valid. In that case, Tina Holland ("Holland") had a personal automobile insurance policy with American National County Mutual Insurance Company ("American National), which included underinsured motorist ("UIM") coverage with limits of $100,000/per person and personal injury protection (PIP) benefits of $2,500. In April 2015, while the policy was in effect, Holland was involved in a motor vehicle collision with a vehicle driven by Nhachi Nguyen ("Nguyen"). Following the accident, Holland informed American National of the accident, yet did not make any PIP claim, indicating that she'll pursue coverage from Nguyen's insurance carrier, Allstate. In June 2016, Holland's attorney sent a letter to American National seeking permission to settle with Allstate in the event an offer is made, and referencing Nguyen's liability limits and Holland's UIM benefits. American National responded in writing and gave permission to settle "…'so long as it is within [Allstate's] policy limits and no payments are claimed under the PIP or the UIM coverage.'" After Allstate made an offer, Holland's attorney again sought permission from American National to settle and the latter approved. However, after the settlement, Holland's attorney sent an e-mail on November 3, 2016 informing American National that Holland demanded PIP and UIM benefits under her policy with American National. On November 4, 2016, Holland's attorney wrote a letter to American National requesting reimbursement for Holland's medical bills under her PIP coverage. On December 13, 2016, American National paid the entire PIP benefits.

Holland commenced an action against American National alleging breach of contract under the UIM provision of the policy and violations of the Texas Insurance Code and general insurance principles. Subsequently, American National moved to sever and abate Holland's extracontractual claims with her UIM claim, yet the trial court denied said motion. After trial, the jury awarded damages totaling $120,000 to Holland, and further found that American National "engaged in an unfair or deceptive act or practice and violated the duty of good faith and fair dealing," yet timely paid the PIP benefits. The jury also found that American National's conduct was performed "knowingly," and awarded an additional $10,000 in damages and attorney's fees. American National then moved for judgment notwithstanding the verdict and also moved for a new trial. The trial court denied both motions and American National appealed to the Tyler Court of Appeals.

The Tyler Court of Appeals reversed the trial court's denial of the motion to sever and abate the extracontractual claims and remanded the UIM claim for a new trial. With regard to allegations of deceptive or unfair act and violations of the duty of good faith and fair dealing, the court also rendered a "take nothing" judgment in favor of American National. In reaching it decision, the Tyler Court of Appeals reasoned that although issues of severance and abatement are within the broad discretion of the trial court, severance is required where "…'all of the facts and circumstance of the case unquestionably requires a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion," and the rights of parties are not prejudiced. Furthermore, the court held that abatement of extracontractual claims is required where the parties "would incur unnecessary expenses if the breach of contract claim were decided in the insurer's favor." The court rejected Holland's argument that American National waived its motion to sever by not moving for said relief until after voir dire. The court instead held that severance is permitted anytime before

submission to the jury, and since American National moved for severance prior to the case's submission to the jury, it preserved its argument.

Holland further argued that American National breached the duty of good faith and fair dealing and violated the Texas Insurance Code §541.060(a)(2)(B) by imposing a condition on Holland to waive her UIM and PIP benefits in exchange for American National's consent for Holland to settle with Allstate and Nguyen. The court noted that the direct examination of Holland revealed her aggravation and distress with American National [for refusing to pay her UIM benefits] aimed to prove her extracontractual claims, which in turn prejudiced the jury against American National. The court reasoned that American National owed no duty to pay UIM benefits until Holland proved that the damages were in excess of the Ngyuen's insurance limits. Without first obtaining a judgment establishing that she is an underinsured driver and without showing an extent of her damages, the extracontractual claims should not have been addressed. The court found that the evidence submitted by Holland was aimed to "incite anger" against American National, as a result of which the jury awarded the entire $100,000 in UIM benefits to her. The court, therefore, found that the trial court's failure to sever the extracontractual claims prejudiced American National.

