



Insurance Coverage Newsletter September 2014

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discussion of coverage concepts applicable to workers' compensation claims illustrates. Insurance coverage law and workers' compensation law occasionally intersect with significant results. The firm was recently involved in two such cases, which involved significant workers' compensation coverage principles.

Where Does Your Workers' Compensation Policy Apply?

The standard workers' compensation insurance policy includes an "Information Page" which includes Paragraph 3.A. That paragraph provides:

3.A Workers' Compensation Insurance: Part One of the policy applies to the workers' compensation law of the states listed here; IN. (IN selected solely for illustration).

Paragraph 3.C of the Information Page also provides:

3.C Other States Insurance: Part Three of the policy applies to the states, if any, listed here:

While the purpose of these provisions is to define what states the workers' compensation policy applies to, their meaning and application are far from clear.

Assume that paragraph 3.A simply lists the state of Indiana as the referenced state and that no "other states insurance" has been selected. What does that mean? From a simple reading of paragraph 3.A, one might assume that since Indiana is the only state

Insurance Coverage/Workers' Compensation Update

By: Terrence J. Madden



This is the first edition of the firm's "Insurance Coverage Newsletter", which will focus on new court decisions dealing with significant coverage issues, primarily involving CGL policies. In the past, the firm provided analysis of these issues in conjunction with other newsletters. The "insurance coverage newsletter" is now a standalone publication, which will be issued several times a year.

Although the focus of this newsletter will generally be CGL coverage issues, occasionally other types of coverage issues will be discussed where they are particularly significant. That is the situation presented by this newsletter, as the following

listed, the policy applies only to cases filed in Indiana. That conclusion would be correct in some states but not others.

There is a close division among the states that have addressed the issue of whether Paragraph 3.A applies only to claims filed in the listed states or whether it is simply a choice of law provision, meaning that the policy will be interpreted and applied according to the law of the states that are listed, without limiting the jurisdictional application of the policy.

For example, Illinois is among the states (Washington, New Hampshire, New Jersey, Maryland, and Pennsylvania) that have held that the listing of states in paragraph 3.A is simply a choice of law provision. An Illinois appellate court has held that a policy that listed only Wisconsin in paragraph 3.A, applied to a workers' compensation claim filed in Illinois but coverage was limited to benefits available under Wisconsin law.

If Paragraph 3.C of the information page stated that other states were covered by the residual states endorsement, and if Illinois was listed as such a state, then the policy would cover Illinois benefits.

The result of this application of Paragraph 3.A, is to leave the insured potentially exposed to personal liability. For example, a worker injured in Illinois could recover the full amount of benefits available under Illinois law but the insurance policy would only cover the benefits as determined by Indiana law. Typically, Illinois benefits would be substantially more, leaving the insured responsible for covering the gap between Indiana and Illinois benefits.

There are some states (California, Georgia, Oklahoma, Texas, New York, Louisiana, Mississippi, and Connecticut) however, which have held that Paragraph 3.A is in

fact a jurisdictional limit of the application of the policy. In those states, if paragraph 3.A listed only Indiana as a covered state, the policy would not apply to any extent to actions filed in Illinois.

In this particular case, the firm was able to obtain summary judgment in favor of our client, limiting its exposure to benefits payable under Indiana, rather than Illinois, law.

The application of these concepts can have significant consequences to both the insurer and the insured. Each should determine that the coverage desired has been obtained.

Who Can “Opt Out” from Application of the Workers’ Compensation Act?

Audits are commonly performed of the insured's payroll records at the conclusion of the policy to determine the scope of the risk that was covered during the policy. The audit reviews not only amounts paid to employees but amounts paid to others, including subcontractors. Under the standard policy terms, the insurer is entitled to collect a premium for such amounts unless it is provided with evidence that there was other insurance coverage applicable to the outside contractors.

An insured faced with the results of an audit may receive an unpleasant surprise if it is discovered that outside contractors they were using did not actually have their own workers' compensation coverage, even though it was told that they did. In order to avoid paying a premium on amounts paid to such contractors, one argument being advanced by insureds is that the outside contractors had “opted out” of coverage under the Workers' Compensation Act and

therefore the insurance company cannot collect a premium on amounts paid to them. Two provisions of the Workers' Compensation Act are important in this situation.

