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FIFTH CIRCUIT HOLDS THAT INSURED VERSUS INSURED EXCLUSION DOES NOT BAR COVERAGE FOR ALL SUITS BETWEEN INSURED

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August 13, 2015

The U.S. Court of Appeals for the Fifth Circuit recently held in *Kinsale Insurance Company v. Georgia-Pacific, LLC*,^[1] that a claim brought by one insured against another insured is not barred by an “insured versus insured” exclusion where the claim is not for “property damage,” but for indemnity arising from a third party’s claim for “property damage.”

Background

Georgia-Pacific, LLC, hired Advanced Services, Inc. (“Advanced”) to perform demolition work at Georgia-Pacific’s plywood plant in Gloster, Mississippi. Advanced leased equipment from H&E Equipment (“H&E”) to perform the work. A fire at the plywood plant damaged the leased equipment while the work was in progress. H&E sued Advanced to recover for its damaged property. In that suit, Advanced filed a third-party demand for indemnification against Georgia-Pacific based on general tort principles, under which Advanced contended that Georgia-Pacific was the at-fault party.

Kinsale Insurance Company (“Kinsale”) insured Advanced under a Commercial General Liability policy. The Kinsale policy named Georgia-Pacific as an additional insured. Georgia-Pacific submitted a claim under the Kinsale policy seeking coverage for Advanced’s indemnity claim. Kinsale denied Georgia-Pacific’s claim citing a policy exclusion that purports to bar coverage for claims brought by one insured against another — the “insured versus insured” exclusion. Kinsale then filed a declaratory judgment action in the United States District Court for the Southern District of Mississippi seeking a declaration that the exclusion indeed barred coverage in this instance. The district court granted summary judgment in favor of Kinsale, finding that the insured versus insured exclusion did in fact bar coverage for Advanced’s indemnity claim against Georgia-Pacific. The district court reasoned that the exclusion applied because Advanced’s third-party demand was brought in the same suit as H&E’s claim for property damage and “essentially [sought] reimbursement for a damages claim.” Georgia-Pacific appealed the district court’s decision.

Holding

The Fifth Circuit reversed, finding that the insured versus insured exclusion does not apply because Advanced’s indemnity claim against Georgia-Pacific was not a claim for “property damage.” According to the Kinsale policy, the insured versus insured exclusion provides that coverage “does not apply to claims or ‘suits’ for ‘bodily injury,’ ‘property damage’ or ‘personal and advertising injury’ brought by one insured against any other insured.” On appeal, Georgia-Pacific argued that the exclusion does not apply because Advanced’s claim was not itself a claim for “property damage,” one of the listed categories of claims to which the exclusion applies, but rather, it was a claim for indemnification under tort law principles. The Fifth Circuit agreed.

The Fifth Circuit explained that the claim for “property damage” had been brought by H&E against Advanced, which leased the property from H&E and which, consequently, was responsible for safeguarding the property while it was in Advanced’s possession. In contrast, Advanced did not assert a claim for “property damage” against Georgia-Pacific. Rather, Advanced sought only indemnity from Georgia-Pacific for amounts that it might become obligated to pay to H&E under its agreement to lease the damaged equipment. The court described the claim by Advanced against Georgia-Pacific as a procedural mechanism under Louisiana law by which the defendant in a principal action may bring in any person who may be liable to him for all or part of the principal demand. According to the court, such a claim is not one for “property damage.” Thus, the insured versus insured exclusion was not implicated.

The appeals court also distinguished *Fidelity & Deposit Company of Maryland v. Conner*,^[2] relied upon by the district court in support of its decision. That case involved a claim by a former corporate officer against other former officers in the midst of a regulatory investigation. The court found *Conner* distinguishable because the insured versus insured

exclusion in that case contained broader language that rendered the exclusion applicable to “any claim” between insureds, rather than only claims for “property damage.”

Implications

Kinsale illustrates that exclusions to coverage are to be read narrowly based on their plain terms. It is incumbent on policyholders, therefore, to read their policies closely, particularly those provisions that form the basis of a carrier’s denial of coverage. Where the carrier overreaches, or overstates the scope of an exclusion, policyholders should be prepared to challenge the carrier’s position.

Kinsale also illustrates the breadth of coverage available under insurance held by entities other than the policyholder. Here, for instance, Georgia-Pacific presented a viable claim for coverage as an additional insured under a policy issued to Advanced. *Kinsale* serves as a valuable reminder, therefore, that coverage may be available under more than just your own insurance. Companies engaged in multiparty endeavors should, therefore, be mindful of each participant’s insurance and pursue all potential coverage in the event of a loss.

Notes

[1] No. 14-60770 (5th Cir. July 27, 2015).

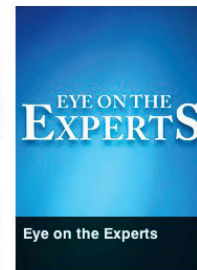
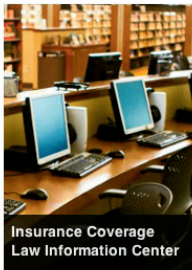
[2] 973 F.2d 1236 (5th Cir. 1992).

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