American National also argued that the evidence was insufficient to show unfair or deceptive act or practice, that the evidence did not show a breach of duty of good faith and fair dealing. With regard to Holland's prompt payment claim, the jury found that American National did not untimely pay Holland's PIP benefits, and as such, the Tyler Court of Appeals ruled that said finding is insufficient to conclude that American National engaged in deceptive or unfair act or violated its duty of good faith and fair dealing. Also, contrary to Holland's contentions, the court found that American National's letter containing the conditioned consent to settle with Allstate did not constitute a violation of the duty of good faith and fair dealing. The court noted that "the purpose of the consent-to-settlement letter in an UIM case is to protect the insurance company's subrogation rights." American National's letter did not misrepresent Holland's rights under the policy. Focusing on the chronology of events, the court noted that American National sent its letter only after it was "presented with an actual settlement offer." Holland first settled with Nguyen and Allstate and *afterwards* commenced the action against American National seeking UIM benefits. Since American National's duty to pay UIM benefits does not arise until a resolution of liability in the underlying case, at the time American National sent its consent letter [June 2016], it owed no duty to Holland to pay UIM benefits and therefore could not have engaged in unfair or deceptive practice. Therefore, the Tyler Court of Appeals found no evidence supporting the jury's findings of deceptive or unfair practice or violation of good faith and fair dealing.

SOUTHERN DISTRICT OF TEXAS FINDS NO DUTY TO DEFEND BASED ON

APPLICATION OF BREACH OF CONTRACT EXCLUSION IN THE INSURANCE POLICY DESPITE THE INAPPLICABILITY OF DAMAGE TO YOUR WORK EXCLUSION

In *Mt. Hawley Insurance Company v. Huser Construction, Inc.*, No. H-18-0787, 2019 WL 1255756, (S.D. Tex., Mar. 19, 2019), the Southern District of Texas addressed the issue of whether the insurer owes a duty to defend in a lawsuit involving alleged construction defect where the policies contained a breach of contract exclusion in addition to a "your work" exclusion preserving coverage for the insured if the insured used subcontractors. In that case, Huser Construction Company, Inc. ("Huser") maintained a commercial general liability and commercial excess policy issued by Mt. Hawley Insurance Company ("Mt. Hawley) ("policies") for the period of December 31, 2014 to January 1, 2019, with limits of $1,000,000 per occurrence, $2,000,000 general aggregate limit and $2,000,000 products-completed operations aggregate limit. The policies included a breach of contract exclusion, which barred coverage for liability arising from breach of express or implied contract, as well as a "your work" exclusion, which barred coverage for property damage arising from the insured's work. However, the policy contained an exception to the "your work" exclusion which preserved coverage in the event liability arose from the insured's subcontractors' work.

Huser, as general contractor, contracted with a third party, Eagle Heights Pleasanton, LLC ("EHP") to build an apartment complex in Pleasanton, TX. Huser also hired subcontractors including Schaffer for designing and installing an HVAC system. Huser completed the work in 2016, after which EHP allegedly found "..multiple deficiencies in the workmanship and materials used" by Huser. On February 13, 2018, EHP filed an action against Huser and Schaffer in Harris County, Texas alleging breach of contract and negligence against Huser as well as allegations of defective work against Schaffer ("underlying action"). Huser timely notified Mt. Hawley regarding the lawsuit. Mt. Hawley commenced an action in the Southern District of Texas and moved for summary judgment and judgment on the pleadings, seeking a declaration that it did not owe any duty to defend Huser in the underlying action because coverage was barred due to the breach of contract exclusion in the policies. Huser cross moved for breach of contract and violations of the Texas Insurance Code. The Southern District of Texas granted Mt. Hawley's motions and denied Huser's cross motion.

In reaching its decision, the court noted that the breach of contract exclusion in the policies provided, in pertinent part, that any claim or suit for property damage "'arising directly or indirectly" out of breaches of contract or warranty are not covered by the policies. The court also noted that "arising out of" language is broader than "caused by." Furthermore, the court found that EHP has clearly alleged breach of contract against Huser and essentially claimed Huser was a "but for" cause of the property damage alleged since Huser allegedly failed to hire and supervise qualified subcontractors. The court rejected Huser's argument that the breach of contract exclusion is overbroad by specifying that the exclusion requires a breach of contract, not just its mere existence. The court rejected Huser's argument that the policies' "your work" exclusion preserves coverage by the exception for work involving subcontractors. The court noted that even if the "your work" exclusion does not apply due to use of subcontractors, said

exception only modified the "your work" exclusion; it does not apply to other exclusions, such as breach of contract. Also, the court found that the breach of contract exclusion provided in endorsements trumped the policy language containing the "your work" exclusion simply because the endorsement containing the breach of contract exclusion specifically stated that it changed the policy. The court, therefore, ruled that EHP's claims against Huser were excluded due to the breach of contract exclusion in the policies, and Mt. Hawley owed no duty to defend Huser in the underlying action. Furthermore, since Huser's liability arose directly or indirectly out of the alleged breach of contract, the same facts that negated Mt. Hawley's duty to defend also negated its duty to indemnify.

