

## Sixth Circuit Holds Public Officials Policy Affords Entity Coverage

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The United States Court of Appeals for the Sixth Circuit, applying Ohio law, has held that a public officials liability policy issued to a port authority afforded coverage to both the port authority and its officials and employees. *Toledo-Lucas County Port Auth. v. AXA Marine & Aviation Ins., Ltd.*, 2004 WL 963517 (6th Cir. May 6, 2004). In addition, the court held that the public officials liability coverage was not conditioned upon a formal claim or demand being made against an individual official or employee.

A port authority purchased a blended "Ports Liability Policy" that provided coverage for various liabilities. Among other things, the insuring agreement of the primary policy provided that the insurer would "pay on behalf of the Assured" damages for liability imposed on the Assured "on account of...Public Officials Liability." "Public Officials Liability" was defined as "any act or alleged act...by an officer and/or...employee...in the discharge of his/her duties as such and claimed against him/her solely by reason of his/her capacity as such." The policy defined "Assured" to include "(a) The Named Assured and/or subsidiary, associated, affiliated companies or owned and controlled companies, their duly elected and appointed officials...officers [and] employees" as well as "(b) any officer, director...or employee of the Named Assured, while acting in his capacity as such."

Between 1993 and 1998, the port authority and its employees were named as defendants in several lawsuits arising out of noise created by an air carrier's flights into and out of a local airport operated by the port authority. Some of these suits alleged that the port authority's employees, while acting at the direction of the port authority, had "committed fraud and other wrongful acts" in enticing the air carrier to establish a hub at the airport.

By 1996, all counts alleged against the port authority's employees had been dismissed, leaving only allegations against the port authority itself, which ultimately settled the litigation in 1999 for \$4.6 million. The primary and excess insurers declined to pay for the settlement or any of the attorneys' fees incurred by the port authority after the individual employees had been dismissed from the litigation on the grounds that the policy did not afford coverage for a claim asserted against only the port authority. Coverage litigation ensued.

The Sixth Circuit disagreed with the insurers and held that "the pertinent rules of [Ohio] statutory construction... [and] common sense" lead to the conclusion that the public officials liability provision of the primary policy afforded coverage for both the port authority and its employees. First, the court noted that the policy's insuring agreement stated that it covered "any 'Assured' who has to pay damages on account of Public Officials Liability," and "Assured" was defined to include the port authority. The insurers argued that the inclusion of "and/or" in clause (a) of the policy's definition of "Assured" meant that the term had different meanings for different coverage parts of the policy. In the context of the public officials liability coverage part, the insurers contended that the term "public officials liability" included only the port authority's officers and employees. According to the court, however, this argument ignored that fact that the port authority was identified as an assured "without limitation" in "more specific" portions of the policy including the certificate of insurance and the first page.

In addition, the court reasoned that clause (b) in the definition of "Assured" was to be read conjunctively with clause (a), meaning that both the port authority (under clause (a)) and its employees (under clause(b)) were to be considered "Assureds." Although there were no conjunctions or disjunctions between clauses (a) and (b), the court explained that the policy's use of the term "include" suggested that the clauses should be read conjunctively. The court also reasoned that it would be "hard to imagine" that the port authority would have purchased public officials liability coverage for its employees but not itself, given that "state law generally immunizes governmental employees acting within the scope of their employment."

Finally, the court held that coverage for public officials liability was not conditioned upon a formal claim being made against an individual employee, as opposed to the port authority. The insurers argued that the phrase "claimed against him/her solely by reason of his/her capacity" in the definition of "Public Officials Liability" required that result. The court reasoned that the meaning of the term "claim" was ambiguous in the policy as it was not clear whether it meant "'to demand, ask for, or take as one's own,'" suggesting the need for a formal demand against an employee, or "assert or maintain," suggesting that any allegation of an employee's wrongdoing in a complaint against the port authority would suffice. The court explained that "[w]ere the point of this language" relied upon by the insurers "to exclude coverage when a plaintiff decides to sue the Port Authority for its employee's wrongdoing, one would not expect such a significant limitation on coverage to be tucked away in a phrase addressing the capacity in which the employee acts."

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