

Insurance Law *FlashPoints*

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Illinois Supreme Court Finds Omnibus Insurance Requirement of the Illinois Safety and Family Financial Responsibility Law Does Not Apply to Commercial Truckers Regulated Under the Commercial Transportation Law.

On October 29, 2009, in *Zurich American Insurance Co. v. Key Cartage, Inc.*, No. 107472, 2009 WL 3470846 (Oct. 29, 2009), the Illinois Supreme Court determined that a “reciprocal coverage” provision in a commercial trucking insurance policy unambiguously precluded coverage for an underlying lawsuit and did not violate the public policy of omnibus coverage required under §7-317(b)(2) of the Illinois Safety and Family Financial Responsibility Law (625 ILCS 5/7-317(b)(2)). The coverage dispute arose out of an underlying suit in which a commercial truck driver and his employer, Key Cartage, were sued by the estate of the victim of a fatal accident. Key Cartage had borrowed the truck from Rose Cartage, which had leased the truck from its owner, Franklin Truck. Key Cartage and its driver were insured under a policy issued by West Bend Mutual Insurance. The truck itself was scheduled on an insurance policy issued by Zurich American Insurance Company to Rose Cartage. West Bend provided a defense to Key Cartage and its driver but asserted that Zurich owed a primary duty to defend because Key Cartage and its driver were permissive users insured under the Zurich policy.

In response to West Bend’s contention, Zurich recognized the availability of coverage under its policy for permissive users but declined coverage for Key Cartage and its driver based on a “reciprocal coverage” provision in its policy. Under the provision, in order for Key Cartage to be covered under the Zurich policy issued to Rose Cartage, the reciprocal coverage provision required Rose Cartage to be insured under the West Bend policy issued to Key Cartage. The circuit court agreed with Zurich and concluded that the policy provision precluded coverage because the West Bend policy did not provide coverage for Rose Cartage. The appellate court reversed by first finding that the requirement of omnibus insurance found in §7-317(b)(2) of the Financial Responsibility Law applied to the entire Illinois Vehicle Code, including the Commercial Transportation Law. The appellate court then determined that Zurich’s policy provision was void and unenforceable because it violated public policy by precluding omnibus coverage for permissive users.

Reversing the appellate court, the Illinois Supreme Court first determined that the reciprocal coverage provision in the Zurich policy was unambiguous as applied to the facts of the case. The court next addressed the appellate court’s finding that the policy provision violated the public policy of omnibus coverage required under §7-317(b)(2). In doing so, the court distinguished the case before it from its earlier holding in *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill.2d 240, 695 N.E.2d 848, 231 Ill.Dec. 75 (1998), in which it found that a garage insurance policy was required to provide omnibus coverage to a customer test-driving a dealer’s car despite the insurer’s contention that car dealerships were exempt from the statutory requirement of omnibus coverage. Specifically, court reasoned:

The appellate court below read *Universal* as requiring that section 7-317(b)(2) be applied to commercial trucking insurance policies mandated by the Commercial Transportation Law. This is too broad a reading of the opinion. *Universal* never discussed commercial trucking insurance policies or considered the interplay between section 7-317(b)(2) and the Commercial Transportation Law. Further, our reasoning in *Universal* expressly rejects an

overly broad application of the opinion. As we explained in *Universal*, section 7-317(b)(2)'s omnibus requirement is part of the statutory definition of “motor vehicle liability policy,” found in section 7-317. This statutory definition applies to the term “motor vehicle liability policy” as it is “used in this Act.” In turn, the word “Act,” under the definition provided by the Illinois Vehicle Code . . . means the entire Illinois Vehicle Code, “*unless the context clearly indicates another meaning.*” (Emphasis added.) . . . Thus, in determining whether the word “Act” in a conflict would asection 7-317 refers to other provisions of the Vehicle Code, and, therefore, whether the omnibus requirement of section 7-317(b)(2) applies to those provisions, each case must be judged on its own facts. [Citations omitted.] 2009 WL 3470846 at *4.

Reviewing the “statutory context” in the case before it, the court concluded:

[I]t is apparent that the word “Act,” as used in section 7-317, cannot refer to the Commercial Trucking Law. If it did, rise between section 7-317(b)(3) of the Financial Responsibility Law and section 18c-4902 of the Commercial Transportation Law. . . . Section 7-317(b)(3) of the Financial Responsibility Law sets forth specific policy limits that must be adopted for motor vehicle liability insurance policies regulated under section 7-317. If the word “Act” in section 7-317 referred to the Commercial Transportation Law, then this provision would apply to motor vehicle liability policies issued pursuant to that law as well. However, section 18c-4902 of the Commercial Transportation Law expressly provides that the Illinois Commerce Commission “shall prescribe the amounts of insurance” necessary for insurance policies issued to motor carriers of property in the state of Illinois. [Citations omitted.] 2009 WL 3470846 at *5.