- §1(a) 3 creates the concept of a "statutory employer" by providing that one engaging in "ultra hazardous activity" as defined by the Act is liable to pay compensation to the employees of any contractor or subcontractor that he uses, unless that party has its own coverage.
- §3.20 of the Act provides that the Act may not be construed to apply to any sole proprietor or partner or a member of a limited liability company who elects not to provide and pay compensation for injuries sustained by "himself".

In attempting to avoid additional premiums as a statutory employer for amounts paid to outside contractors, some insureds are arguing that those contractors "opted out" of the Act and they should not be charged a premium for amounts paid to them. The issue raised by this argument is whether an outside contractor can relieve an employer from its "statutory employer" liability by its unilateral actions in "opting out" of coverage.

The firm has recently successfully taken the position in the Department of Insurance that an employer's liability as a "statutory employer" is not affected if an outside contractor elects not to provide and pay compensation for injuries sustained by himself. The opt out provision simply excuses the party opting out from its own personal liability under the Act but says nothing about the liability of a "statutory employer" either for injuries to the

individual who has "opted out" or injuries to employees of that party.

This issue is likely to be seen more frequently in future cases because it provides a potential defense to the insured's liability for additional premiums based upon amounts paid to contractors who allegedly "opted out" of the act.

"Targeted Tender" – Targeted Insurer Cannot Undo Tender

The targeted tender doctrine provides that if an insured has multiple concurrent policies that apply to the same loss, it can decide to tender the defense of a claim to the insurer of its choosing. That insurer is then stuck with defending the claim and is deprived of the opportunity to seek contribution from other insurers, whose policies might also apply.

In the recent case of *Amco Insurance Company v. Cincinnati Insurance Co.*, 2014 Ill App (1st) 122856 an insurer who was the recipient of a targeted tender of a claim thought that it had developed a creative solution to permit it to seek contribution from other insurers.

Kevin Smith was injured on a construction site accident and sued the general contractor and two subcontractors for damages. Upon being sued, the general contractor made a targeted tender of its defense to the insurers for the subcontractors who had been sued. It was attempting to avoid implicating its own policy.

Eventually the targeted insurers reached a settlement of the entire suit. As part of that settlement it obtained an assignment of rights from the insured, including the right to "deactivate" the targeted tender. The position of the settling insurer was that

once it obtained an assignment of the insured's rights it could undo the targeted tender and then seek contribution from the insurance carriers who had not been participating. The appellate court rejected this effort, finding that the targeted tender doctrine precluded the targeted insurance company from undoing that targeted tender.

This was a creative effort by the targeted insurance company to circumvent the targeted tender that was made to it. The appellate court simply held that the attempt to undo the targeted tender through the release and assignment of rights was inconsistent with the targeted tender doctrine.

Recent Seminars

- On 5/2/14, Geoff Bryce presented **"Learn to Navigate Through Complex Change Order Procedures and Prevent Costly Mistakes"** for Lorman Education Service in Chicago.

Upcoming Seminars



- On 9/15/14, Edward Jordan will present **"Closing Difficult / Complex Cases"** in Naperville, IL
- On 9/17/14, Geoff Bryce will present **"Defense of Construction Design Claims: Liability Theories and Defenses, Contractual Limitations, Third Party Liability, Role of Building Codes, and Trial Tactics"** at the Professional Liability Defense Federation's Fifth Annual Meeting and

CLE/CEU. For more info and to register, [Click Here](#)

- On 10/1/14, the Foodservice Industry Risk Management Association (FIRMA) will hold a conference in Fullerton, CA. For more info and to register, [Click Here](#)
- On 10/17/14, Bryce Downey & Lenkov will present at a multi-state breakout session regarding effective workers' compensation claims handling in Dallas, TX. For more info and to register, [Click Here](#)
- On 10/24/14, Rich Lenkov, Robert Baer and Grant Dixon will present **"Point/Counterpoint: Key Workers' Compensation Issues from the Perspective of an Employee Attorney and an Employer Attorney"** at the CLM 2014 Workers' Compensation Conference in Costa Mesa, CA. For more info and to register, [Click Here](#)
- On 11/13/14, CLM will be hosting an educational and networking event. Stay tuned for more details.
- On 11/19/14, Rich Lenkov & Jill Dulich, Senior Director of Marriott Claims Services, will present **"Top 10 Ways to Reduce Legal Expenses Now"** at the National Workers' Compensation & Disability Conference in Las Vegas. This seminar will give you real-world, practical takeaways to mitigate your litigation expenses. For more info and to register, [Click Here](#)

FREE Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics.