SOUTHERN DISTRICT OF TEXAS FINDS THAT SCOPE OF ADDITIONAL INSURED COVERAGE IS NOT LIMITED IN ACCORDANCE WITH LIMITATIONS ON SCOPE OF INDEMNITY OBLIGATIONS IN A CONTRACT

In *AIG Specialty Insurance Company v. Ace American Insurance Company, et al,* No. 2:18-CV-16, 2019 WL 1243911 (S.D. Tex., Mar. 18, 2019), the Southern District of Texas addressed the issues of whether the terms and conditions of an insurance policy mandate limitation of additional insured coverage in accordance with the limitations of an indemnification provision of a contract, as well as the validity of a breach of contract claim by a third party's subrogee against an employer of an injured employee following payment of worker's compensation benefits. On March 30, 2010, Plaintiff AIG Specialty Insurance Company's ("ASIC") insured Sherwin Alumina, LLC ("Sherwin") hired Turner Industries Group, LLC ("Turner) as an independent contractor for "separately-contracted services" as per a master service Agreement ("MSA"). Pursuant to the MSA, Turner agreed to have control over the worksite and be solely responsible for ensuring that the work was performed in a safe manner and also assumed responsibility for the "…training, supervision, safety, and health of Turner's employees." Furthermore, Turner agreed to indemnify Sherwin for certain bodily injury claims that might be brought against Sherwin by Turner's employees and also to provide additional insured coverage to Sherwin under a comprehensive general liability policy. The indemnity provision of the MSA specifically included claims brought by employees of either of the parties to the MSA. As such, pursuant to the MSA, Turner agreed to defend Sherwin for claims "…directly connected with or aris[ing] out of performance of the Work" which are caused by Turner's negligence or legal fault. Turner complied with the insurance obligations under the MSA and maintained a policy for the period of March 1, 2012 to March 1, 2013.

On November 15, 2012, one of Turner's employees, Edward Warren ("Warren") visited the Sherwin plant to perform emergency descaling work. As he was working on a platform that was attached to a catwalk structure, the tack welds underneath him gave away, and Warren fell through sustaining serious bodily injuries. After collecting worker's compensation benefits under Turner's policy, Warren commenced an action against Sherwin and its plant manager alleging negligence, gross negligence and failure to maintain a safe work environment.

Sherwin claimed that the defect in catwalk grating resulted from Turner's defective work since Turner's work involved cutting through grating and its subsequent repair after completion

of work. Sherwin demanded defense and indemnity from Turner and its insurer, Ace American Insurance Company ("Ace") pursuant to the MSA which required Turner to assume responsibility for safety of its employees and the worksite. In response, Turner and Ace denied Sherwin's claim, arguing that the MSA agreement did not require indemnification for Sherwin's or its plant manager's own negligence or gross negligence, and that the indemnification provision violated the express negligence rule. Subsequently, Sherwin and Warren settled the case after Sherwin's insurer, ASIC, tendered the policy limits. However, ASIC brought a breach of contract action against Turner and Ace in the Southern District of Texas, as subrogee of Sherwin, seeking reimbursement for the amount paid and for defense costs. Each party, including ASIC, Turner and Ace, moved for summary judgment. The court granted in part and denied in part ASIC's motion, finding that while Sherwin was entitled to additional insured coverage under Turner's policy and ASIC was entitled to pursue damages against Turner and Ace, ASIC's request for reimbursement of full policy limits paid in settlement was denied. Furthermore, the court granted Turner's motion in part, finding that Turner complied with its obligation under MSA and Turner was not required to indemnify Sherwin or its plant manager for their own negligence; however, the court denied Turner's argument that ASIC could not pursue claims against Turner for establishing sole or partial negligence of Turner for Warren's injuries. Finally, the Court denied Ace's motion in its entirety for several reasons discussed below.

