

Owned Property, Assumption of Liability Exclusion Coverage Update

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Texas, Michigan Coverage Cases

The e-POST

Owned Property – Fifth Circuit (Texas Law)

Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.

--- F.3d ---, 2017 WL 5562300 (5th Cir. Nov. 20, 2017)

The U.S. Court of Appeals for the Fifth Circuit held that an insurer had no coverage obligations where its insured lost \$17.2 million of pension fund proceeds in a Ponzi scheme. The insured's investment manager invested the money with a brokerage that was ultimately found to be running a Ponzi scheme. The commercial-crime insurance policies at issue provided coverage for property that the insured "owned." The appellate court, however, held that the insured relinquished control of the funds such that it did not own the principal and earnings. The insured made a loan to its investment manager in exchange for promissory notes, and the court found that "[w]hen it made that loan, it gave up possession and control of the funds" such that "it 'owned' the notes, and the [investment manager] 'owned' the funds." The appellate court explained that no Texas case law supported a holding that a party continues to own funds that it was fraudulently induced to loan to another. The appellate court also noted that nothing in the policies indicated an intention to define "own" in a technical, legal sense rather than its common meaning of "[t]o have or possess property ... to have control over." Though the insured also argued that it suffered a "loss" under the policies when it loaned the funds to the investment manager, the appellate court found that the insured's "loss" occurred not when it initially loaned the funds to the investment manager, but when the brokerage later misappropriated the money. Thus, the court found the insured was not entitled to recover the principal investment.

Assumption of Liability Exclusion – Sixth Circuit (Michigan Law)

N. Ins. Co. of New York v. Target Corp.

--- Fed. Appx. ---, 2017 WL 5899790 (Nov. 29, 2017)

The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's ruling that an assumption of liability exclusion in a policy issued by Northern Insurance Company of New York (Northern) applied to preclude insurance coverage to the insured, Walsay, Inc. (Walsay). Home Niches, Inc. (Home Niches)

supplied products to Target Corporation (Target) pursuant to an agreement that provided that Home Niches would defend and indemnify Target for liabilities arising from products manufactured or supplied by Home Niches. In 2010, Home Niches began to wind down its dealings with Target and, as a result, Walsay and Home Niches executed an agreement in which Walsay assumed Home Niches' indemnification obligation to Target. Target was subsequently sued by the mother of a child who suffered injury while using a product that was supplied by Home Niches and purchased at Target. A different court determined that Home Niches and Walsay breached their indemnification obligation to Target and Target sought coverage for those amounts under Walsay's insurance policy, which was issued by Northern.

Northern argued that coverage was not available because the assumption of liability exclusion stated that the policy did not apply to "bodily injury' or 'property damage' for which [Walsay] is obligated to pay damages by reason of the assumption of liability in a contract or agreement" except for damages "[a]ssumed in a contract or agreement that is an 'insured contract. ...'" "Insured contract" was defined as "[t]hat part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization." The appellate court determined that the "insured contract" exception to the exclusion did not apply because Home Niches' liability arose solely because of the contractual indemnification provision, which Walsay assumed. Ultimately, the appellate court stated "because Home Niches was not liable to Target in tort, Walsay did not assume tort liability in the [agreement.]"

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