Small Words in an Insurance Policy Make a Big Difference

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Contractor Not Covered Under Subcontractor's Policy For Claim By Subcontractor's Employee.

The rules for interpreting a contract, including an insurance policy, require a court to give meaning and effect to every word whenever practicable. That principle is illustrated by a recent case, *Phoenix Baystate Construction Co., Inc.* v. *First Financial Insurance Company*, Massachusetts Appeals Court No. 19-P-743 (Memorandum and Order Pursuant to Rule 1:28, May 18, 2020), in which the use of the word "any" rather than the word "the" in an exclusion was fatal to the plaintiff's coverage claim. The Appeals Court's analysis in the *Phoenix* case also illustrates that another principle of contract interpretation, requiring the court to consider the provision at issue in light of the contract as a whole, may sometimes override the requirement to apply the plain meaning of every word.

Phoenix was a contractor named as an additional insured on its subcontractor's insurance policy. An employee of the subcontractor sued Phoenix for an injury on the job. The subcontractor's insurer denied coverage, relying on the cross liability exclusion, which barred coverage for injury to an "employee of any insured."

Phoenix sued, arguing that the cross liability exclusion was inconsistent with the policy's separation of insureds clause. That clause, also referred to as a "severability of interests" clause, states that the policy applies separately to each insured against whom a suit is brought. The trial judge found in favor of Phoenix.

The Appeals Court reversed, relying on a majority of cases from other jurisdictions that had considered the issue. Those cases hold that, for exclusions that pertain to "*the* insured," the separation of insureds clause means that the exclusion applies only to the insured who is actually seeking coverage. For exclusions that pertain to "*any* insured," the separation of insureds clause has no effect, and the plain meaning of "any" applies.

Except when it doesn't. As Phoenix argued, in *Worcester Mutual Ins. Co.* v. *Marnell*, 398 Mass. 240 (1986), the Supreme Judicial Court held that an exclusion in a homeowner's policy barring coverage for injury arising out of the use of a motor vehicle owned or operated by "any insured" did not eliminate coverage for the insured parents when they were sued for negligent supervision after their son, also an insured, became intoxicated at their home, left in his car, and fatally struck a third party. The court in *Marnell* concluded that the phrase "any insured" in the motor vehicle exclusion referred only to the insured seeking coverage.

Distinguishing *Marnell*, the Appeals Court pointed to the SJC's conclusion that the negligent supervision claim against the parents was the type of homeowner's risk the policy was meant to cover, and not the kind of motor vehicle risk to which the exclusion in that case was directed. That analysis of the intent of the exclusion and the purpose of the policy as a whole was essential to the outcome in *Marnell*. In contrast, the Appeals Court observed, its interpretation of the cross liability exclusion was consistent with the purpose of that exclusion and, as the Appeals Court stated earlier in its decision, with the policy as a whole.