

Texas Supreme Court Rejects Narrow Construction Of Insured vs. Insured Exclusion

03.29.17



(Article from *Insurance Law Alert*, March 2017)

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Reversing an appellate court decision, the Supreme Court of Texas ruled that an insured vs. insured exclusion bars coverage for claims asserted against a former director by an insurance company standing in the shoes of the insured company. *Great American Ins. Co. v. Primo*, 2017 WL 749870 (Tex. Feb. 24, 2017).

Robert Primo served as a director of Briar Green, a non-profit organization. After Primo resigned, Briar Green allegedly discovered that he had misappropriated funds and sought coverage for those losses from Travelers, its fidelity insurer. Travelers paid the claim in exchange for a written assignment of Briar Green's rights and claims against Primo. Travelers, standing in the shoes of Briar Green, then sued Primo to recover the funds. Thereafter, Primo sued Great American, Briar Green's D&O insurer, seeking reimbursement of the costs he incurred in the Travelers suit. Great American argued that coverage was barred by the insured vs. insured exclusion, which applies to claims against an insured made by Briar Green "or . . . any person or entity which succeeds to the interests of [Briar Green]." A Texas trial court agreed that the exclusion applied. An intermediate appellate court reversed, reasoning that the exclusion did not apply because Travelers was not Briar Green's "successor." The appellate court held that Texas common law requires a "successor" to acquire the rights of another entity and "maintain[] the character of the place taken." The Texas Supreme Court reversed.

The Texas Supreme Court ruled that the appellate court erred in applying a corporate-based "successor" analysis given the absence of that term in the exclusion. As the Texas Supreme Court emphasized, the exclusion does not use the term "successor" or "successor-in-interest." Rather, it requires that the party bringing suit "succeed" to the interests of Briar Green. Further, the Texas Supreme Court reasoned that applying the plain meaning of "succeeds" (falls heir to, inherits or comes into possession of) comports with the purpose of the exclusion – to prevent collusive suits between organizations and their officers.

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