

Lawyer Insights

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Cosby's Coverage Dispute Has Ramifications for Many Policyholders

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Over the last few years, numerous individuals have made claims of sexual misconduct against comedian Bill Cosby. These claims have led to disputes about the obligation of Cosby's insurers to pay for his defense attorneys and any eventual settlements or judgments. A recent decision by a Massachusetts federal court addressing these disputes provides important guidance about standard contract language found in different kinds of policies issued to all kinds of businesses and individuals. The specific provision at issue in *AIG Property Casualty v. Green*, No. 15-30111-MGM (D.

Mass. Nov. 8, 2016), barred insurance coverage for liability "arising out of" sexual misconduct. But, the same "arising out of" policy language at issue appears in provisions relating to all manner of subjects, from cyberattacks to alleged breaches of contract. It is important for counsel and others to be aware of this decision because it has ramifications for the scope of coverage under a variety of policies.

Summary of Decision

Shocking accounts of disgraced comedian Cosby's purported sexual misconduct toward numerous accusers have been hard to miss in the news. Cosby has publicly denied the accusations. Enflamed by these denials, several of the accusers brought lawsuits claiming that Cosby defamed them by publicly disputing their stories. Cosby has liability insurance coverage under a homeowners policy and a personal excess liability policy, which were both issued by AIG Property Casualty Co. AIG filed suit and sought a court ruling that it did not owe any coverage to Cosby in connection with the defamation lawsuits. The AIG policies do not cover defense costs or liability for personal injury "arising out of any actual, alleged, or threatened" sexual molestation, misconduct, or related acts. AIG argued that Cosby's public statements that formed the basis of the claims in the defamation lawsuits "arose out of" his alleged sexual misconduct and, therefore, there was no coverage. Disputing this interpretation, Cosby advanced a narrower reading of the language that required direct causation between the sexual misconduct and the injuries resulting from the alleged defamation.

The court rejected AIG's interpretation as overly broad and accepted Cosby's reading as reasonable, triggering AIG's duty to defend. The court ruled that the exclusion applied only where sexual misconduct is sufficiently related to, or is the source of, the alleged injuries. According to the court, the fact that Cosby's acts of alleged sexual misconduct preceded and set the context for the subsequent defamation claims did not mean those claims "arose out of" sexual misconduct. Rather, the alleged defamation and sexual misconduct constituted "separate and distinct events." The court focused on the source of the

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defamation plaintiffs' injuries. According to the court, the source of those injuries were the defamatory comments and not the sexual misconduct itself.

The court deferred ruling on whether AIG would be obligated to pay for any judgments or settlements on Cosby's behalf until the conclusion of the underlying suits.

Analysis

This decision supports an interpretation of common exclusionary language that limits its reach. Specifically, the phrase "arising out of" can be found in exclusions relating to a wide range of conduct. For example, a common exclusion in insurance policies providing directors and officers liability coverage excludes coverage for claims "arising out of" breach of contract. Another exclusion has popped up in general liability policies with increasing frequency as the threat of cyberattacks has grown and insurers aim to shift such risks to cyber-specific coverages. This provision excludes coverage for injury or damage "arising out of" access to or disclosure of confidential or personal information. The range of risks to which exclusions with this language apply depends on whether a court accepts or rejects a broad interpretation of the phrase "arising out of."

The *Green* decision is a positive development for policyholders because it rejects a broad reading of the "arising out of" language. According to *Green*, for the harm to "arise out of" excluded conduct, the conduct must directly cause the harm that is the basis for the claim against the policyholder. It is not enough that a claim merely involves the subject matter of the excluded conduct for the exclusion to apply.

Other courts have adopted a broader interpretation of this same language. For instance, a federal court applying Washington state law held that "it is not necessary to analyze causation issues when assessing an arising out of policy term," in *Trident Seafoods v. ACE American Insurance*, No. 13-36035 (9th Cir. Sept. 9, 2016). The court in *Trident Seafoods* found that a watercraft exclusion applied where the excluded conduct merely "set into motion" the resulting injury. Other courts have similarly considered the language to require mere "but for" causation, which the *Green* court rejected as too broad. (See, e.g., *Bethel v. Darwin Select Insurance*, 735 F.3d 1035 (8th Cir. 2013); and *UPS Freight v. National Union Fire Insurance Co. of Pittsburgh*, 428 F. App'x 168 (3d Cir. 2011). Arguably, the court in *Green* would have found the sexual misconduct exclusion barred coverage for the defamation claims if it had interpreted the policy language as broadly as these other courts.

The *Green* decision is therefore important because it provides a thoroughly reasoned rejection of an overly broad reading of this commonly used language. Policyholders should aggressively push back on attempts by insurers to stretch "arising out of" exclusions beyond direct causation in order to maximize the coverage they purchased.

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