Car Crashes Through Restaurant Window. Result: Lesson in the History of Additional Insured Coverage

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Back in the day, additional insureds were oftentimes afforded coverage for liability "arising out of" the named insured's work for the additional insured. When confronted with such language, courts often concluded that it dictated "but for" causation. In other words, but for the named insured doing the work for the additional insured, the additional insured would not be in the liability-facing situation that it is in. The result in some cases: additional insureds were entitled to coverage for their sole negligence. Decisions reaching such a conclusion were generally not well-received by insurers. This was especially so when you consider that the premium received by insurers, for the AI coverage, may not have been enough to buy a package of Twizzlers.

Insurer frustration with such decisions – which insurers did not believe expressed the intent of additional insured coverage – led ISO to make revisions to additional insured forms in 2004 (later revisions followed). At the heart of these revisions was an attempt to require fault on the part of the named insured before coverage could be afforded to the additional insured. (This is a very brief and simple history of this complex issue.)

Given that the use of "arising out of"-type additional insured endorsements have been waning over the years, decisions addressing them have been fewer and fewer. But one came along not long ago. The insurer lost. No doubt it was not happy with the outcome – and for the same reason why ISO changed the additional insured endorsements in 2004.

I am sure that some insurers are still using the form of endorsement that led to the insurer frustration here. Insurers have, in their own hands, the ability to avoid the outcome that befell the insurer here. As the old saying goes, those who do not learn history are doomed to repeat it.

The history lesson at issue in Truck Insurance Exchange v. Amco Insurance Company,[i] [published] was coverage for the Awads, owners of a commercial property in Long Beach, California, as additional insureds under an Amco Insurance Company policy issued to their tenant, Scott Bascon, owner of Holé Molé Restaurant.

In 2013, the Smiths were dining in Holé Molé when two cars collided outside. One of them crashed into the restaurant, continued through the establishment and pinned the Smiths to a wall, causing injuries. Holy moly – with a y.

The Smiths filed suit against Bascon/Holé Molé and the Awads. Holé Molé was dismissed on summary judgment on the basis that, from Bascon's perspective, the accident was not foreseeable. But not so for the Awads, as the landlord, on the basis that an accident in 2007 made them liable for not taking any action to prevent the 2013 accident.

The Awads insurer, Truck Insurance Exchange, settled the matter for $785,000. Truck then filed an equitable subrogation action against Amco, Holé Molé's insurer, alleging that the Awads were entitled to coverage, as additional insureds, under the Amco policy. There is nothing at all surprising about a landlord being an additional insured on a tenant's policy.

The additional insured endorsement, at issue in the Amco policy, provided as follows:

"Any person or organization from whom you [Bascon] lease premises is an additional insured, but only with respect to their liability arising out of your use of that part of the premises leased to you."

As Truck saw it, the Smiths' claim arose out of Holé Molé's use of the premises. So Truck's argument went, the Smiths would not have been injured, but for Bascon's use of the premises as a restaurant.

Amco had a much different take on how to interpret the additional insured endorsement. At its core, Amco's argument was that, because the car accident was not casually connected to Bascon's "use" of the leased premises, the Awads were not additional insureds. The undertone of Amco's argument was that, because Bascon was not liable for the accident (which is true, as he was dismissed from the action), the Awads were not additional insureds. Thus, under this scenario, the Awads were seeking coverage, as additional insureds, for their sole negligence. How can that be?

The California Courts of Appeal, like the trial court, found in favor of Truck and ordered Amco to pay Truck 50% of its settlement to the Smiths' claim.

This is how. The appeals court relied extensively on its 1999 decision in *Acceptance Insurance Company v. Syufy*, which may be the most frequently-cited case nationally on the broad interpretation of "arising out of" additional insured endorsements.

As the *Syufy* court explained it: "California courts have consistently given a broad interpretation to the terms 'arising out of' or 'arising from' in various kinds of insurance provisions. It is settled that this language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship."

The *Syufy* court also noted, importantly, "**the policy language does not purport to allocate coverage according to fault**." (emphasis added). Further, "when an insurer grants coverage for liability 'arising out of' the named insured's work, the additional insured is covered without regard to whether injury was caused by the named insured or the additional insured."

Applying *Syufy* here, but for Bascon using the premises as a restaurant, the Smiths would not have been present there. In addition, the theory of liability, against the Awads, was that the property itself was dangerous, as the Awads knew that a car could crash into the building but failed to take steps to prevent it.

This, the court concluded, was all that was necessary to establish the causal connection to trigger additional insured coverage under an "arising out of" provision.

As I said, insurers have in their own hands the ability to avoid the outcome here. Many have. But as that old saying goes...

If you have any questions or need more information, contact Randy J. Maniloff (maniloffr@whiteandwilliams.com; 215.864.6311).

[i] *Truck Insurance Exchange v. Amco Insurance Company*, No. B298798 (Ct. App. Cal. Oct. 26, 2020)