# Case Alert

## Policyholder Victory! Maryland Appellate Court Broadly Interprets Critical Additional Insured Language

An intermediate appeals court in Maryland recently joined the ranks of other jurisdictions in finding broad coverage for additional insureds under standard policy language. Specifically, the court addressed for the first time the 2004 version of the additional insured endorsement which covers an additional insured for liability "caused, in whole or in part, by" the named insured's acts or omissions. See *James G. Davis Construction Corp. v. Erie Insurance Exchange*, 2015 Md. App. LEXIS 144 (Md. Ct. Spec. App. Oct. 28, 2015).

James G. Davis Construction Company ("Davis") was the general contractor on a home construction project. Davis subcontracted drywall, insulation, and fireplace services to Tricon Construction, Inc. ("Tricon"). Per its subcontract with Davis, Tricon procured a CGL policy naming Davis as an additional insured from Erie Insurance Exchange ("Erie").

Two employees of another subcontractor sued both Davis and Tricon after being injured when Tricon's scaffolding collapsed. The plaintiffs alleged that Davis represented the scaffolding to be safe, and thus was actively negligent in causing their injuries. Davis tendered its defense to Erie. Erie denied, arguing that Davis' additional insured coverage was limited to vicarious liability only (i.e., Davis was not covered for its own negligent acts) – a common position taken by AI insurers. The trial court agreed.

On appeal, the Maryland Court of Special Appeals held that Davis was covered. The court explained that vicarious liability "is an all or nothing proposition and thus a party could not be liable 'in part' for [the named insured's] acts." Instead, "caused, in whole or in part, by" language requires only proximate causation by the named insured in order to trigger coverage for additional insured(s).

The appeals court then concluded that the allegations against Davis fell within the scope of coverage. The claims against Davis could potentially be proximately caused by Tricon's acts or omissions, and therefore, the duty to defend was triggered.

The ruling is significant in Maryland and nationally. Since ISO's shift in language from "arising out of" to "caused, in whole or in part, by" in the CG 20 10 (Ongoing Operations) and CG 20 37 (Completed Operations) endorsements in 2004, courts across the country have addressed the effect of the new language on upstream parties seeking additional insured status, and the Maryland court's opinion is aligned with the view adopted in other jurisdictions. See *Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London,* 788 F.3d 375 (4th Cir. 2015) (Maryland law); *WBI Energy Transmission, Inc. v. Colony Ins. Co.,* 56 F. Supp. 3d 1194 (D. Mont. 2014) (Montana law); *Pro Con, Inc. v. Interstate Fire & Cas. Co.,* 794 F. Supp. 2d 242, 257 (D. Me. 2011) (Maine law); *Gilbane Bldg. Co. v. Admiral Ins. Co.,* 664 F.3d 589 (5th

Cir. 2011) (Texas law); *Dale Corp. v. Cumberland Mut. Fire Ins. Co.,* 2010 U.S. Dist. LEXIS 127126 (E.D. Pa. Nov. 30, 2010) (Pennsylvania law).

Interestingly, some courts have given the language an even broader interpretation (and thus made it easier for the AI to access coverage), suggesting that it could be closer to the "arising out of" variation. New York courts, for example, have held that the phrase "caused, in whole or in part, by" triggers coverage "even in the absence of a negligent act or omission of the subcontractor, provided that the claim arises from the contracted-for services for the additional insured." See *Petrillo Stone Corp. v. QBE Ins. Corp.,* No. 52790/2011, 2014 N.Y. Misc. LEXIS 9, at *31 (N.Y. Sup. Ct. 2014); see also *Burlington Ins. Co. v NYC Tr. Auth.,* 2015 N.Y. App. Div. LEXIS 6349 (N.Y. App. Div. 1st Dep't Aug. 11, 2015); *Hotels AB, LLC v. Permasteelisa, CS,* No. 114758/09, 2013 N.Y. Misc. LEXIS 4154, at *6-7 (N.Y. Sup. Ct. Sept. 11, 2013).

Ultimately, the Maryland Appellate Court ruling represents a victory for policyholders and continues a trend of courts against limiting "caused, in whole or in part" to vicarious liability.

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