

Whose Employee is it Anyway?: Federal Court Finds No Coverage for Injured Subcontractor's Claim Based on Modified Employer's Liability Exclusion

In Nagog Real Estate Consulting Corp. v. Nautilus Insurance Co.,¹ the United States District Court for the District of Massachusetts held that an insurer had no duty to defend its insureds against claims brought by an injured subcontractor, based on an overbroad employer's liability exclusion in the policy.

Nautilus Insurance Company issued a commercial general liability policy to developer Nagog Homes LLC and its related construction company, Nagog Real Estate. The policy was endorsed with an Employer's Liability Exclusion (the L205 Endorsement) that expanded the scope of the standard exclusion in the coverage form to include bodily injury claims of employees of "any" insured and their contractors or subcontractors, as opposed to simply the employees of the named insured.

Nagog Homes was the developer, and Nagog Real Estate was the general contractor for a residential construction project. An employee of the framing subcontractor hired by Nagog Real Estate was injured while working on the project and sued both Nagog entities for his injuries. Nautilus, relying on the modified employer's liability exclusion, denied coverage for the lawsuit based on allegations that the Nagog entities hired the framing subcontractor to perform work, which effectively made the plaintiff an employee of one or both of the Nagog entities.

The court agreed with Nautilus, concluding that "the Underlying Suit alleges that [plaintiff] was an employee of Nagog Homes and/or Nagog Real Estate, both of which are insured under the Policy and the L205 Endorsement bars coverage for injuries of employees of 'any insured.'"² The court explained the vital distinction between "any" insured versus "the" or "that" insured:

¹Nagog Real Estate Consulting Corp. v. Nautilus Insurance Co., Civil No. 19-cv-11714-DJC, 2020 WL 4049896 (D. Mass. Jul. 20, 2020).

²Id. at *6.

One of the main differences between the L205 Endorsement and the Employer's Liability provision in the general terms is that the L205 Endorsement replaces the term "that insured" with "any insured." This replacement alters the exclusion so that instead of excluding coverage only for bodily injury to employees of "that insured" seeking coverage, the L205 Endorsement broadens the exclusion to exclude bodily injury to employees of "any insured" under the policy.³

Although neither of the Nagog entities had a direct employer-employee relationship with the plaintiff, because the employer's liability exclusion in the policy applied to the employees of the insureds' subcontractors, Nagog Real Estate's indirect engagement with the plaintiff was sufficient for the court to conclude that the modified exclusion applied to preclude coverage for the lawsuit.

It is generally understood that general liability policies do not provide coverage for injuries to an insured's own employees because those claims are covered under worker's compensation programs. When an insured enters into a contract with a subcontractor, however, the insured would expect there to be coverage under either the subcontractor's general liability policy as an additional insured or under its own general liability policy for any bodily injury claims brought by the subcontractor's employees. The District Court's decision in Nagog Real Estate serves as an important reminder for insureds to carefully scrutinize any modifications or endorsements to the standard forms to ensure that the anticipated coverage has not been negatively impacted. Even a seemingly minor change from "the insured" to "any insured" can have drastic coverage consequences.

A copy of the decision can be found [here](#). For additional information, please contact Kerianne E. Kane (kek@sdvlaw.com) or Jeffrey J. Vita (jjv@sdvlaw.com).

³Id.