Pa. Justices Narrow Employer Liability Exclusions

By **Jeff Sistrunk**

Law360, Los Angeles (May 27, 2015, 8:56 PM ET) -- The Pennsylvania Supreme Court recently brought the commonwealth in line with most other jurisdictions regarding the scope of an employer's liability exclusions by sharply limiting insurers' ability to use a 50-year-old precedent to bar coverage for those sued by an employee of another company insured under a policy.
On Tuesday, the **high court held** that the employer's liability exclusion in a restaurant's umbrella commercial general liability policy is ambiguous and can't be invoked by the insurer to preclude coverage for a negligence suit that a restaurant employee filed against the property owners, who were additional insureds on the policy.

The justices distinguished the case from PMA v. Aetna, in which the high court ruled in 1967 that the term "the insured" as used in an employer's liability exclusion encompasses the named insured, regardless of whether coverage is sought by a different insured under the policy.

Pennsylvania insurance lawyers have been arguing over the interpretation of the PMA decision since it was issued. According to Reed Smith LLP partner Michael H. Sampson, who represented nonprofit United Policyholders and others as amici in the case, insurers have long cited to the case when seeking to exclude coverage in situations in which an insured is sued by an employee of a co-insured.

Indeed, insurers "would effectively point to PMA and the employer's liability exclusion and say, 'Game over,'" said K&L Gates LLP partner Jeffrey Meagher.

The state high court's ruling Tuesday largely puts the controversy over PMA to rest and places Pennsylvania into the majority of states where courts have narrowly interpreted the employers' liability exclusion, according to policyholder attorneys.

"This will eliminate insurers' use of PMA v. Aetna to eliminate coverage obligations that would otherwise exist under a policy," said James C. Haggerty, a Haggerty Goldberg Schleifer & Kupersmith PC partner who represented the Pennsylvania Association for Justice as an amicus in the case.

The employer's liability exclusion at issue in the instant case stated that the policy provided no coverage for

liability for an injury to the insured's employee "arising out of ... employment by the insured." The policy also contained a "separation of insureds" clause establishing that, with exceptions, the insurance applies separately to "each insured against whom claim is made or suit is brought."

Employee Marina Denovitz was injured when she fell from a set of stairs outside of Leola Restaurant in Leola, Pennsylvania. She brought a negligence suit against property owners Christos Politsopoulos and Dionysios Mihalopoulos in state court, alleging they maintained the stairs in a dangerous condition.

Politsopoulos and Mihalopoulos sought defense and indemnification from insurer Mutual Benefit Insurance Co. But Mutual Benefit disclaimed coverage based on the employer's liability exclusion, contending that because Denovitz was an employee of the named insured restaurant, it didn't have to cover claims brought against any of the insureds on the policy. The property owners countered that the exclusion was unclear and that coverage should be barred only if there is an injury to an employee of the specific insured seeking coverage.

The trial court judge reluctantly ruled in the insurer's favor, finding that it was bound by PMA even though he disagreed with that decision's approach to an employer's liability exclusion. A midlevel appellate court reversed.

The Pennsylvania Supreme Court affirmed the reversal on different grounds, declining to extend PMA's "expansive construction" of the term "the insured" to a situation where a commercial general liability policy variously uses both "the insured" and "any insured."

"Application of governing principles of insurance policy construction yields the understanding that the ambiguous exclusionary language pertains only to claims asserted by employees of 'the insured' against whom the claim is directed, which understanding gains further support by reference to the policy's separation of insureds provision," Chief Justice Thomas G. Saylor wrote for the court.

The Pennsylvania Supreme Court's holding makes clear that PMA "doesn't apply in the context of these modern policies, particularly because they tend to deviate in how they describe 'any insured' or 'the insured,'" said Reed Smith LLP partner Traci Rea.

"This puts coverage where it should be," Rea said. "It doesn't make sense to use the employer's liability exclusion to deny coverage for an insured who isn't the plaintiff's employer."

The decision is "good news for any company that uses contractors and relies on additional insured provisions in their contractors' insurance policies as part of its risk management strategy," according to Meagher. Companies in the energy, construction and manufacturing sectors are among those that stand to benefit from the ruling, he said.

"This decision reinforces the reasonable expectations of policyholders, who never would have expected to lose coverage when adding another company as an additional insured — which could have happened under PMA," Meagher said.

The policy language that the Pennsylvania high court considered in the case is the same language used in the standard general liability policy form, so the ruling should have far-reaching implications, according to attorneys.

"To the extent a policy uses the standard language, this decision takes away the ability of carriers to cite to the employers' liability exclusion in similar factual circumstances," said Hill Wallack LLP partner Michael S. Savett.

However, if insurers incorporate policy language that eliminates the ambiguity identified by the Pennsylvania Supreme Court, they may still be able to rely on PMA, according to attorneys.

"Since both additional insured [general liability] coverage and endorsements extending coverage to named additional insureds vary, we can expect to see the industry and brokers draft language to avoid any claimed ambiguity of the sort found here by the Pennsylvania Supreme Court," said Ronald P. Schiller, vice chairman of Hangley Aronchick Segal Pudlin & Schiller.

Schiller added that he takes issue with the "apparent reasoning that the decision somewhat realigns Pennsylvania with the majority of jurisdictions."

"At least in the context of 'any insured' versus 'the insured' language, I think most jurisdictions still draw a sharp distinction between these 'insureds' in construing insurance contracts and look for ways to reconcile the contract language with exclusions and broad protections to insureds, generally not finding ambiguity," he said. "This is an area where policyholders and insurers will continue to disagree."

Mutual Benefit is represented by Robert Witold Jozwik of Marshall Dennehey Warner Coleman & Goggin PC.

The property owners are represented by Christina Lee Hausner of Russell Krafft & Gruber LLP. Denovitz is represented by Neil Ernest Durkin of Bauer Law Firm PC.

The case is Mutual Benefit Insurance Co. v. Christos Politsopoulos et al., case number 60 MAP 2014, in the Supreme Court of Pennsylvania.

--Editing by Katherine Rautenberg and Christine Chun.

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