wiley

NEWSLETTER

Court Dismisses Claim for Coverage for a First-Party Loss Under a Third-Party Liability Policy

June 2013

The United States District Court for the Northern District of Texas has dismissed a claim for coverage under a D&O liability policy, holding that the loss at issue did not arise from "a claim for a wrongful act," but rather only from a wrongful act on the part of the insured's president such that the loss was an uninsured first-party loss. *Am. Constr. Benefits Grp., LLC v. Zurich Am. Ins. Co.*, 2013 WL 1797942 (N.D. Tex. Apr. 29, 2013).

The named insured–a captive benefits group–provided insurance for one of its member construction companies. During negotiations with its reinsurer, the group's president agreed to a coverage exclusion for the cost of a heart transplant operation for the child of an employee of the construction company. As a result, the benefits group itself was forced to pay the construction company's claim for the transplant costs. The benefits group sought coverage for that payment under its D&O liability policy, contending that the loss resulted from the president's wrongful act in agreeing to the exclusion. The D&O insurer declined coverage, and the insured brought suit.

The court granted the insurer's motion to dismiss, finding that the group failed to state a plausible claim for breach of contract because its complaint did not allege that the construction company had made a claim against the group "for a Wrongful Act." According to the court, the construction company's claim against the group was not a claim for a wrongful act committed by the group's president but rather for coverage under its insurance contract with the group, regardless of whether the president's conduct in agreeing to the exclusion caused the loss incurred by the group. The court concluded that the insured could not "transform its D&O liability policy into a first-party policy to provide coverage for its own loss."