

December 3, 2020

Traub Lieberman Partner Jason Taylor Obtains Summary Judgment On Behalf of Excess Carrier Client

Related Attorneys: Jason Taylor

On November, 19, 2020, the United States District Court for the District of Kansas entered a Memorandum and Order granting summary judgment in favor of one of the firm's excess carrier clients in the matter of *Everest Indemnity Company et al. v. Jake's Fireworks, Inc. et al.*, No. 19-CV-2620-JAR-ADM (D. Kan. Nov. 19, 2020). The coverage action concerned whether Defendant-insured Jake's Fireworks, Inc. ("Jake's") had insurance coverage for a state court lawsuit arising from a tragic accident in which Howard Harper ("Harper") was grievously injured. Jake's business involves the import, retail sale, and wholesale distribution of 1.4G consumer fireworks. Jake's and multiple other businesses, including Lone Star, are owned and controlled by a single family. In 2011, the controlling family formed Lone Star for administrative efficiency in handling human resources functions for employees of the family owned ventures. Harper was employed by Lone Star, but worked primarily for Jake's under the terms of a Staffing Services Agreement ("SSA") between Lone Star and Jake's. On August 14, 2014, Harper and a coworker were unloading and cleaning out a trailer that contained expired consumer fireworks, when a fire started in the trailer and Harper was severely injured.

Harper obtained worker's compensation benefits from Lone Star's worker's compensation carrier, and then filed suit against Jake's for his injuries. Jake's took the position in the underlying action that Jake's was Harper's "statutory employer" entitling Jake's to protections under the state's worker's compensation exclusivity provisions, which precludes a suit against one's own employer for negligence where worker's compensation benefits are available. The trial court found that a fact question regarding Harper's employment status prevented it from granting summary judgment, and the underlying case remains undecided.

Jake's sought insurance coverage from its primary and excess carriers for the underlying *Harper* lawsuit. Jake's primary insurer, Everest, defended Jake's under a reservation of rights and filed a complaint for declaratory judgment with the Kansas District Court. Jake's excess carriers, including the firm's client, intervened in the declaratory suit. The carriers primarily relied up on an amended "Employer's Liability" exclusion in the respective policies, which barred coverage, in relevant part, for "bodily injury" to an "employee" of any insured arising out of and in course of employment or performing duties related to the conduct of any insured's business. "Employee" was defined to include "leased workers." Notably, both Jake's and Lone Star were insureds under the policies.

The parties filed cross-motions for summary judgment on application of the amended "Employer's Liability" exclusion. There was no dispute that Harper was an employee of Lone Star, but the parties disagreed on whether Harper qualifies as Jake's "employee" within the meaning of the policies, and whether the term "any insured" in the exclusion was ambiguous under Kansas law. While many issues were presented to the court, the court ultimately held that Harper was a "leased worker," and therefore, an "employee" of Jake's precluding coverage.

Jake's argued that because Lone Star was created by a single family to provide workers only to family-owned businesses and did not hold itself out to the public as a labor leasing firm, Lone Star did not qualify as a "labor leasing firm," which was required to meet the "leased worker" definition in the policies. The carriers were able to distinguish the case law cited by Jake's in support of its argument, and the court agreed. The court found that labor leasing firm is an entity "in the business of placing its employees at client companies for varying lengths of time in exchange for a fee." A "labor leasing firm" generally "retain[s] the rights and obligations of an employer—including determining rate of pay, procuring workers' compensation insurance and processing payroll—while the client company direct[s] the employees daily activities."

In analyzing the evidence presented by the carriers, the court concluded that under the SSA Lone Star was responsible for handling wages, benefits, employment taxes, and other human resources functions for the staff it provided to Jake's, including the provision of workers' compensation insurance and other required insurance. In turn, the SSA required that Jake's pay Lone Star a monthly fee in addition to the amount of gross wages and all employer contributions. Although use of the term "lease" in the controlling agreement was not determinative of whether an entity is a "labor leasing firm," Jake's own corporate representative testified that Lone Star was formed to "lease out the employees" to the family-owned entities, and that function is Lone Star's only business. Under these facts, the court reasoned that a reasonable insured would understand an exclusion for bodily injury to "employees," including "leased workers," to include workers employed by Lone Star and leased to Jake's, particularly given that Jake's had no employees of its own. Finally, the court held that there was no genuine dispute of material fact regarding whether Harper's injuries arose out of and in the course of performing duties related to Jake's business, as Harper was cleaning and inventorying property owned by Jake's on premises owned by Jake's and using Jake's equipment.

In finding that the amended "Employer's Liability" exclusion applied, the court granted summary judgment in favor of all carriers finding that the policies do not provide liability coverage for the underlying bodily injury claim and lawsuit filed against Jake's.