

Minnesota Court of Appeals Interprets “Additional Insured” Endorsement Broadly in Finding Coverage for Construction Contractor

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In what appears to be a case of first impression in Minnesota, the Court of Appeals recently issued an opinion potentially expanding coverage for additional insureds in the construction context. *Nor-Son, Inc., v. Western Nat. Mut. Ins. Co.*, No. A11-2016, 2012 Minn. App. Unpub. LEXIS 411 (Minn. Ct. App., May 14, 2012). This case arises from a familiar fact pattern in the construction industry where the general contractor, Nor-Son, Inc. (Nor-Son) was named as an additional insured on the general liability policy of the subcontractor, Select Carpenters & Components, Inc. (SCC).

The additional insured endorsement provided that coverage was extended to Nor-Son for injury or damage caused, in whole or in part by: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf, in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

Id. at *5. This endorsement is entitled "Additional Insured - Owners, Lessees or Contractors - Scheduled Person or Organization" form (CG 20 10 07 04, © ISO Properties, Inc., 2004), and is the one most commonly used in the construction industry today. The terms "you" and "your" refer to the insured, SCC.

An employee of SCC was injured while on the job and received workers' compensation benefits. The employee was barred from suing SCC because of the exclusivity of the statutory workers' compensation remedy. Instead, the employee sued the general contractor (Nor-Son) alleging negligence, breach of contract, and failure to warn based solely on Nor-Son's retention of control over the worksite. Nor-Son tendered the employee's claim to SCC's insurer, which declined the tender, claiming that the above additional insured endorsement only applies where the additional insured (Nor-Son) was vicariously liable for the subcontractor's (SCC's) negligent acts or omissions. The insurer further contended that since SCC was not named as a defendant in the complaint, Nor-Son was sued for its own negligent acts or omissions (i.e., liability was direct rather than vicarious) and, hence, was not covered by SCC's policy because SCC was not named as a defendant in the complaint. Nor-Son then commenced a third-party action against SCC and its insurer, claiming that SCC failed to provide the employee with a safe work environment and that

SCC's insurer was obligated to defend and indemnify Nor-Son for the employee's claims.

The critical issue in the case was whether Nor-Son was covered as an "additional insured" under SCC's general liability policy for the SCC employee's claims. The trial court entered summary judgment in favor of SCC's insurer, finding that the additional insured endorsement did not apply because the employee did not plead negligent acts of SCC in the underlying complaint against Nor-Son. The Court of Appeals reversed, holding that since the alleged liability of the contractor (Nor-Son) was based solely on the control it retained over the construction site, the underlying complaint stated a claim for vicarious liability, triggering coverage under the additional insured endorsement. The appellate court went further, however. It concluded that the insurer's policy extended coverage for liability incurred by Nor-Son if "caused ... in whole or in part by [SCC's acts or omissions]." *Id.* at *7. (Emphasis in original.) Accordingly, coverage for Nor-Son was not limited solely to vicarious liability, "but that coverage also extends to situations in which liability is shared by SCC and another." *Id.* at *8. "Thus, if SCC's negligent safety practices were at least in part the cause of the liability, the policy may extend coverage for Nor-Son's negligent acts." *Id.* The policy language, together with the fact that the employee's claims against SCC were barred by the workers' compensation statute and Nor-Son's third-party complaint against SCC alleging negligence, were sufficient to trigger the insurer's obligation to defend. This case represents the first instance where a Minnesota court has looked to allegations made in a third-party complaint to establish a duty to defend.

Given the familiar fact pattern of this case and the widespread use of the ISO additional insured form at issue, this case (even though unreported) could have significant implications for risk transference in the construction area.

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