The Limitations of Liability Coverage Under 'Designated Premises' Policies

By Jonathan H. Pittman and Elaine A. Panagakos

Defendants facing tort liability for bodily injury claims usually turn to their comprehensive general liability ("CGL") policies for defense of suits and indemnity of amounts paid in settlement of claims or satisfaction of judg-ments. Where CGL coverage is not available, either because it was not purchased or because it has been exhausted, some policyholders have attempted to obtain general liability coverage under policies that provide a more limited coverage, namely policies that provide coverage for bodily injury or property damage liability arising out of the ownership, maintenance or use of a particular "designated premises."

Policies that provide such "designated premises" liability insurance can include "package" policies that combine one or more coverages for a specific building or premises. Such policies frequently combine first-party coverage for loss of or damage to the designated building or premises from such perils as fire or storm with coverage for liabilities arising out of the ownership, use or maintenance of the designated premises. Policies of this type can include Special Multi-Peril policies ("SMP policies"), Commercial Package policies ("CPP policies"), or Owner's, Landlord's and Tenant's Policies ("OLT policies"). In other instances, endorsements added to CGL policies modify the policies' insuring agreement to limit coverage to liabilities arising out of the ownership, maintenance or use of a particular "designated premise."

The distinction between CGL coverage and "designated premises" coverage is readily apparent from the policies' respective insuring agreements: A "designated premises" liability policy only applies to liability arising out of the use of an "insured premise" or "designated premise," whereas a CGL policy contains no such limitation. *See, e.g., Couch on Insurance*, 3d Ed., § 132:59 (the "purpose" of OLT insurance is "simply to protect against liability arising from the condition or use of the building *as a building.* Accordingly, landlord-tenant insurance must be distinguished from insurance against liability arising from the nature of the enterprise or activity conducted within the insured premises" (emphasis added)). Some policyholders have nonetheless argued for a result that would essentially eliminate the distinction between coverage for general liability and coverage for liability arising from the use or maintenance of particular premises.

As detailed below, courts have generally rejected these efforts, and there is substantial support in the case law against extending "designated premises" liability coverage to liabilities arising out of the insured's general business operation.

CGL Policies vs. Designated Premises Policies: the Difference in the Insuring Agreement

A CGL policy typically provides coverage for the policyholder's liability for bodily injury or property damage during the policy period that is caused by an "occurrence." The following insuring agreement is typical:

The Company will pay on behalf of the insured all sums which the insured shall be

legally obligated to pay as damages because of
A. bodily injury; or
B. property damage
to which this insurance applies caused by an occurrence ...

A typical SMP, CPP or OLT insuring agreement starts out with similar language, but adds the requirement that the bodily injury or property damages also arise out of the "ownership, maintenance or use" of the particular "insured premises":

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
A. bodily injury or
B. property damage
to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance, or use of the insured premises and all operations necessary or incidental thereto.

The "designated premises" endorsement attached to CGL policies likewise contains language modifying the policy's insuring agreement to require that bodily injury or property damage for which coverage is sought be both caused by an occurrence and arise out of the ownership, maintenance or use of the designated or insured premise.

There can be variations in the specific terms of the insuring agreement that provides coverage for liabilities arising out of the "designated premises." For example, some refer to "the ownership, maintenance or use of the [insured premises] and operations necessary or incidental to those premises." Others refer to "the ownership, maintenance or use of the insured premises and all operations necessary or incidental to the business of the named insured conducted at or from the insured premises." While we would assert that these differences in language are not material, at least one court, as discussed below, has found these differences dispositive.

