

# PUBLICATION

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## 11th Circuit Affirms No Indemnity for a Subcontractor's Deceased Employee Under Employee Exclusion Contained in General Contractor's Commercial General Liability Insurance Policy

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**On April 24, 2014, the United States Court of Appeals for the 11th Circuit issued an opinion affirming summary judgment denying a claim by the estate of a subcontractor's employee against a general contractor's commercial general liability ("CGL") policy. *Stephens v. Mid-Continent Cas. Co.*, 2014 WL 1623737 (11th Cir. 2014)**

A subcontractor's employee fell to the ground on a project and died on the way to the hospital. The estate for the subcontractor's employee brought a wrongful death suit against the subcontractor, the general contractor and the owner. The general contractor made a demand on its CGL insurance carrier because the insurer agreed to "pay those sums that [general contractor] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." *Id.* at \* 1. The policy also provided that the insurer had "the right and duty to defend the insured against any 'suit' seeking those damages." *Id.*

Most importantly, for this case, was that the policy contained an exclusion of damages relating to injuries to any of general contractor's employees.

The general contractor settled with the deceased employee's estate and assigned its claim against the CGL insurer. In the assignment, the parties agreed that the estate would not be entitled to collect any of the agreed amount from the general contractor but only from the general contractor's CGL insurer.

The estate brought suit against the CGL insurer asserting that the CGL insurer wrongfully refused to defend and indemnify the general contractor. The trial court granted summary judgment for the insurer on the grounds that the claim was excluded from coverage under the CGL policy's employee exclusion clause. The CGL insurer argued that the deceased employee was an employee of the general contractor.

In Florida, standard employee exclusion clauses apply both to actual employees and to statutory employees. "Under Florida law, a contractor who sublets part of its work to a subcontractor develops a statutory employment relationship with the employees of that subcontractor." *Id.* \* 3; see also Law, Fla. Stat. §§ 440.01 et seq.

It was argued that the homeowner was the general contractor and therefore the deceased employee was not a statutory employee of the general contractor negating the application of the CGL policy exclusion.

However, the court looked at other evidence to determine that there was a general contractor/subcontractor vertical relationship:

- the general contractor had a written contract with the owner identifying general contractor as such;

- contract between the owner and the general contractor provided that the general contractor would furnish all materials and perform all work to complete the project as provided in the contract documents;
- the owner agreed to make progress payments at various stages of the project;
- the general contractor had the right to engage subcontractors;
- the general contractor remained responsible for all subcontracted work;
- the general contractor was required to supervise and direct all the work;
- the general contractor was required to maintain a CGL policy and workers' compensation insurance;
- the general contractor, not the owner, paid the subcontractor for the work performed; and
- the subcontractor was hired for one portion of the project.

The United States Court of Appeals for the 11th Circuit held that the general contractor was the statutory employer of the deceased subcontractor employee and was not entitled to indemnification under its CGL policy for damages arising from the death on the project. Stephens, 2014 WL 1623737 at \* 9.

Although it seems clear there was a general contractor/subcontractor relationship. What was not clear, and may vary depending on the location of the project, was what was covered under various insurance policies for each party on the project.

The opportunity after reading this case is to review the insurance obligations of the various policies and how they will be enforced where projects are located.

This case is also a reminder to take care when agreeing to settle disputes. Here the estate's settlement with the general contractor appears worthless.