Case Highlights Need for Waiver of Subrogation Between Additional Insureds

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Does a party named as an additional insured under an insurance policy also qualify as an ”insured” under the policy for purposes of the interinsured exclusion? That was the question in a recent property damage case decided by the Second District Court of Appeal in California. Gemini Insurance Company v. Delos Insurance Company (12/5/12)

The case involved a commercial tenant and the tenant’s landlord. The tenant negligently caused a fire on the premises which damaged the landlord’s property. The landlord’s insurer paid the damages caused by the fire then sought subrogation from the tenant’s insurer. The tenant’s insurance policy named the landlord as an additional insured, which was required by the lease.

But the tenant’s insurance policy also included an interinsured exclusion which stated:

"The liability coverage afforded by this policy does not apply to any claim or 'suit' for damages by any 'insured' against another 'insured' because of 'bodily injury', 'property damage', 'personal injury' or 'advertising injury'. We have no obligation to defend or indemnify any 'insured' as to any such claim or 'suit' by another 'insured'."

The question as presented by the court:

“Was the tenant covered for the landlord's claim, or was coverage barred by the interinsured exclusion?”

The policy defined an “insured” as follows:

“if you are designated in the declarations as . . . an organization other than a partnership, joint venture, or limited liability company, you are an insured."

The court noted that being named an additional insured weighed in favor of the interinsured exclusion preventing recovery. But a separate policy endorsement made clear that the additional insured (i.e. the landlord) was covered only when facing liability for acts of the tenant. In other words, the additional insured language was protecting a party (the landlord) who was not a named insured from vicarious liability for acts of the named insured.

As the court noted, the landlord sought to be named an additional insured “in order to protect itself in the event that it was sued” and “[i]t surely would not have done so in order to limit its ability to recover, in the event that it was injured by [the tenant’s] negligence.” The court held that this provision, excluding coverage for claims between insureds, was not applicable given the facts of this case.

Pursuant to this recent holding by the Court of Appeals, parties seeking to maintain their right to subrogation against an additional insured should make sure that that their right to subrogation is explicitly included in a policy. In this case, the landlord did not seek recovery for damages paid to third parties. Rather, the issue was damage incurred by the tenant who not only caused the fire, but was the primary insured.

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