ASIC argued that Turner agreed to provide additional insured coverage for Sherwin prior to Warren's injury. However, ACE argued that the language in the Certificate of Insurance ("Certificate") issued to Sherwin showed that the additional insured endorsements were only intended to provide coverage to the extent of indemnity obligations under MSA. The court, however, disagreed with Ace, ruling that the Certificate did not evidence coverage, by specifically pointing to the language in the Certificate stating that it is for information purposes only and does not confer any rights upon the certificate holder and does not affect coverage.

Ace also argued that the scope of additional insured coverage, based on the language in the endorsements, is commensurate with the scope of the indemnity obligation. Since the MSA did not require Turner to indemnify Sherwin for Sherwin's own negligence or gross negligence, then, Ace argued, the endorsement could not provide additional insured coverage. However, the court rejected Ace's argument, and agreed with ASIC, reasoning that the scope of coverage is determined by the terms of the policy; only if the policy directs elsewhere, such as a contract, then same will be considered but only to the extent allowed by the policy. The court noted that the endorsement only points to the MSA to determine if Turner agreed to provide Sherwin with additional insured coverage prior to Warren's accident, which it did. The endorsement, however, did not reference the MSA for any other purpose and, therefore, did not limit Turner's additional insured obligation. The court explained that

> …[t]he fact that the carrier's [Ace] obligation to provide insurance to an additional insured [Sherwin] might exceed the scope of the named insured's [Turner] liability is a risk taken when the carrier fails to reference the terms of the outside contract for purposes of determining the scope of liability.

Furthermore, Ace claimed that the endorsements expressly required that the policy obligations will only trigger upon the named insured's [Turner] acceptance of the duty to defend and indemnify or a judicial determination. However, the court yet again rejected same, concluding that such an interpretation would render both additional insured endorsements illusory. The court noted that if the duty to defend and indemnify depended upon Ace's interpretation of the endorsements, then Sherwin would have no additional insured coverage unless it obtained a judgment finding Turner liable; this would leave Sherwin with no defense against Warren. As such, the court found that Sherwin was entitled to additional insured coverage under Turner's policy with Ace, and that said coverage was not commensurate with any limits on Turner's indemnity obligation under the MSA.

Moreover, Ace argued that ASIC's subrogation claim must fail because ASIC did not show proof of its own policy for Sherwin to rule out the possibility that ASIC voluntarily defended Sherwin, ASIC did not show whether Sherwin's plant manager was also covered under ASIC's policy so that any settlement with regard to the plant manager's liability is included in ASIC's subrogation claim, and that ASIC did not show whether any such coverage may be limited to pro rata recovery based on Ace and ASIC policies' coordination of benefits provision. The court rejected all of these arguments by Ace, ruling that ASIC provided a copy of the policy to Ace, the policy clearly defined an "insured" to include the plant manager, and the ASIC policy's "Other Insurance" provision made the ASIC policy excess over the Ace policy.

With regard to ASIC's breach of contract claim, the court dismissed same, finding that Turner complied with the insurance requirement by securing its policy with Ace, which included an additional insured endorsement. As such, the court found that Turner did not violate the terms of the MSA.

Turner argued that Warren's claims arose from Sherwin's own negligence and gross negligence, which were not covered under the indemnification provision of the MSA. ASIC claimed that Turner had actual knowledge of the indemnity agreement and, therefore, there was no need for indemnity for Sherwin's own negligence to be express and conspicuous. The court, however, ruled that it would not determine whether an actual notice exception applied to the express negligence test; instead the court found that the indemnity provision conspicuously limited Turner's indemnity obligation to its own negligence. The court acknowledged that if ASIC could establish that its settlement included Turner's liability (based on Turner's obligations under the MSA), same will open the question of Turner's own fault and negligence causing Warren's injuries. However, the only determination the court made was that ASIC's entire policy limit (the full settlement amount) could not be imposed on Turner.

Finally, Turner also argued that worker's compensation law prohibited Sherwin's recovery because "Warren's claim against Sherwin cannot be used to make an end-run around the protection afforded" to Turner as an employer after Warren has already collected worker's compensation benefits. However, the court disagreed with Turner by noting that a third party, such as Sherwin, may not seek reimbursement from the employer [Turner] after Turner has paid

worker's compensation benefits to its injured employee [Warren] *unless* the employer specifically agreed in writing to assume liability to Sherwin. Since Warren agreed under the MSA to assume liability for safety of the work environment and its employees, ASIC, as subrogee of Sherwin, was entitled to pursue a breach of contract claim against Turner.

