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When Employer's Liability Coverage May Be Limited in New York

BY: Craig Rokuson

New York recognizes that coverage under Workers' Compensation ("WC") and Employer's Liability ("EL") policies is generally unlimited. See *Tully Const. Co. v. Illinois Nat. Ins. Co*., 131 A.D.3d 598 (2d Dept. 2015); *Oneida Ltd. v. Utica Mut. Ins. Co.,* 263 A.D.2d 825, 694 N.Y.S.2d 221 (3d Dept. 1999). However, there is case holding that EL coverage may be limited in certain instances, such as when the primary EL carrier is listed as scheduled underlying insurance on an excess policy.

In *Liberty Mut. Ins. Co. v. Ins. Co. of State of Pennsylvania*, 43 A.D.3d 666, 841 N.Y.S.2d 288 (1st Dept. 2007), an employee of General Industrial Service Corporation ("General"), a subcontractor on a construction project, sought to recover under New York's Labor Law against the project's owner and construction manager. Those defendants, in turn, brought a third-party action for indemnification against General. The employee's personal injury claim was ultimately settled for $2.5 million. After the settlement, the excess insurer, Liberty, filed suit against the primary employer's liability insurers, The Insurance Company of the State of Pennsylvania and American International Group of Companies (collectively, "AIG"), which had refused to participate in the defense or settlement of the underlying personal injury litigation. Although the issue of whether the plaintiff in the underling action had sustained a "grave injury" (necessary to support the common law indemnity claim against General and trigger coverage under the Employer's Lability policy) had not yet been determined, the court held that "[i]n the event the existence of a grave injury is proven, AIG's liability will be limited to $1 million."

The court's decision to limit the amount of the employer's liability policy was based upon the terms of Liberty's excess policy, which provided that coverage thereunder was implicated by liability in excess of the insured's "Retained Limit," defined, in pertinent part, as "the total amounts stated as the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the applicable limits of any other insurance providing coverage." That Schedule listed the AIG policy and attributed to it a "$1 million per-accident" limit of insurance.

In reaching its decision, the court acknowledged, "[e]ven though it appears that the coverage afforded by the AIG policy may have been unlimited in this case, the policy limit set forth in the Schedule of Underlying Insurance annexed to the Liberty policy controls the triggering of Liberty's excess coverage." The court cited prior precedent for the same proposition. See *State Ins. Fund v. International Ins. Co.,* 251 A.D.2d 86, 673 N.Y.S.2d 680 (1st Dept. 1998), *lv. denied* 92 N.Y.2d 816, 684 N.Y.S.2d 187 (1998) (holding that the EL coverage was limited because excess policy provided that it was triggered by a loss in excess of "the retained limit" which listed the employers' liability policy in Schedule A as having an "applicable limit" of $100,000).

The above cases are to be contrasted with *Commissioners of State Ins. Fund v. Aetna Cas. & Sur. Co.*, 283 A.D.2d 335, 728 N.Y.S.2d 6 (1st Dept. 2001), where the excess policy's Schedule of Underlying Insurance did not include the primary EL policy. In that case, the court found that the excess coverage would not be triggered until "any other available insurance" was exhausted. Since the primary coverage was unlimited, the excess policy was not implicated. See also *Merchants Mut. Ins. Co. v. New York State Ins. Fund*, 85 A.D.3d 1686, 1688 (4th Dep't 2011) ("defendant was obligated to provide unlimited coverage…and the obligation of plaintiff to provide excess coverage was never triggered.").

In reconciling *Liberty Mut. Ins. Co. v. Ins. Co. of State of Pennsylvania* and *State Ins. Fund v. International Ins. Co.,* with *Tully Const*., supra, Tully was insured under a Workers Compensation and Employers Liability policy (hereinafter the WCEL policy) issued by Zurich American Insurance Company ("Zurich") and a commercial umbrella policy issued by Illinois National Insurance Company ("Illinois"). The umbrella policy required Tully to exhaust all insurance available before the excess coverage provided by the umbrella policy would be triggered. The umbrella policy also explicitly stated that, despite the listing of any limits of underlying insurance in the Schedule of Underlying Insurance, if the actual insurance available to Tully exceeded the amounts listed in the schedule, the umbrella policy would not be triggered until those greater amounts were met and exceeded. In the underlying actions, the parties settled for $9,000,000. Zurich paid $6,500,000, and Illinois paid $2,500,000. Illinois sought a declaratory judgment that Zurich was required to reimburse Illinois the $2,500,000 it paid. The court agreed with Zurich, holding that the WCEL policy was unlimited, thus the excess coverage provided by the umbrella policy was never triggered because the limits of the underlying policies were never met or exceeded.

The New York Limit of Liability Endorsement in the WCEL policy was critical to the court's decision in *Tully*, which found that Zurich could not limit its liability and, as such, the WCEL policy was unlimited. In light of the unlimited nature of the WCEL policy, the appellate court affirmed the trial court, stating that "Supreme Court properly concluded that the limits of the underlying insurance policies were never met and, as such, the excess coverage provided by the umbrella policy was never triggered."

Based upon the holdings in *Liberty Mut. Ins. Co. v. Ins. Co. of State of Pennsylvania* and *State Ins. Fund v. International Ins. Co.,* a court would likely find that an EL policy which contains a limit and is scheduled as underlying insurance, is not unlimited.

Another exception exists where the Workers' Compensation Board permits an employer to self-insure. See *Oneida Ltd. v. Utica Mut. Ins. Co.,* 263 A.D.2d 825, 694 N.Y.S.2d 221 (3d Dept. 1999). However, that is a discussion for another article.