Alert
March 2, 2017

Global Insurance Alert
News Concerning Professional Liability Issues

COZEN O'CONNOR

Texas Supreme Court Broadly Defines Successor When Enforcing the Insured v. Insured Exclusion

The Underlying Dispute

Robert Primo (Primo) served as the director and treasurer for a condominium association. Shortly before he resigned from that position, he wrote himself two checks totaling more than $100,000 from the condominium account. Primo and the condominium association disputed whether the payments were authorized, and the condominium association made a claim for loss with its fidelity insurer. The fidelity insurer paid the claim and received an assignment of the condominium association's rights against Primo.

The fidelity insurer then filed suit against Primo, and Primo filed a counterclaim against the condominium association. Primo ultimately received a judgment on his claim. Separately, Primo sued Great American Insurance Company (Great American), which provided D&O coverage to both him and the condominium association, in part to recover the defense costs that he incurred in defending the lawsuit filed by the fidelity insurer.

The Coverage Dispute

Great American defended against Primo's claim for defense cost recoupment, in part, by citing the insured v. insured exclusion found in Great American's policy. That clause excluded coverage for claims as follows:

> This Policy does not apply to any Claim made against any Insured by, or for the benefit of, or at the behest of [condominium association] or . . . any person or entity which succeeds to the interest of [condominium association]."

Great American argued that Primo, who qualified as an insured due to his role on the condominium association board, sought indemnity for costs incurred defending a lawsuit brought by another insured; namely, the fidelity insurer, which stood in the shoes of the condominium association. Therefore, Great American argued that it had no obligation to reimburse Primo for the costs he expended defending himself against such claims. The trial court granted summary judgment to Great American, but the intermediate court reversed that judgment. According to the intermediate court, the fidelity insurer was not a legal successor in interest to the condominium association; i.e., a business successor that would take on the obligations of a predecessor entity. Therefore, reasoned the intermediate court, the insured v. insured clause would not preclude coverage for Primo's claim, as Primo was not involved in a lawsuit against another insured but was instead involved in a lawsuit involving an unrelated third party.

Texas Supreme Court Reinstates the Original Summary Judgment

The Texas Supreme Court reviewed the plain language of Great American's policy and, specifically, the language found in the insured v. insured exclusion. The court emphasized that the goal of policy interpretation was to ascertain the intentions of the parties based on the plain language found within the policy. Here, Primo, as a former director, was an insured under the condominium associations D&O policy. So, the question for the court was whether the fidelity insurer "succeeded to the interest" of the condominium association so as to trigger the insured v. insured exclusion.

The court opined that the insured v. insured exclusion was designed to prevent collusive suits between business organizations and their directors and officers, as well as claims that arise when members of a corporate family have disagreements. In that light, the intermediate court failed to give meaning to the plain language used in the insured v. insured exclusion. No language found

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therein limited the exclusion to only those disputes involving a legal successor in interest.

The court also noted that the plain meaning of the term “successor” involved one who would “fall heir to, inherit, or come into possession of.” In this light, the fidelity insurer became the owner of condominium association’s rights by virtue of the assignment it received. As such, the fidelity insurer “succeeded to the interest” of the condominium association, and the insured v. insured exclusion preclude coverage for Primo in connection with the lawsuit filed by the fidelity insurer.

Thus, Great American was not obligated to reimburse Primo for his defense costs incurred in that proceeding. The court noted that any other interpretation would make collusive suits more likely, as the exclusion could be avoided by simply assigning the rights of one insured to an unrelated third party. The court also noted that its interpretation of Great American’s policy comported with that of other courts and commentators.

Conclusion

The Texas Supreme Court reaffirmed that insurance policies mean what they say when it is said in plain language. The language of the insured v. insured exclusion does not apply only in situations involving insureds suing in their name or where entities take on the rights and obligations of an insured. Instead, the exclusion uses broader language so as to encompass any claim where a party has stepped into the shoes of an insured.

To discuss any questions you may have regarding the issues addressed in this Alert, or how they may apply to your particular circumstances, please contact Gregory S. Hudson at (832) 214-3909 or ghudson@cozen.com.