PLUNKETT COONEY

Occurrence, Insurance Proceeds in Bankruptcy, Criminal Acts Exclusion Coverage Update

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Kentucky, federal law, Michigan law Coverage Update
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'Occurrence' – Kentucky

Am. Mining Ins. Co. v. Peters Farms LLC
--- S.W.3d ---, 2018 WL 3913781 (Ky. Aug. 16, 2018)

The Kentucky Supreme Court ruled that a coal mining company's conduct in removing coal from a property was not an accident, even though the mining company was under the mistaken belief that the coal was on a different property. Between 2007 and 2008, Ikerd Mining (Ikerd) was engaged in mining near a property owned by Peters Farms LLC (Peters). Some of the coal was removed from Peters' land under an oral agreement; however, several thousand tons more was removed under the belief that it was on a different property. American Mining Insurance Co. (American Mining) denied coverage for the suit that followed, and it was eventually named separately in the suit in part because Ikerd became insolvent.

In overturning the appellate court decision, the Supreme Court found that Ikerd's actions did not constitute an accident under the policy because the actions were not fortuitous – Ikerd intended to mine the coal and to eventually sell it, even though it did not specifically intend to mine Peters' coal. Moreover, Ikerd had full control over its employees when they were engaged in mining the coal over a matter of months, and its conduct could not be considered an accident on the part of either Ikerd or its employees. Two justices offered a partial dissent, concluding that coverage should be owed for the coal mining conducted under the mistaken belief it was on someone else's property. The dissent disagreed with the majority's position that the action was not an accident because it was a mistake within Ikerd's control, and the dissenting justices opined that the decision could open the door for future insurers to avoid coverage by claiming a mistake was within the control of the insured.

Insurance Proceeds in Bankruptcy – Fifth Circuit (Federal Law)

In re OGA Charters, L.L.C.
--- F.3d ---, 2018 WL 4057525 (5th Cir. Aug. 24, 2018)

The U.S. Court of Appeals for the Fifth Circuit ruled that insurance proceeds can be considered property of a bankruptcy estate under limited circumstances. The case involved a bus crash that caused catastrophic injuries. A group of 14 victims initially settled their claims with the bus company's liability insurer for $5 million, thereby exhausting the policy. The victims who were not part of this settlement, however, filed an involuntary bankruptcy petition against the bus company, asserting that the insurance proceeds should be made part of the bankruptcy estate. The appellate court agreed, finding that the insurance proceeds were properly part of the bankruptcy estate and should be distributed to all crash claimants. Though the 14 victims pointed to prior circuit court decisions holding that proceeds of insurance policies are distinct from the policies and are not property of the bankruptcy estate, the appellate court recognized that "[i]n our previous decisions, we have been careful to leave open the possibility that liability proceeds are property of the estate in cases like this one." The appellate court explained that "[i]n the 'limited circumstances,' as here, where a siege of tort claimants threaten the debtor's estate over and above the policy limits, we classify the proceeds as property of the estate." The appellate court ultimately held that "over $400 million in related claims threaten the debtor's estate over and above the $5 million policy limit, giving rise to an equitable interest of the debtor in having the proceeds applied to satisfy as much of those claims as possible."

Criminal Acts Exclusion – Sixth Circuit (Michigan Law)

K.V.G. Props., Inc. v. Westfield Ins. Co.
--- F.3d ---, 2018 WL 3978211 (6th Cir. Aug. 21, 2018)

The U.S. Court of Appeals for the Sixth Circuit affirmed a ruling of the district court which granted summary judgment to Westfield Insurance Company (Westfield), finding no coverage under a building policy where the insured's tenant was involved in an illegal marijuana grow operation. K.V.G. Properties Inc. (KVG) was the owner of a commercial property and leased a portion to a tenant. The tenant purportedly used the property, without KVG's knowledge, to house an illegal marijuana grow operation. In so doing, the tenant made several changes to the leased property and, at some point, damaged the HVAC system at the property, the repair cost of which was estimated at $500,000.

On Oct. 29, 2015, the U.S. Drug Enforcement Agency (DEA) raided the tenant's property and discovered the illegal grow operation. Westfield had issued a building and personal property policy to KVG, but the policy had an exclusion precluding coverage for any "loss or damage caused by or resulting from" any "[d]ishonest or criminal act by you, any of your partners, members, officers, managers, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose," and denied coverage to KVG for the loss on the basis of this exclusion.

The district and appellate courts agreed with Westfield that the exclusion applied. Even though Michigan law had carve-outs under the Medical Marihuana Act for some grow operations, the tenant's operation here was not protected under the Act. Additionally, at the time of the raid, the DEA was not conducting raids on entities protected under the Act, and KVG had alleged in its eviction complaint that the tenant's activity was "illegal." The district court found that KVG could not subsequently argue that the tenant's activity was legal. Importantly, the district court also noted that because the exclusion was for criminal acts, the same did not require an actual conviction. The appellate court affirmed the grant of summary judgment to Westfield on the basis of the exclusion.

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