

Damage to Real Property Exclusion, Reasonableness of Settlement Coverage Update

August 16, 2021

Damage to Real Property Exclusion – Fifth Circuit (Texas Law)

Kinsale Ins. Co. v McBride Operating L.L.C.

--- Fed. Appx. ---, 2021 WL 3524147 (5th Cir. Aug. 10, 2021)

The plaintiff, Kinsale Insurance Company (Kinsale), filed an action against its insured, ETOPSI Oil & Gas LLC (ETOPSI), seeking a declaratory judgment that ETOPSI's commercial general liability policy did not require coverage for damages arising out of its work on behalf of McBride Operating, LLC (McBride) regarding a new injection well. The U.S. District Court for the Eastern District of Texas held that the contractor exclusion in the policy precluded coverage. The U.S. Court of Appeals for the Fifth Circuit affirmed.

McBride hired ETOPSI as a consultant for the design and construction of an injection well. After ETOPSI constructed the well, it was approximately 200 feet too shallow to reach the desired subterranean geological formation. ETOPSI attempted to expand the well's depth, but those efforts failed and the well was deemed valueless. McBride sued ETOPSI in state court for this error and for ETOPSI allegedly causing various fluids, muds, and other substances to be injected into the wellbore. ETOPSI then sought coverage under its policy.

Kinsale argued in the district court that the policy did not cover ETOPSI's well for two reasons: (1) the policy's insuring agreement was not satisfied, and (2) various exclusions precluded coverage. The district court concluded that the installation of the well caused "property damage" as defined in the policy and, therefore, satisfied the insuring agreement. However, the district court held that the damage to real property exclusion in the policy applied to bar coverage. The exclusion read: "This insurance does not apply to ... 'property damage' to ... [t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations[.]" Relying on Fifth Circuit precedent, the district court concluded that there was no genuine dispute as to whether the alleged damage to McBride's physical property occurred during the performance of ETOPSI's operations. Therefore, Kinsale met its burden to establish the applicability of the exclusion. On appeal, the appellate court affirmed based upon the district court's reasoning.

By: Joshua LaBar

Reasonableness of Settlement – Washington

Wood v. Milionis Constr., Inc.

--- P.3d. ---, 2021 WL 3412516 (Wash. Aug. 5, 2021)

The Washington Supreme Court ruled that a \$1.7 million settlement between a couple and a construction contractor for faulty construction work was reasonable, and the couple could seek this amount from the contractor's insurer. Anna and Jeffrey Woods (Woods) entered into a contract with Milionis Construction Inc. (MCI) to build a single-family home for approximately \$1.3 million. Construction was halted following several issues related to the contractor's work. At the time construction was halted, the Woods had paid \$570,000 of the contracted price.

The Woods sued MCI and its owner for breach of contract and other claims. Cincinnati Specialty Underwriters (Cincinnati), MCI's general liability insurer, agreed to defend the contractor, but reserved the right to deny coverage. MCI and its owner also retained their own defense counsel. Cincinnati intervened in the action and the parties agreed to settle the suit for \$399,000, but the insurer refused to fund the amount. Cincinnati also filed suit in federal court seeking a ruling that it had no duty to cover the contractor.

Before the dispute went before an arbitrator, the Woods, MCI and its owner reached an agreement to settle the suit for \$1.7 million. The trial court held a two-day reasonableness hearing, where Cincinnati and the Woods both presented evidence and expert testimony. Cincinnati argued that the settlement value was \$399,000, and the Woods argued their damages exceeded \$2 million. The trial court ultimately found that the \$1.7 million settlement agreement was reasonable and that the Woods could seek treble damages under a consumer protection law. Cincinnati challenged the trial court's order and a divided Washington Court of Appeals panel held that the trial court abused its discretion because the reasonableness finding credited a defense expert's evaluation of contract damages at \$1.2 million despite other evidence in the record suggesting that damages never rose above \$399,000.

The Supreme Court held that the trial court properly conducted the reasonableness hearing and evaluated the varied and conflicting evidence of contractual damages. Additionally, the Supreme Court held that the trial court appropriately considered damages for the plaintiffs' extracontractual claims as well as allowable attorney fees. The Supreme Court reasoned that the appellate court misapprehended parts of the record and substituted its own assessment of the competing damages evaluations for the trial court's assessment.

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The Supreme Court found that the appellate court's decision was based on "its own mistaken assessment of damages in this case." Specifically, the appellate court majority did not properly consider a defense expert's estimate on the cost to complete the construction. "In concluding the trial court abused its discretion, the Court of Appeals majority misapprehended parts of the record and improperly gave greater weight to certain defense expert testimony." The Supreme Court reversed the appellate court and reinstated the trial court's order.

By: Michael Hanchett

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