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Practice Group(s):
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Buyer Beware: New Jersey's Appellate Division Confirms that Exclusion for Bodily Injury to "An Employee of Any Insured" Bars Coverage for Third-Party Over Claim Against Additional Insured

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Parties who require additional insured coverage from their contractors usually expect the coverage to extend to third-party over claims, particularly with respect to bodily injury claims by employees of contractors. Those with such contracts covered by New Jersey law, however, may want to take special notice of a recent ruling of the New Jersey Appellate Division, which suggests that their expectations may be frustrated unless they take particular care in reviewing the policies at issue.

Specifically, on May 18, 2012, the New Jersey Appellate Division held in *Gabriele v. Lyndhurst Residential Community, L.L.C.*, No. 5257-10T3, 2012 WL 1758138 (N.J. Super. Ct. App. Div. May 18, 2012) ("*Gabriele*"), that an endorsement in a general liability policy purporting to exclude coverage for bodily injury claims by an employee of any insured barred coverage for an additional insured seeking coverage for a wrongful death suit brought by the estate of a deceased employee of the named insured.

In *Gabriele*, a subcontractor named Bravante Automatic Sprinkler ("Bravante") contracted to perform sprinkler work on a construction project. Bravante obtained a general liability insurance policy from International Insurance of Hanover ("Hanover") that named the project owner and construction manager as additional insureds. During construction, a Bravante employee was killed. His administratrix sued the construction manager, owner and others for wrongful death. The construction manager and owner sought coverage as additional insureds on Bravante's Hanover policy. Hanover denied coverage based on two exclusions, only one of which was relevant on appeal. This exclusion was contained in an endorsement titled, "Exclusion – Employees, Persons & Organization" ("Employee Exclusion") and provided that the insurance did not apply to, among other things, bodily injury to an employee of any insured arising out of, in the course of or as a consequence of employment by any insured.

The construction manager sued Hanover for coverage. The trial court found both exclusions inapplicable and ordered Hanover to provide coverage. The Appellate Division disagreed, however, reversing on the grounds that the Employee Exclusion barred coverage for the wrongful death lawsuit. The Court explained that the Exclusion applied to additional insureds, not just the named insured, and that it construed a nearly identical exclusion similarly in *American Wrecking Corp. v. Burlington Ins. Co.*, 400 N.J. Super. 276 (App. Div. 2008). The construction manager asserted that the Employee Exclusion was a catch-all that applied only to employment-related claims, because it followed other specific employment-related exclusions in the endorsement, unlike the exclusion in *American Wrecking*, which stood alone. The Court rejected this argument, holding that the placement of the

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Employee Exclusion after the specific exclusions did not warrant a result different from *American Wrecking*. The Court also rejected the construction manager’s assertion that the endorsement was inconsistent with the policy’s basic coverage provisions, creating an ambiguity that must be resolved in its favor, because the language of the endorsement clearly stated that it changed the policy.

Gabriele serves as a reminder to parties who seek to transfer the risk of liability for an employee’s injuries to the employer’s insurer that an exclusion for bodily injury to an employee of “any” insured in a policy governed by New Jersey law may eliminate coverage for all insureds for such claims. Accordingly, parties who require additional insured coverage from their contractors should consider specifying in their contracts that additional insured coverage must include third-party over claims and verifying that their contractors obtain the proper coverage. Also, contractors that agree to name others as additional insureds for third-party over claims should contemplate confirming that their policies do not purport to exclude coverage for bodily injury to an employee of any insured, so as to protect against future disputes with either insurers or their contracting parties.

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