Case Alert

Nov. 2018

Fourth Circuit Rejects Application of Wrap-Up Exclusion to Additional Insured

Utilizing an owner-controlled or contractor-controlled insurance program (collectively known as "wrap-ups") can reduce claims, save costs, and give owners and general contractors comfort in knowing their project is adequately insured. However, problems often arise when a subcontractor doesn't enroll in the wrap-up and, instead, agrees to provide additional insured coverage to the owner and general contractor on the subcontractor's own general liability policy. One of those problems is the prevalence of wrap-up exclusions on subcontractors' general liability policies. If the wrap-up exclusion is too broadly drafted, the exclusion can eliminate coverage for the general contractor and owner even when the subcontractor is not enrolled in the wrap-up.[1]

The U.S. Court of Appeals for the Fourth Circuit in *Continental Casualty Co. v. Amerisure Insurance Co*.[2] found that an unenrolled subcontractor's general liability insurer was required to provide additional insured coverage to a general contractor because the policy's wrap-up exclusion did not apply. In *Continental*, a general contractor entered into an agreement with a steel subcontractor (SteelFab) to supply and construct the steel infrastructure of a hospital. SteelFab subsequently subcontracted a portion of the work to a sub-subcontractor (Carolina Steel). An employee of Carolina Steel was seriously injured while performing work on the project site. Carolina Steel's general liability carrier was Amerisure; SteelFab's general liability carrier was Continental. The general contractor was enrolled in a rolling OCIP provided by the hospital-owner, however, neither Carolina Steel, nor SteelFab were enrolled in the OCIP. The injured employee sued the general contractor and SteelFab, and the general contractor tendered its defense to Amerisure and Continental as an additional insured. Continental accepted the tender, while Amerisure denied coverage arguing that a wrap-up exclusion applied. Continental ultimately settled the claim on behalf of the general contractor and SteelFab, and filed suit against Amerisure seeking reimbursement of the amount it paid.

> The wrap-up exclusion in *Continental* provided that:
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> This insurance does not apply to 'bodily injury'…arising out of…[Carolina Steel's] ongoing operations…if such operations were at any time included within a 'controlled insurance program' for a construction project in which you are or were *involved*. (Emphasis added).

The court determined that two elements must be satisfied to find that the exclusion applied: (1) the employee's injuries "arose out of" Carolina Steel's operations, and (2) Carolina Steel's operations were "included" in the rolling OCIP. The court concluded that under the "plain language" of the exclusion, "only injuries arising from Carolina Steel's operations were excluded…[and] any injuries allegedly arising out of the operations of [the general contractor] or SteelFab were not subject to the wrap-up exclusion." While the court acknowledged that at the time of the employee's accident he was "unquestionably" performing work for Carolina Steel, his complaint alleged more than one potential cause of his injuries (including failures of the general contractor and SteelFab with respect to supervisory roles over Carolina Steel's operations and safety procedures; and failures of SteelFab and general contractor, independent of Carolina Steel, such as a failure to provide adequate safety equipment and procedures). Therefore, the court concluded that there was a "distinct possibility" that the employee's injuries arose out of the other contractors' operations and thus, the first prong of the wrap-up exclusion was not satisfied. The court ultimately concluded that Amerisure had the obligation to indemnify Continental for the amounts it paid to defend and settle the claim.

[1] Check out SDV's previous case alert in *Structure Tone, Inc. v. National Casualty Co.* where a New York appellate court came to that very conclusion and eliminated coverage for the project's general contractor and owner.
[2] 886 F.3d 366 (4th Cir. 2018) (applying North Carolina law).

In contrast to the Fourth Circuit's decision in Continental, the New York Appellate Division in *Structure Tone* previously concluded, under similar facts, that a wrap-up exclusion was triggered, even though the subcontractor was not enrolled in the project's wrap-up program.[3] In *Structure Tone*, the project owner and construction manager were seeking additional insured coverage on an unenrolled subcontractor's general liability policy. The trial court in *Structure Tone*[4] reasoned that "[t]he language of the [e]xclusion does not require that [the subcontractor] be enrolled in the wrap-up program, but that a wrap-up insurance program exist and cover a bodily injury that arose from [the subcontractor's] operations." The *Structure Tone* decision effectively deems the subcontractor's enrollment in a wrap-up irrelevant, and the mere existence of a wrap-up program negates additional insured coverage for construction managers and owners.

Despite the positive outcome in *Continental*, owners, general contractors, and construction managers utilizing wrap-ups should be concerned with whether their unenrolled subcontractors' general liability policies contain broad wrap-up exclusions. In addition, subcontractors who promise to provide additional insured coverage to others may be breaching their contractual obligations if their general liability policies contain any such exclusions. Accordingly, owners, general contractors, and construction managers should consider reviewing their unenrolled subcontractors' general liability policies to avoid being blindsided by a wrap-up exclusion. Similarly, subcontractors who are contractually obligated to provide additional insured coverage should consider reviewing their insurance policies to determine whether they have a broad wrap-up exclusion that could expose them to a breach of contract claim.

As evidenced by the courts' differing opinions in *Continental* and *Structure Tone*, if you are denied additional insured coverage because of a wrap-up exclusion it is important to consult with coverage counsel to determine potential arguments to push back against the insurance carrier.

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[3] *Structure Tone, Inc. v. Nat. Cas. Co.,* 130 A.D.3d 405 (N.Y. App. Div. 1st Dept. 2015)

[4] *Structure Tone, Inc. v. Nat. Cas. Co.,* 2014 WL 840408, *8 (N.Y. Sup. 2014)