INSURANCE COVERAGE
SECTION OF LITIGATION

Additional Insureds and Mutual Mistakes: The Difficulty of Post-Claim Reformation

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A recent string of cases underscores the need to carefully review insurance policies and all their terms to confirm that the proper people or entities have indeed been included as additional insureds.

A property owner is sued for injuries arising out of an alleged building defect. Luckily, and as is commonly the case, the owner had required that it be added as an additional insured to its contractor's commercial general liability (CGL) policy, which should in turn provide a defense and, if required, indemnity for the lawsuit. Alas, the owner discovers that it had been left off its contractor's CGL policy, despite the contractor and its broker having fully intended its inclusion. Can the property owner nevertheless obtain coverage by alleging a mutual mistake such that the policy may be reformed to add it as an additional insured?

A recent string of cases suggest an answer in the negative, absent compelling circumstances to the contrary. These cases, discussed below, underscore the need to carefully review insurance policies and all of their terms to confirm that the proper people or entities have indeed been included as additional insureds.

This past March, in *Weyerhaeuser Co. v. Simsboro Coating Servs. LLC*, No. 3:21-CV-00905, 2022 (W.D. La. Mar. 1, 2022), the court considered whether to reform a CGL policy to include a wood product manufacturer (Weyerhaeuser), who was mistakenly left off the policy held by a commercial coating company (Simsboro). Both parties had entered into a manufacturing agreement requiring Simsboro to obtain CGL insurance and name Weyerhaeuser as an additional insured, and while Simsboro did in fact obtain the required policy, it failed to include Weyerhaeuser. After settling a lawsuit brought by employees of Simsboro alleging exposure to unsafe levels of formaldehyde, Weyerhaeuser sought coverage under Simboso's CGL policy, and initiated this litigation when the insurer declined to provide a defense or indemnification. In opposition to the insurers' motion to dismiss, Weyerhaeuser argued that it had stated a claim for breach of contract because the failure to be included as an additional insured was the result of a mutual mistake, citing the parties' intent as evidenced by the manufacturing agreement.

The court disagreed. After noting the "heavy burden to warrant reformation," the court explained that while the manufacturing agreement indicated the intent of Weyerhaeuser and Simsboro, it did not demonstrate the intent of the parties to the actual insurance contract—Simsboro and its insurers. Here, there were no allegations that the insurers had intended to include Weyerhaeuser as an additional insured. Additionally, the court explained that "reformation arises in equity," so

that when the mistake is of no fault of the insurer, "it would be unjust to add the forgotten party to the policy after the fact." Thus, while the court was "sympathetic to Weyerhaeuser's situation," it concluded that "it would be unfair to insert a separate entity into the insurance contract after the underlying suits have already been settled, and there is no evidence that it was [insurer's] fault that Weyerhaeuser was not named as an additional insured."

The Michigan Court of Appeals reached a similar conclusion a few weeks later. In *Doa Doa, Inc. v. PrimeOne Ins. Co*., No. 356877, (Mich. Ct. App. May 12, 2022), the owner of a bar included on its policy an entity called GCRE, which owned the full building and surrounding premises. However, while GCRE was included as an additional insured under the general liability portion of the policy, it was *not* included as an additional insured as to property coverage. While the insurance agent responsible for processing the insurance application testified that he was aware that GCRE owned the property and fully intended to include it as an additional insured in both provisions of the policy, he nevertheless failed to express that intent in the insurance application. After a fire destroyed the bar, GCRE sued seeking coverage on the basis that the policy should be reformed under the theory of both mutual and unilateral mistake. Specifically, GCRE argued that the insurer was aware that it owned the building, and that the failure to be included as an additional insured in the property section of the policy "did not effectuate the intentions" of the parties.

The court of appeals affirmed the trial court's refusal to reform the insurance policy. While explaining that reformation "may be appropriate" in some circumstances—for example, where one party makes a mistake "and the other party is aware of the mistake but remains silent"—the panel explained that while GCRE, the bar owner, and its insurance agent intended that GCRE be listed as an additional insured for property coverage, there was no evidence that the *insurer* was aware of that intent. Nor was the insurer aware that GCRE was supposed to be listed as a property additional insured and was "complicit in its silence." As a result, GCRE failed to demonstrate a genuine issue of material fact regarding the requirements necessary to reform an insurance policy.

Courts have issued similar decisions even when the alleged mistake arose directly between the insurer and insured. In *Prospect JV Dev. LLC v. Illinois Union Ins. Co*., No. 18CV5837WFKLB (E.D.N.Y. Sept. 27, 2021), yet another court considered whether to reform an insurance policy to include a mistakenly excluded party as an additional insured. Here, a real estate company with three separate entities (Prospect JV, HS Prospect, and Prospect Sharp), was sued for alleged injuries sustained at one of their properties (Property 84). The subject policy, however, only listed HS Prospect as a named insured, even though at the time it was issued, Prospect Sharp owned Property 84. After the insurer declined coverage for Prospect JV and Prospect Sharp because neither entity was listed as an insured, the Prospect entities initiated litigation.

As an initial matter, the court agreed that the listing of HS Prospect as the owner of Property 84 was indeed a mutual mistake justifying reformation. Even though the inclusion of HS Prospect as the owner and only insured of Property 84 was solely Prospect's mistake, the court found that the insurer would have still insured Property 84 had the proper owner been listed on the application, meaning "it is clear [insurer] intended to insure Property 84, and its owner, for the particular risk associated with the underlying action." The policy was therefore reformed to list Prospect JV as the true owner and insured for Property 84.

But the court refused to go further, including by adding any other Prospect entity as an additional insured. While the true owner of Property 84 was a clear mistake, the court held that Prospect failed to demonstrate that the insurer had any reason to think that there were or should be additional insureds, nor was there any claim that the insurer intended to add additional insureds and "simply neglected to do so." The court therefore declined to include any additional Prospect entities in the policy. (The case is now on appeal.)

As these cases demonstrate, it is critical that an insured expressly state its intentions to its counterparties, brokers, and insurance carriers regarding who should be included as an additional insured, and further confirm that the insured *has in fact been added*. Unless there is material evidence demonstrating a true mistake on the part of the parties, a court will likely hesitate to reform a contract. As always, an insured's best defense is closely reviewing insurance terms and filling gaps in coverage before the policy is needed.

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