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Pekin Ins. Co. v. Lexington Station, LLC, 2017 IL App (1st) 163284. This case is the latest in a series of cases from the First District Illinois appellate court to address the issue of the scope of additional insured insurance coverage. The case involves the typical fact situation where an employee of a downstream contractor is injured and sues the owner or general contractor, which in turn seeks coverage under the downstream contractor's general liability insurance policy as an additional insured. The appellate court held, as it has in a series of recent cases, that the downstream contractor was potentially vicariously liable even though the contractor was not named as a defendant in the underlying lawsuit and the injured plaintiff did not allege negligence against it.

Lexington was the owner of a construction project in Morton Grove. Lexington contracted with ACC, Inc. to provide carpentry services for the project. The contract stated ACC was responsible for installing hoisting and erection equipment and for ensuring the safety of its workers. Lexington had no responsibility for safety or for construction means and methods. Lexington did, however, have inspection authority. Pekin issued a commercial general liability policy to ACC, under which Lexington was an additional insured. Pekin's additional insured endorsement stated that additional insureds such as Lexington were covered "only with respect to vicarious liability for 'bodily injury' imputed from [ACC] to [Lexington]."

Botello, an ACC employee, was injured when he fell from a ladder while working on the project. He sued Lexington, alleging construction negligence, premises liability, and direct negligence. Specifically, Botello alleged among other things that Lexington "was in charge of the property's 'erection, construction, repairs, and maintenance'; and controlled the property 'both directly and indirectly, individually and through its agents, servants and employees.'" ACC was not named as a defendant.

Pekin filed a complaint for declaratory judgment, arguing it had no duty to defend Lexington because Lexington was being sued for its own direct negligence, which was not covered by its policy. Lexington argued, citing the recent cases referred to above, that the underlying complaint created a potential Lexington could be found vicariously liable as a result of ACC's negligence and that Pekin owed Lexington a duty to defend as a result. Lexington and its insurer, Westfield, moved for judgment on the pleadings, and Pekin filed a motion for summary judgment. The trial court granted Lexington and Westfield's motion and denied Pekin's motion, finding Pekin owed a defense to Lexington.

On appeal, the court agreed with Lexington, following the two-step analysis utilized in its recent decision in *Pekin v. Centex Homes*. The court first addressed whether there was a potential for finding the named insured, ACC, was negligent, notwithstanding the fact that it had not been sued. Here, the court noted there was no reason for Botello to allege negligence against ACC, his employer, because the Workers' Compensation Act gives ACC immunity from personal injury actions brought by Botello. Noting that the complaint did not specify who was responsible for ensuring Botello was protected from injury while doing carpentry work on the project, the court

examined the construction contract and noted that it required ACC to supply and install the hoisting and erection equipment and to ensure the safety of its employees. The court thus found that when read together, the underlying complaint and the contract made it clear that Botello's injury was potentially caused by ACC's negligence. The court also noted the language in the contract providing that Lexington had "no responsibility or obligation in connection with safety."

Next, the court examined the second step of the *Pekin v. Centex Homes* test – whether the underlying complaint contained allegations that supported a potential claim that Lexington was vicariously liable for ACC's negligence. The court found that it did, citing what it called the "boilerplate" allegations that Lexington was liable because of the conduct of its agents, that Lexington had control over the work being done and designated various work methods, maintained and checked work progress, and participated in the scheduling of the work and inspection of the work. In addition, the court cited other "boilerplate" allegations that Lexington "had the authority to stop the work, refuse the work and materials and order changes in the work," that Lexington "improperly operated, managed, maintained and controlled the premises" and that Lexington negligently "failed to supervise the work being done." The court interpreted these allegations to create the potential that a jury could find Lexington retained sufficient operative control over the carpentry work on the project such that ACC was its agent, thus making Lexington vicariously liable for the negligence of ACC.

Finally, in finding Pekin owed Lexington a duty to defend, the court rejected Pekin's argument that Lexington could not be held vicariously liable for ACC's negligence because the contract referred to ACC as an "independent contractor." The court found this label standing alone "does not preclude the possibility" that ACC could be found to be an agent of Lexington based on the parties' conduct, and therefore it did not alter the court's conclusion.

Jeffrey A. Siderius
jas@crayhuber.com
(312) 332-8495