

Federal Court Enforces Diveboat Limitation Exclusion in Scuba Diving Death Claim

Jason Minkin, Jonathan A. Cipriani and Katherine A. Martin of BatesCarey in Chicago have sent in a note discussing a recent US case, *Travelers Prop. Cas. Co. of Am. v. Barkley*, 16-61768-CIV, 2017 WL 3593953 (S.D. Fla. Aug. 21, 2017), in which the court enforced the commercial marine insurance policy's diveboat limitation exclusion for a wrongful death claim arising out of a scuba diving accident.

The U.S. District Court for the Southern District of Florida determined that a commercial marine insurance policy's exclusion for "[b]odily injury, loss of life, or illness of any person while in the water or arising as a consequence of being in the water" barred coverage for a wrongful death claim arising out of a scuba diving accident. The holding is a reminder that a court will not read an ambiguity into an insurance contract where there is no reason to disregard the policy's plain language.

On July 30, 2014, Joseph Grosso was transported on the M/V Scubatyme III (the "Vessel") to a dive location in Pompano Beach, Florida. Grosso completed one dive before deciding to re-descend in the water to retrieve a lobster. During Grosso's second dive, the captain steered the Vessel away from Grosso to pick up other divers. When the Vessel returned, Grosso was found unresponsive approximately fifteen feet below the water, without his regulator, and was tangled in the dive flag line. Unfortunately, Grosso died as a result of the accident. His survivors filed a wrongful death action, naming as one of the defendants Douglas Barkley, the mate and deckhand responsible for supervising the divers.

Underwriters at Lloyd's, London, agreed to provide a defense to Barkley pursuant to a professional liability insurance policy under which Barkley was a named insured. Barkley also sought coverage under a separate commercial marine insurance policy, issued by Travelers Property Casualty Company of America, under which Barkley also qualified as an additional insured. Travelers conditionally accepted Barkley's defense while reserving its rights to withdraw its defense based on any applicable policy exclusions.

Following a settlement in the underlying wrongful death action, Travelers sued Barkley for declaratory judgment, contending that Grosso's drowning death was not covered by its policy. Barkley counterclaimed, seeking a declaration that Travelers had a duty to defend the wrongful death action and to indemnify Barkley and Lloyd's, Barkley's assignee, for Travelers' fifty percent share of the defense costs.

Travelers' policy obligated Travelers "to pay sums that . . . a covered person under this policy become[s] legally obligated to pay a result of the ownership, operation or maintenance of the insured vessel because of . . . bodily injury or loss of life." The policy also contained a diveboat limitation endorsement

which excluded from coverage claims involving "[b]odily injury, loss of life, or illness of any person while in the water or arising as a consequence of being in the water."

As a threshold issue, Travelers argued that the wrongful death claims did not even fall within the policy's insuring agreement because Grosso's death was not "a result of the . . . operation . . . of the insured vessel." The court found that this language was not dispositive for either side. Applying Florida law, the court reasoned that Grosso's death would have been "a result" of the operation of the vessel if his death "originated from, grew out of, flowed from, was incident to or had a connection with the operation of the Vessel" that was "more than a mere coincidence." The court concluded that the facts did not clearly indicate whether Grosso's death was causally related to his abandonment. Accordingly, the court turned to Travelers' next argument: that the diveboat limitation endorsement barred coverage because Grosso's death occurred in the water.

Barkley raised three arguments against application of the exclusion. First, he argued that the exclusion was so broad that it rendered the Travelers policy illusory, swallowing up the policy's coverage for bodily injury and death as result of negligent operation of the vessel. The court disagreed. Contrary to Barkley's position, the exclusion only applied to a subset of claims-those happening in the water-and not to any injury or death that occurred onboard the Vessel. Accordingly, the policy was not illusory.

Next, Barkley argued the exclusion was ambiguous. Barkley reasoned that the diveboat limitation endorsement was ambiguous because it was unclear whether there would be coverage for any liability arising out of the operation of a scuba diving charter that resulted in the death of a passenger. The court disagreed with Barkley that the endorsement was unclear, finding that it "plainly exclude[d] coverage for injuries and loss of life in water" and noted that a drowning death while scuba diving would be unambiguously excluded by the terms of the endorsement.

Finally, Barkley contended that Travelers "effectively confessed liability" by providing a defense and paying a portion of the global settlement in the underlying wrongful death action. However, because Travelers reserved its rights, the court found those actions did not constitute confessions of liability.

Because the policy excluded coverage for Grosso's drowning death, the court concluded that Travelers did not have a duty to defend Barkley in the underlying wrongful death action, and was not obligated to reimburse Lloyd's for any costs incurred in defense of that action. The Travelers decision is a reminder that, where the meaning of a policy's exclusionary language can be determined by its plain language, a court will not read in any ambiguities or deem it illusory.