Simple and Straightforward Construction

Most courts have rejected policy-holder attempts to extend the scope of "designated premises" liability coverage to non–premises-related li-abilities on the basis of the language of the insuring agreement. A good example is *Union American Insurance Co. v. Haitian Refugee Center*,

Coverage Limitations

858 So.2d 1076 (Fla. 3d DCA 2003), which involved a designated prem-ises policy limiting coverage to in-juries "arising out of the ownership, maintenance or use of the [insured organization's] premises ... and op-erations necessary or incidental to those premises." The insured organi-zation sought coverage for a shoot-ing death at a rally held away from its premises, and the trial court found that the coverage applied because the event was "an operation neces¬sary or incidental to the business" of the insured. Reversing that decision, the Florida appellate court held that, while it "may well have been true" that the operation was necessary or incidental to the insured's business, "providing coverage on this ground involves a judicial rewriting of the policy by substituting 'business' for the policy word 'premises.' This is a process in which we may not en-gage." Id. at 1078.

Concurring in the reasoning of Union American, a Massachusetts court denied coverage under anoth¬er "designated premises" policy for an injury at an off-premises event that the court found to be "inciden¬tal to" the insured's business, but which "did not serve any purpose related to the premises, as distinct from the business" (emphasis add¬ed). United States Liability Insur¬ance Company v. Harbor Club, Inc., 2008 WL 2121136 at *4 (Mass. Super. 2008), aff'd, 922 N.E.2d 864 (Mass. App. 2010). In order for the policy to provide coverage, the court stated, "there must be a causal connection between the event giving rise to the injury and the designated premises." Id. The court considered, and reject¬ed, an attempt to predicate coverage on the theory that decision-making about the event occurred at the in¬sured premises, explaining: "Of ne¬cessity, a business's decision-making about virtually all of its activities is likely to occur at its premises. If that is enough to connect all its activities to the premises, then a designated premises endorsement excludes

nothing related to the business, re-gardless of any relationship with the premises. Such an interpreta¬tion would effectively nullify the en¬dorsement." Id. at *5. Other courts have reached the same result in the context of OLT policies. In American Empire Sur plus Lines Insurance Co. v. Bay Area Cab Lease, Inc., 756 F. Supp. 1287 (N.D. Cal. 1991), the court held that a policy providing coverage for liabilities for injuries "arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto" did not cover an insured taxicab company for claims based on its driver's sexual molestation of a minor passenger away from the insured premises. The court stated: It seems clear that this language was intended to address the typical "slip and fall" case and was not intended to protect against liability for any and all occurrences which could conceivably arise out of an insured's "use" of its premises. Otherwise, this concededly narrower form of insurance could be extended to cover all aspects of an insured's business operations. Nearly all acts could be said to "arise out of the use of the insured premises" in the sense that all business actions either directly originate from or are ultimately attributable to the "head office." If Cab Co. had wanted to be insured against liability for acts committed by its drivers while off company premises it could have purchased a comprehensive general liability policy. Id. at 1289. See also Harvey v. Mr. Lynn's, Inc., 416 So.2d 960, 962 (La. App. 1982) (no coverage under OLT policy for claims against insured director of fashion show by model injured at performance of show at a location away from insured prem¬ises; the OLT coverage "properly pertains only to those claims which arise out of the ownership, mainte¬nance or use of the insured prem¬ises and all operations necessary or incidental to such ownership, main¬tenance or use").

Another noteworthy case is On Air Entertainment Corp. v. National In-dem. Co., 210 F.3d 146 (3d. Cir. 2000), in which the court determined that an OLT policy issued to a television show producer did not cover claims asserted against it based on alleged rapes by the show's host of two mi-nor females who had appeared on the show, where the alleged rapes occurred at social events away from the insured premises. The decision includes a discussion of the different ways in which various courts have construed the "operations necessary or incidental thereto" language, but the court ultimately determined that "there is no need for us to decide which category of cases we agree with," because "the injuries arose out of purely social outings that were unconnected to any of the operations of" the insured. Id. at 151-152. The court acknowledged, however, that "OL&T policies should not be confused with more compre¬hensive general liability policies[.]" Id. at 151.

