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Expert Analysis

Welcome Clarity: The Priority of Coverage in Construction-Accident Cases

By Kevin Szczepanski

The priority of coverage nettles the best of us in multi-party, bodily injury cases under New York's Labor Law. A plaintiff's claims spawn third-party claims for common-law and contractual indemnification; and the insurance policies of the owner, general contractor, and subcontractors afford primary and excess coverage for named and additional insureds.

In cases involving a "grave injury" under New York's Workers' Compensation Law, the subcontractor employing the plaintiff also has a workers' compensation policy providing unlimited employers-liability (EL) coverage. In a "grave injury" case involving an owner- or contractor-controlled insurance program, the employer's EL carrier and the program's excess carriers sometimes clash over coverage for the employer's liability.

We were overdue, then, for a decision clarifying the roles of the EL and excess carriers in a case involving a "grave injury." In *Bosquez v. RXR Realty*, 195 A.D.3d 536 (1st Dep't 2021), the First Department helpfully offered one. The decision holds that:

- the owner and general contractor enrolled in an insurance program may maintain a third-party action against the enrolled subcontractor who employed the plaintiff; and
- the anti-subrogation rule does not bar that action as to excess policies that do not cover the employer's liability.

Construction site. Photo: Raychel Lean/ALM

The Facts

The case arose out of the Pier 57 renovation project in Manhattan. The plaintiff, an employee of a subcontractor, was allegedly working for his employer when he suffered a "grave injury." He sued the project owner and construction manager (CM), asserting negligence and Labor Law claims. The owner and CM, in turn, brought a third-party action against the employer, asserting common-

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law indemnification and contribution claims against the employer.

The CM and the employer were enrolled in a contractor-controlled insurance program (CCIP), which provided the following "tower" of coverage: (1) a GL policy; (2) a "corridor," or gap-filling excess policy; (3) a "lead" excess policy; and a "high" excess policy. (The program did not include a general waiver of subrogation.). Separately, each subcontractor, including the employer, was required to have its own workers' compensation policy providing unlimited liability coverage as required by the Workers' Compensation Law.

The GL and "corridor" excess policies covered contractual liability for the CCIP enrollees, including the employer. But the "lead" and "high" excess policies applied only in excess of applicable underlying insurance, which included the unlimited EL coverage afforded to employers. The "lead" and "high" excess policies also contained an EL exclusion barring coverage for any "liability arising out of [bodily injury] to an employee … where the obligation of any underlying [EL] insurer … is by law unlimited." *Bosquez*, 195 A.D.3d at 537-38.

The Motion To Dismiss the Third-Party Action

The employer moved to dismiss the third-party action, arguing that the owner and CM *could* have asserted a contractual-indemnification claim against the employer that *would* have been covered by the CCIP policies. So as the employer saw it, the CCIP insurers were violating the anti-subrogation rule, which bars an insurer from seeking indemnification for a claim arising from the very risk for which the insured was covered. See *North Star Reins. v. Continental Ins. Co.*, 82 N.Y.2d 281, 294 (1993)). The employer also argued that the owner, CM, and CCIP insurers had omitted a contractual-indemnification claim from the third-party complaint to avoid covering the employer's contractual liability. Finally, the employer argued that if the EL exclusion in the "lead" and "high" excess policies were to apply, then the excess coverage would be illusory.

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In opposition, the owner and CM argued that the anti-subrogation rule did not apply because the EL exclusion in the "lead" and "high" excess policies precluded coverage to the employer. They also argued that the policies could apply only if the limits of underlying insurance were exhausted. Because the employer's EL policy provided unlimited coverage, the limits of underlying insurance could never be exhausted, the "lead" and "high" excess policies could not cover the employer, and that as a result, the anti-subrogation rule did not apply.

The Decision

The Supreme Court denied the employer's motion to dismiss, and the Appellate

Division affirmed. In doing so, the Appellate Division reasoned that the EL exclusion in the "lead" and "high" excess policies "unambiguously excludes [the plaintiff's employer] from coverage." *Bosquez*, 195 A.D.3d at 537. So as to those policies, the third-party action was not seeking indemnification for a claim arising from the very risk for which the [employer] was covered. "Accordingly," the court said, "the [anti-subrogation] rule is not implicated." Id.

In the context of the employer's late-notice argument, the court went on to note that the "lead" and "high" excess policies "will never be triggered" because they "apply only after all other applicable underlying insurance limits have been exhausted"—and those limits "will never be exhausted" because the employer's underlying EL policy "provides unlimited coverage … for an employee's grave injury." Id. at 538. Although the court did not frame it this way, this lack of coverage is an independent reason that the anti-subrogation rule did not bar the third-party action as to the "lead" and "high" excess policies. Because the policies could never cover the employer for its liability for a "grave injury," the employer was not an "insured," and the chief policy behind the anti-subrogation rule—prohibiting an insurer from passing its loss to its own insured—was simply not in play.

The Takeaway

In essence, the Appellate Division ruled that once the limits of the CCIP's GL and "corridor" excess policies were exhausted, the owner and CM could pursue their third-party action against the employer. In doing so, the court confirmed an important priority-of-coverage principle: in cases involving a "grave injury," excess policies will not cover the employer when (1) they apply only after exhaustion of all underlying insurance and (2) the employer's underlying EL insurance is inexhaustible.

This conclusion does not render a CCIP's excess coverage illusory. It could still apply to the owner, general contractor, or other enrollee. It could apply to an employer in cases that are not subject to the Workers' Compensation Law. Or it could apply if the parties to an excess policy agree to fix the policy's attachment point.

The critical takeaway is that an excess policy is a contract that must be given its plain meaning. Its terms cannot be changed after a loss to suit the parties' interests. And the general policy behind a CCIP—promoting efficiency in a construction project's insurance program—should yield to an insurance policy's specific terms. *Bosquez* vindicates these enduring principles.