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Nevada Supreme Court: Seven and Out for Insurers that Use "Arising Out Of " Additional Insured Endorsements

On Thursday the Nevada Supreme Court added its voice to the age old additional insured question: To what extent is coverage available to an additional insured for its own negligence (and even its sole negligence). Even if Nevada is not a jurisdiction of interest for you, the court examined the issue nationally and offered a lesson for insurers everywhere.

The issue before the Nevada high court in *Federal Insurance Co. v. American Hardware Mutual Insurance Company* was the following certified question from the District Court for the District of Nevada: Whether, under Nevada law, an additional insured endorsement provides coverage for an injury caused by the sole independent negligence of the additional insured?

The court answered the question in the affirmative and concluded that, "unless the contrary intent is demonstrated by specific language excluding or limiting coverage for injuries caused by the additional insured's independent negligent acts, there is coverage."

The facts that gave rise to the coverage issue were simple. Clark Lift West, Inc. provided maintenance and repair services at the Sparks, Nevada facility of Southern Wine and Spirits of America, Inc. American Hardware issued an endorsement naming Southern Wine as an additional insured under Clark Lift's liability policy. The endorsement provided that Southern Wine, as an additional insured, was covered for liability, **"but only with respect to liability arising out of [Clark Lift's] ongoing operations performed for [Southern Wine]."** *American Hardware* at *2.

A Clark Lift employee was injured at the Sparks facility while acting within the course and scope of his employment. He filed a personal injury complaint against Southern Wine seeking to recover damages for Southern Wine's negligence in causing his injuries. According to the complaint, as he was attempting to perform mechanical repairs on a conveyor belt drive, the belt unexpectedly began moving, at which time he slipped on a piece of loose cardboard on Southern Wine's floor and, in reaching out to stop his fall, his hand became caught in the belt mechanism, resulting in serious injuries." *Id.* at *2-*3.

Southern Wine, through its general liability insurer, Federal Insurance Company, tendered the defense of the personal injury action to American Hardware. American Hardware refused the tender on the grounds that its additional insured endorsement did not cover Southern Wine, as an additional insured, for its direct acts of negligence. American Hardware maintained that coverage was triggered only when the alleged negligence could be imputed to the additional insured through the named insured's operations, *i.e.*, when the additional insured can be held vicariously liable for the named insured's negligence. *Id.* at *3.

In concluding that Southern Wine, as an additional insured, was entitled to coverage for its independent acts of negligence, the Nevada Supreme Court was persuaded by two reasons. First, the majority of jurisdictions resolving disputes over whether coverage extends to the additional insured's own negligent acts have interpreted "arising out of" additional insured endorsements in favor of coverage, regardless of fault, provided that the injury or loss is connected to the named insured's operations performed for the additional insured.

Second, the court looked to the rules of policy interpretation which require that unclear terms be interpreted against the insurer: "[W]ithout concrete evidence of a different intent, when the term 'arising out of the operations' of a named insured is included in an additional insured provision, that term must be read to include coverage for acts arising from the additional insured's own negligence. Accordingly, here, given that the language used in the endorsement does not allocate fault, and in light of our rule to broadly construe insurance policies in favor of coverage, it seems objectively reasonable that the additional insured would have expected that the endorsement provides coverage for liability connected to the named insured's operations, regardless of who was at fault."

Take Away Point: The court stated several times that the endorsement did not allocate additional insured coverage based "fault." In other words, nothing in the language of the endorsement precluded an additional insured from coverage, even for it was at fault for the injury. The court was clear that if different language had been used, the result would have been different.

Insurers have long been hand-wringing over the amount of coverage that they are required to provide to additional insureds. Insurers are often required to provide coverage for an additional insured's negligence, yet they may have collected little or no premium for that exposure.

This is the problem that ISO set out to address in its 2004 additional insured amendments. Even if ISO's amendments are not perfect, they are an improvement over "arising out of" endorsements when it comes to this issue. Yet this coverage lawyer can count on one hand (and not all fingers are required) the number of policies that he has seen since 2004 that incorporate the new ISO additional insured endorsements.

A link to *Federal Insurance Co. v. American Hardware Mutual Insurance Company* is here:

http://www.nvsupremecourt.us/documents/advOpinions/124NevAdvOpNo31.pdf

Please let me know if you have any comments or questions.

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