Here is what past attendees have had to say:

“A useful look at the types of work comp back claim exposures and review of available defenses.”

- 8/25/14

“It was very informative and I like how you have doctors discuss the topics and provide actual case studies.”

- 8/25/14

“Everything about the presentation was well thought out and presented very well.”

- 8/25/14

“Interesting topic as I handle a lot of back injuries.”

- 8/25/14

“I liked the case law examples to back up the medical that was covered. Giving the real life claim examples help make training ‘stick.’”

- 8/25/14

If you would like a copy of any of our prior webinars, please email Jason Klika at jklika@bdlfirm.com. Recent webinars include:

- Preferred Provider Programs
- Illinois vs. Indiana: 5 Key Issues & How Each State Deals With Them
- AMA Guidelines: A Legal And Medical Perspective
- Traveling Employees In Illinois Workers' Compensation
- Defending Repetitive Trauma Claims In Illinois Workers' Compensation Claims

- Employment Law Issues Every Workers' Compensation Professional Needs To Know
- Permanent Partial Disability
- Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace
- Workers' Compensation Negotiation Strategies
- Subrogation Basics for Workers' Compensation Professionals
- Defending Pain Claims: A Medical & Legal Perspective
- Defending Back Pain Claims: A Medical & Legal Perspective

Bryce Downey & Lenkov is Growing



We are pleased to announce the addition of **Jessica M. Rimkus** and **Jorge F. Rovelo**. Jessica focuses her practice on workers' compensation and general liability. Jorge represents clients in all aspects of workers' compensation.

Did you know? Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please email our Marketing Coordinator, Jason, at jklika@bdlfirm.com.

General Liability

- Illinois Court of Appeals Broadens Distraction Exception to Open and Obvious Doctrine

Labor & Employment Law

- Medical Marijuana Update: Eye on the Pot

Corporate & Construction

- Trade Secrets: If It's Not A "Trade Secret," How Do I Protect It?

Workers' Compensation

- Top 5 Ways to Close Difficult Illinois Workers' Compensation Cases

Free Seminars!

Our attorneys regularly provide free seminars on a wide range of insurance coverage topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Among the national conferences at which we've presented:

- Claims and Litigation Management Alliance Annual Conference
- Illinois Work Comp Forum
- National Workers' Compensation and Disability Conference® & Expo
- SEAK Annual National Workers' Compensation and Occupational Medicine Conference
- REBEX
- RIMS Annual Conference

Some of the topics we presented are:

- *Turning The Tables: Using An Employee's Own Actions As A Defense To Their Workers' Compensation Claim*
- *Closing The Nightmare Case*
- *Workers' Compensation 101*
- *Mandatory CMS Reporting Requirements: What You Need To Know*
- *Managing & Closing WC Claims In A Cost-Effective Manner*
- *Obtaining A Winning Medical Opinion*
- *The Mediation Process*
- *Balancing Aggressive Pursuit Of Lien Recovery With Associated Litigation Expenses*
- *Dealing With Difficult Claimants*
- *Health-Related Leave: Workers' Compensation, ADA, and FMLA*

If you would like us to come in for a free seminar, please email Terrence Madden at tmadden@bdlfirm.com.

We can teach you a lot in as little as 60 minutes.

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Crown Point, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

Business Litigation Business Transactions & Counseling Corporate/LLC/Partnership Organization and Governance Construction	Employment and Labor Counseling & Litigation Entertainment Law Insurance Coverage Insurance Litigation Intellectual Property	Medical Malpractice Professional Liability Real Estate Transportation Workers' Compensation
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The attorneys at Bryce Downey & Lenkov are committed to keeping you updated regarding the latest developments in insurance coverage law in Illinois and Indiana. If you would like more information on any of the topics discussed above, or have any questions regarding these issues, please contact Terrence Madden at 312.327.0061, Geoff Bryce at 312.327.0021, or any member of the Insurance Coverage team. © Copyright 2014 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner. The content of this newsletter has been prepared by Bryce Downey & Lenkov LLC (the Firm) for informational purposes and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. You should not act upon this information without seeking advice from a lawyer licensed in your own state of country.

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