



This month we report on one decision each from the Eleventh and Seventh Circuit, which issued rulings against insurers in Georgia and Wisconsin, respectively.

11th Circuit Holds D&O Policy's Insured v. Insured Exclusion To Be Ambiguous

The 11th Circuit Court of Appeals in Atlanta has ruled as a matter of Georgia law that an insured v. insured exclusion in a Directors & Officers policy was ambiguous. *St. Paul Mercury Ins. Co. v. FDIC* (17 December 2014). In this case, St. Paul was the D&O insurer for Community Bank & Trust. The bank failed and regulators appointed the Federal Deposit Insurance Corporation as receiver for the bank, to assume the bank's obligations and pay creditors. The FDIC brought an action against two former directors and officers of the bank, alleging their negligent conduct caused the bank to incur over \$15 million in losses.

The insurer denied coverage, on grounds the D&O policy contained an insured v. insured

exclusion, and the FDIC should be deemed an insured as it "stood in the shoes" of the bank. The district court granted summary judgment to the insurer. But the Court of Appeals, applying Georgia law, held the insured v. insured exclusion was ambiguous, and reversed the judgment.

The 11th Circuit's decision determined the exclusion was ambiguous in the context of a claim brought by the FDIC. Courts have reached different results in a number of states on whether the FDIC is deemed an insured for the purposes of an insured v. insured exclusion. The wording in this policy was typical of such exclusions. The 11th Circuit held the mere fact that different courts had reached different results on this exclusion was enough to deem the policy to be ambiguous.

7th Circuit Holds Continuous Trigger Theory Applies to Property Policy

The 7th Circuit Court of Appeals in Chicago has held as a matter of Wisconsin law that the continuous trigger theory applicable to some commercial general liability policies applies

to a first-party property loss. In *Strauss v. Chubb Indemnity Ins. Co.* (18 November 2014), owners of a home in Wisconsin sued their homeowners insurer for water damage to their home. The

owners alleged that water infiltration had been damaging their home from the time of its construction in 1994 until they discovered the infiltration 16 years later in 2010. Chubb insured the home under first-party property policies from 1994 to 2005. Chubb denied coverage on grounds the loss did not manifest during its policy periods. A panel of the 7th Circuit Court of Appeals ruled against Chubb, because the court held the continuous trigger theory applied to the property loss. On 15 January 2015, the 7th Circuit denied rehearing of the decision before the full Court of Appeals.

Most courts that have addressed trigger of coverage in a first-party property policy have applied a manifestation rule, rather than a continuous trigger rule. The continuous trigger theory is usually applied under some general liability policies. This decision appears to have been based on the particular wording of this policy, which defined “occurrence” to include “continuous or repeated exposure to substantially the same general conditions.” That wording often appears in liability policies, and the court followed the reasoning of cases applying the continuous trigger theory to that wording.

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