



## Alerts

### What a Difference a Word Makes: "Any Insured" Cross Liability Exclusion Bars Coverage for Lawsuit Against Additional Insured

June 3, 2020

*Insights for Insurers*

Based on the policy's use of the term "any insured" instead of "the insured" in a cross liability exclusion, a Massachusetts appeals court recently ruled that an additional insured contractor was not entitled to coverage under its subcontractor's commercial general liability policy for a negligence claim brought by the subcontractor's employee.

In *Phoenix Baystate Construction v. First Financial Insurance Company*, 2020 Mass. App. Unpub. LEXIS 411, 97 Mass. App. Ct. 1118 (May 18, 2020), First Financial Insurance Company (FFIC) issued a policy to Lanco Scaffolding (Lanco), a subcontractor of Phoenix Baystate Construction (Phoenix). In accordance with the requirements of their contract, Lanco arranged to have Phoenix included as an additional insured under the FFIC policy. When Phoenix was subsequently sued for negligence by a Lanco employee who had been injured on the job site, Phoenix sought coverage under the FFIC policy. FFIC declined to defend Phoenix, and coverage litigation ensued. FFIC prevailed on a motion for summary judgment in the trial court, and Phoenix appealed.

The appellate court noted that the only issue it needed to address was "the interplay between the cross liability exclusion and a separation of insureds." The cross liability exclusion precluded coverage for bodily injury to, among others, an "employee of *any insured*" (emphasis added). The separation of insureds clause stated:

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or 'suit' is brought.

Phoenix argued that the cross liability exclusion and separation of insureds provision were inconsistent, stating that the latter requires that each insured be treated as having its own policy. Asserting that the term "any insured" in the cross liability exclusion is ambiguous, Phoenix argued that the term should be construed as meaning Phoenix only.

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The appeals court made short work of Phoenix's argument, stating:

The language at issue has been interpreted across the country. The majority view is that there is a crucial distinction between the phrases "any insured" and "the insured" in determining the import of a severability of interests clause such as the separation of insureds clause. For exclusions that pertain to "any insured," severability of interests clauses have no effect, and the plain meaning of "any" applies. For exclusions that pertain to "the insured," severability of interests clauses make clear that "the insured" refers only to the insured who is actually seeking coverage. (Internal citations omitted).

The court further noted that where, as in the present case, the policy uses the two phrases "any insured" and "the insured," the court must presume that every word has "been employed with purpose" and must be given "meaning and effect whenever practical." Consequently, the court concluded that the policy's use of the term "any insured" in the cross liability exclusion unambiguously excluded coverage for the claim by Lanco's employee.