A Handful of Courts Have Extended Coverage

Despite the designated premises policies' limitation of coverage to li-abilities arising from the condition or use of designated premises, a hand-ful of courts have nonetheless found that these policies provide what amounts to general liability cover¬age for any liabilities arising out of the policyholder's general business. Some courts have reached this result by finding the language of a desig-nated premise endorsement confus-ing, and therefore ambiguous, where it appears to conflict with some other provision of the policy. See, e.g., American Empire Surplus Lines Insurance Co. v. Chabad House of North Dade, Inc., 2011 WL 1085558 at *7 (S.D. Fla. 2011) ("The existence of a coverage territory and coverage for 'advertising injury,' a tort not tied to the premises, within the policy and [designated premises] endorse¬ment itself creates sufficient confu¬sion" to render the designated prem¬ises endorsement ambiguous).
continued on page 4

A handful of other courts have confused the nature of "designated premises" liability coverage with general liability coverage, and construed the clause granting coverage for "operations necessary or incidental to [the designated] premises" as providing coverage for liability for injuries arising out of the policyholder's general business operations. For example, the policyholder in *Servants of the Paraclete, Inc. v. Great American Insurance Co.*, 857 F. Supp. 822 (D.N.M. 1994), was a nonprofit organization whose mission was to provide treatment to pedophile priests. The policyholder sought coverage for claims by children allegedly molested by a particular priest when he was sent to work at various churches in the course of his treatment at the facility. The OLT policy at issue provided coverage for bodily injury liability "arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto." Framing the issue as "whether there exists a sufficient connection between the injury and the insured's premises, including necessary or incidental operations on the premises[,]" the court concluded that the policy did cover the claims, inasmuch as: 1) the organization's alleged negligence occurred at its insured premises; and 2) "since one of the missions of the [insured] is the rehabilitation of pedophiliac priests, the alleged negligence details activities which were at least an 'incidental' if not a 'necessary' use of the premises." *Id.* at 837. The court in *Cycle Chem., Inc. v. Lumbermens Mutual Casualty Co.*, 837 A.2d 1149, 1151 (Nj. App. 2003) reached a similar result, concluding that a policy providing coverage for "operations necessary or incidental to the business of the named insured conducted at or from the insured premises" would provide coverage for liabilities arising out of off-premises injuries.

We believe that these decisions confuse coverage for injuries resulting from operations necessary or incidental to the policyholder's business that happen to be conducted at the designated premises with coverage for injuries resulting from operations that are necessary or incidental to the operation of the designated premises. For example, a "designated premises" liability policy may provide a products distributor with coverage for injuries resulting from a forklift being driven into a pedestrian on or adjacent to the policyholder's warehouse designated in the policy, but would not cover bodily injury resulting from a consumer's use of a defective product distributed by the policyholder, even if it was shipped from the warehouse.

Potential Extrinsic Evidence Considerations

As noted above, some courts have essentially converted "designated premises" coverage into CGL coverage by concluding that the relevant language is ambiguous, at least in the context presented to the court. In jurisdictions where courts will consider extrinsic evidence of the parties' actual intent or the policyholder's "reasonable expectations," extrinsic evidence may lead the court to conclude that the parties did not intend or could not have reasonably expected such broad coverage. For example, the policyholder may have purchased contemporaneous general liability coverage covering the same policy period as the "designated premises" policy. In that instance, were the court to consider extrinsic evidence, it may conclude that the policyholder could not have reasonably expected that its "designated premises" coverage would provide general liability coverage, or else it would have had no need to purchase duplicate CGL coverage. It also appears that insurers had available endorsements for SMP and CPP policies that would modify those policies' insuring agreements to delete the requirement that the injury arise out of the use or maintenance of the designated premises — essentially converting those policies into CGL policies. Again, were the court to consider this extrinsic evidence, it may conclude that the parties could not have intended the policy to provide CGL coverage in the absence of such an endorsement.

Conclusion

The plain language of the insuring agreements of "designated premises" liability policies should preclude policyholder attempts to convert the policy's coverage to broader CGL coverage applicable to the policyholder's general business operations. Most courts that have addressed the issue have relied on the plain language of the policy in rejecting such attempts to expand coverage under "designated premises" policies. Those courts that have construed these policies as providing coverage for liabilities arising out of the policyholder's general business, have, in our view, engaged in an impermissible rewriting of the policy terms.

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