

“Intended Use” Exclusion Enforced In Elevator Injury

In *Zurich Ins. Co. v. Principal Mutual Ins. Co.*, Nos. 1716 & 2327, Sept. Term 1999, ___ Md. App. ___ (November 2, 2000), Maryland’s intermediary appellate court applied an intended use exclusion in an Owners and Contractors Protective (“OCP”) liability insurance policy where an elevator maintenance company had completed it’s repairs and the elevator was back in service. In the underlying tort case, Sonia Davila (“Davila”) alleged that she was trapped in the elevator when it dropped rapidly, stopping between two of the basement floors. She sued the building owner, management company and elevator service company. The Complaint alleged that “[t]he defendants failed to warn plaintiff that the elevator system she was using was being repaired or remodeled and, as a result thereof, the plaintiff took the elevator and became injured...”

The building owner and the management company (collectively the “Insureds”) were named insureds under an OCP liability insurance policy that Millar Elevator Service Company (“Millar”) purchased from Zurich Insurance Company (“Zurich”) on their behalf as required by its remodeling and maintenance contract. The policy covered the named insureds for the negligent supervision of Millar's work and for third-party claims arising solely from Millar's negligent acts or omissions in performing its work.

Zurich denied coverage to the Insureds for Davila's claims relying on exclusions c(1) and c(2) of the OCP policy, which provided:

This insurance does not apply to:

- c. "Bodily injury" or "property damage" which occurs after the earlier of the following times;

- (1) When all "work" on the project (other than service, maintenance or repairs) to be performed for you by the "contractor" at the site of the covered operations has been completed; **or**
- (2) When that **portion** of the "contractor's" "work" out of which the injury arises, **has been put to its intended use** by any person or organization . . .

(emphasis added).

St. Paul Fire & Marine Insurance Co. ("St. Paul") defended the Insureds under a separate policy and settled the suit. St Paul filed a declaratory action against Zurich alleging that Zurich breached its duty to defend the Insureds in the underlying suit. The trial judge found a duty to defend and Zurich appealed.

Zurich contended on appeal that Millar employees had performed safety tests on certain elevators in the building on the day of the accident, including the elevator in which the accident occurred. The State of Maryland had requested that the testing be performed prior to the commencement of the remodeling work. The elevators were taken "out of service" during the tests. The elevators were returned to normal service and available to persons in the building after the tests were completed. The testing was complete, the elevators were back in normal service and no Millar employees were in the building when Davila boarded the elevator and the accident occurred

The Court of Special Appeals reasoned that:

“the ‘intended use’ of an elevator in an office building is to transport passengers, office supplies, and equipment. And here, there was no dispute but that at the time of the accident the elevator ‘Had been put to its intended use’ by Ms Davila.”

Since the elevator was being used for its "intended use" at the time of the accident, the incident fell clearly within exclusion c(2) of Zurich's policy. The court held that, under c(2), the issue of future repairs and remodeling work was irrelevant if the elevator had been put to its intended use when the bodily injury occurred. The pertinent determinations under the "intended use" exclusion are whether: (1) the bodily injury or property damage occurred while covered work was actually in progress; (2) was the work that the injury or damage arose out of a separate, distinct portion of the overall covered work; and (3) if the injury or damage arose out of a separable portion of the insured work, had this portion of work been put to its intended use at the time of the accident.