MARCH 2019 MCS-90 UPDATE
(ALL COURTS – ALL JURISDICTIONS)

NORTHERN DISTRICT OF ILLINOIS FINDS THAT EMPLOYEE DEFINITION UNDER THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS DOES NOT APPLY WHERE MCS-90 ENDORSEMENT TO THE POLICY DOES NOT EXPRESSLY INCORPORATE SAID DEFINITION

In *National Continental Insurance Co. v. Vukovic*, No. 17-CV-2607, 2019 WL 1331790 (N.D. Ill., March 25, 2019), the Northern District of Illinois addressed, among other issues, whether the Federal Motor Carrier Act of 1980's ("Act") definition of "employee" is included in a policy which has an MCS-90 endorsement attached and where the policy itself does not clearly define the term "employee." In that case, MBDP007 Transportation, Inc. ("MBD") was a trucking business involved in freight transportation. Mario Konstadinovic ("Mario") owned MBD and was an independent contractor. AAA Freight Incorporated ("AAA"), a federal motor carrier and trucking company providing long-haul trucking services, contracted with MBD for MBD to provide equipment and qualified drivers for truck-hauling services. The Agreement specifically provided that AAA and MBD were not employer and employee, and that MBD's agents were not employees of AAA at any time. MBD agreed to provide sufficient employees to operate equipment covered under the Agreement and further agreed to retain control of its employees at all times, including responsibility for their payment and worker's compensation insurance. Milijan Rancic ("Rancic") was employed by MBD as an independent contractor and provided services to AAA pursuant to the Agreement.

National Continental Insurance Company ("NCIC") issued an insurance policy to AAA, effective April 9, 2015 and April 9, 2016.

AAA and MBD agreed for the latter to take a trip involving several states ("subject trip"). Rancic was hired as a driver and Nikola Vukovic ("Vukovic"), a driver with a temporary commercial driver's license, was to accompany him as "trainee and passenger." On August 31, 2015, while Rancic was driving with Vukovic as a passenger on the subject trip, Rancic allegedly negligently lost control, resulting in the vehicle going down a hill and causing Vukovic to suffer serious injuries. Vukovic subsequently filed suit against Rancic and AAA, claiming that he was an authorized passenger in the vehicle Rancic operated and he had permission from both Rancic and AAA to be included in the subject trip ("underlying suit"). NCIC filed a declaratory judgment action in the Northern District of Illinois against Vukovic, Rancic, and AAA, claiming that NCIC had no duty to defend or indemnify Rancic and AAA in the underlying suit, specifically arguing, among other things, that as per the MCS-90 Endorsement to the policy, Vukovic is an employee of AAA and coverage is precluded due to "Fellow Employee" exclusion and "Employee Indemnification and Employer's Liability" exclusion. Meanwhile, Vukovic, AAA and Rancic ("Defendants") moved for summary judgment arguing that NCIC had a duty to defend and indemnify. While the court partially granted Defendant's motion, it denied NCIC's motion.

Among other things, the court noted that the MCS-90 Endorsement to the policy states that "all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in force and effect as binding between insured and the company." Furthermore, as per the endorsement, the insurance policy assured compliance by the insured [AAA], as a motor carrier of the property, with the Motor Carrier Act of 1980 and the rules of Federal Motor Carrier Safety Administration (FMCSA). NCIC argued that Vukovic was a "statutory employee" as per the definition by Federal Motor Carrier Safety Regulations ("FMCSR") and that said definition applied because the policy did not clearly define the term "employee," and since the policy was issued to AAA, a federal motor carrier, the policy incorporated the broader "statutory employee" definition, and that the MCS-90 establishes same. However, contrary to NCIC's contentions, the court ruled that the policy clearly "define[d] 'employee' to include a 'leased worker' but not a 'temporary worker.'" The policy did not mention or reference any "statutory" employee definition when defining a leased worker or a temporary worker. Furthermore, the MCS-90 did not refer to the "statutory employee" definition under the FMCSR. As such, the court ruled that imposing the "statutory employee" definition will essentially reduce coverage and will "upset" the contracting parties' intentions. The court relied on several prior decisions, including *National Continental Insurance Company v. Singh*, 2018 WL 3861549 (N.D. Ill. 2018), where courts declined to adopt the "statutory employee" definition where the MCS-90 did not specifically incorporate same.

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