The Supreme Court further reasoned that the “existence of inconsistencies, by themselves, establishes that the legislature could not have intended for the term ‘Act’ in section 7-317 to include the Commercial Transportation Law.” *Id.* Rejecting the appellate court’s holding that the Zurich reciprocal coverage provision was void as against public policy, the court concluded that the “definition of motor vehicle liability insurance policies set forth in section 7-317 . . . does not apply to commercial truckers regulated under the Commercial Transportation Law.” *Id.* (Please note that Chris Kentra of Meckler Bulger Tilson Marick & Pearson LLP represented Zurich.)

Seventh Circuit Finds That a Prior Notice Exclusion in the Later of Two Claims-Made Policies Bars Coverage for Claim Made During Later Policy Period.

On October 28, 2009, in *James River Insurance Co. v. Kemper Casualty Insurance Co.*, No. 08-3570, 2009 WL 3447447 (7th Cir. Oct. 28, 2009), the Seventh Circuit Court of Appeals considered the coverage available for an underlying legal malpractice suit under two claims-made policies. The first policy issued by Kemper covered the policy period September 27, 2000, to September 27, 2002, with a retroactive date of January 1, 1937. The second policy issued by James River covered the policy period November 8, 2004, to November 8, 2005, with a retroactive date of November 8, 2002. As described by the court, the underlying malpractice claim was filed in May 2005 and accused the lawyers of wrongful acts during both the period covered by Kemper’s policy and the later period covered by James River’s policy.

James River denied coverage under the provision of its policy that excluded coverage for any claim “directly or indirectly arising from . . . any common fact, circumstances, transaction advice or decision involved in a ‘professional service’ reported as a claim or potential claim under any prior Policy.” 2009 WL 3447447 at *3. According to James River, the exclusion applied because the lawyers had purchased a five-year extended

reporting period on the Kemper policy that provided coverage for any claim made before the end of the extended reporting period when the claim arose from professional services rendered between the retroactive date of January 1, 1937, and the end of the policy period on September 27, 2002. The district court granted summary judgment for Kemper, finding that the Kemper policy was not a “prior Policy” as used within the James River policy exclusion because the claim was made within the extended reporting period of the Kemper policy.

The Seventh Circuit reversed the district court’s holding. Examining the underlying allegations, the court of appeals considered the boundaries of the phrase “arising from” in the James River policy exclusion. After noting that “‘arising from’ implies a tighter connection than a mere ‘but for’ cause creates,” the court described the state of Illinois law on the issue:

It is true that Illinois cases say that “arising from” is satisfied by a showing of “but for” causation. E.g., American Economy Ins. Co. v. DePaul University, 383 Ill.App.3d 172, 321 Ill.Dec. 860, 890 N.E.2d 582, 588 (Ill.App. 2008); Shell Oil Co. v. AC & S, Inc., 271 Ill.App.3d 898, 208 Ill.Dec. 586, 649 N.E.2d 946, 951-52 (Ill.App. 1995). But what they mean is that a claim need not have been foreseeable to be deemed to arise from an act by the insured. Illinois distinguishes between “but for” causation (which the cases call “cause in fact”) and “legal cause,” which means foreseeability. . . . If Illinois understood “but for” literally, to mean just a condition that had to exist for the event in question to occur (a subsequent act of malpractice, in this case), liability insurance companies would have no way of setting premiums equal to expected cost; they would be insuring against a range of possible claims so vast that an estimate of the probability that a claim within that range would actually be filed would be arbitrary. [Citations omitted.] 2009 WL 3447447 at *4.

Based on the above, the court first found that the James River policy “excluded coverage in situations in which the wrongful acts committed during its policy period were a continuation of wrongful acts committed during the policy period of the previous insurer — and they were.” 2009 WL 3447447 at *5. The court then addressed the district court’s holding that the exclusion did not apply because the Kemper policy was not a “prior Policy” as used in the James River policy exclusion. Finding that “Kemper’s policy is explicit that a claim reported in the extended reporting period must have arisen ‘prior to the end of the policy period’ ” and that “nothing in the prior-policy exclusion in James River’s policy limits the time within which a claim under the a prior policy must be reported for the exclusion to apply,” the court held that the exclusion in the James River policy barred coverage for the underlying claim. 2009 WL 3447447 at *6.

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