What's Your Status?

By Daniel A. Dorfman  July 26, 2011

The Illinois First District Court of Appeals recently held that a general contractor was not an additional insured under a commercial general liability policy where the general contractor was not in contractual privity with the named insured. *Westfield Ins. Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730, 2011 Ill. App. LEXIS 186 (1st Dist. 2011).

**Background**

FCL Builders, Inc., a general contractor, entered into a subcontract with Suburban Ironworks, Inc. to perform structural steel work for a construction project. *Westfield*, 2011 Ill. App. LEXIS 186 at *1. FCL, under its subcontract agreement with Suburban, required Suburban to name FCL as an additional insured under its commercial general liability (CGL) policy. The FCL/Suburban subcontract also provided that Suburban was to require all of its sub-tier contractors to name FCL as an additional insured.

Suburban subcontracted out the steel-erection work for the project to JAK Iron Works, Inc. The Suburban/JAK sub-subcontract incorporated by reference the FCL/Suburban subcontract, which FCL claimed obligated JAK to name FCL as an additional insured. The additional insured endorsement provided that it would cover “any [] organization for whom [JAK] [is] performing operations when you and such [] organization have agreed in writing in a contract . . . that such . . . organization be added as an additional insured . . .” *Id.*

During the project, a JAK employee was injured on the job site when he fell off a steel beam. The JAK employee filed a lawsuit against, among others, the general contractor, FCL. FCL, in turn, tendered the claim to Westfield Insurance Co., JAK’s CGL insurer. Westfield refused the tender and filed a declaratory judgment arguing that it did not owe a duty to defend or indemnify FCL because it did not have a contract with JAK, and therefore did not meet the definition of an additional insured under the Westfield CGL policy.

**Privity Required**

The Illinois First District Court of Appeals held that FCL was not an additional insured under the Westfield CGL policy because there was not a written agreement between JAK and FCL for FCL to be added as an additional insured to the Westfield CGL policy. The court identified two conditions to be met for a party to be an additional insured under the Westfield CGL policy: JAK must perform operations for that entity, and the entity must have agreed in writing in a contract with the named insured to be added as an additional insured. *Id.* at *3. The court resolved the dispute based on the second condition, without deciding whether JAK was performing operations for FCL.
FCL argued that because the Suburban/JAK sub-subcontract incorporated the terms of the FCL/Suburban subcontract, there was an agreement in writing requiring JAK to name FCL as an additional insured. The court disagreed. The court found that “there [was] no evidence in the record that JAK had agreed in writing with FCL for FCL to be an additional insured.” *Id.*

In so holding, the court explained that Westfield’s additional insured endorsement defined an additional insured as any entity for which JAK is performing operations, and “such a person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured.” *Id.* (emphasis in original). Because the language “such person or organization” provided for in the additional insured endorsement refers back to any entity for which JAK performs operations, the court held that, to be an additional insured under the Westfield CGL policy, JAK must contract directly with the party that is to be named as an additional insured. Interestingly, the court suggested that had the language to the additional insured endorsement provided instead for “any organization be added as an additional insured” as opposed to “such organization be added as an additional insured,” FCL may have been considered an additional insured. *Id.*

**Contractual Flow-Down Obligations**

FCL also argued that the flow-down contractual obligation requiring JAK to obtain insurance for its upstream contractors, such as FCL, is “evidence” in the record that JAK agreed in writing to name FCL as an additional insured. Again, the court disagreed. The court explained “the question in this case is not JAK's contractual obligations to Suburban. . . . Instead, the question is Westfield's contractual obligations to its insureds, and those obligations are controlled by the insurance contract itself.” *Id.* JAK may have had a contractual obligation to procure insurance naming FCL as an additional insured, but the terms of Westfield’s additional insured provision required that there must be a contract between the named insured and the other entity for this other entity to qualify as an additional insured. Because JAK and FCL had no such contract, the court found that FCL could not be an additional insured—despite JAK’s contractual requirements. *Id.*

**Certificate of Insurance**

The appellate court also rejected FCL’s argument that it “must be an additional insured” because it received a certificate of insurance that listed it as an additional insured. *Id.* at *5. The court held that such a certificate of insurance “does nothing to modify Westfield’s obligations” because, among other reasons, the certificate contained a disclaimer stating that it conferred no greater rights than afforded by the policy. *Id.* Because the terms of the Westfield CGL policy did not provide additional insured status to FCL, the court reasoned, the certificate of insurance could not confer such a status. In other words, just because FCL received a certificate of insurance naming it as an additional insured, the certificate could not create rights that the Westfield CGL policy did not confer.

**Conclusion**

In light of holdings like that of *Westfield*, additional insureds need to do more than just obtain a certificate of insurance as that may not provide coverage. Proposed additional insureds must take it upon themselves to read and understand the terms of the policies and the requirements for obtaining additional insured coverage, and recognize which contractual risks are actually insured
or not. As the *Westfield* case illustrates, the difference between one word, “any” as opposed to “such,” may mean the difference between having and not having coverage as an additional insured.