

SOME CONDITIONS APPLY

The Scope of Insurance Policy Coverage and What the Terms Dictate 2024.10

At some time or another, many have tried to read and some have actually understood insurance policies. Many of those same people have concluded (rightfully) that word games, puzzles, and the like are far easier (and more entertaining). Elementally, insurance policies are like any other contracts with terms and conditions. The terms dictate rights and duties. The conditions define the scope of coverage.

What is often most frustrating is determining what is/is not with the scope of coverage and when something that is covered is actually not covered because of an exception (i.e., a condition that "if" something happens (or does not happen), then what would have been covered is actually not covered).

The answer(s) always depends on the situation. Who did or did not do what, when, and where? How are those actions/inactions later characterized? ("Why" often only matters after determining the others are unfavorable.) The "how" mattered in this example.

While on a project for CalTrans, a bridge deck was being lowered onto abutments when water trapped in the deck caused the deck to fail and collapse of scaffolding and workers atop the deck. Several injuries resulted. *Liberty Insurance Corporation v. HNTB Corporation*, 87 F.4th 886 (8th Cir. 2023).

The injured workers alleged that the third-party engineer should have inspected and detected the water. The engineer argued it was independent quality control to "check the checker." The engineer's insurer began the defense of the engineer, but later terminated its defense when it determined there were two policy exclusions: one for "construction management" and the other for "professional liability." The engineer continued defending itself and settled the lawsuit for \$2.5 million. Subsequently, the insurer asked the trial court to agree that it had no duty to defend the insured (the engineer) because of the policy exclusions. The trial court summarily decided the insurer had wrongfully failed to defend the engineer.

On appeal by the insurer, the appellate court decided that whether the insurer must defend the engineer depends on the focus of the injured workers' original lawsuit. That focus mattered even after the engineer settled the injured workers' original lawsuit. The subsequent suit between insurer and insured continued to focus on how the injured workers (the original plaintiffs) characterized the alleged acts or omissions of the engineer. If the allegations were within an exception to the policy, then the insurer had no duty to defend.

In this case, the policy excluded coverage for construction management services and inspection activities. The engineer's own work plan described its work as providing construction management services and inspection services. However, the engineer explained that its own work plan was simply "boilerplate" and that, on this project, the engineer did not provide construction management services and its review of the work was only QA/QC and, somehow, not inspection services. The appellate court reversed the trial court's summary decision and returned the case to the trial court to look deeper into the facts of whether and to what degree the engineer's acts were within a policy exclusion. At the time of this column, there are no further published court opinions, so the conclusion is unknown to this author.

With this case in mind, it is practically in the control of the original complaining party whether the insurer owed certain duties to its insured (the engineer). Not because of the policy itself, but in how the events are described and how the insured's fault is alleged. As such, careful attention is helpful when describing "how" things happened. One description may keep the insurer in the fight. Another description may let the insurer off the hook. There may be advantages and/or disadvantages either way for the complaining/insured party.

