Case Alert

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KY Mining Accident Not a Covered Occurrence Under Commercial General Liability Policy

In *Am. Mining Ins. Co. v. Peters Farms, LLC*,[1] the Kentucky Supreme Court ruled that a mining error was not a covered accident under a commercial general liability insurance policy. The central issue was whether an insured mining company's unauthorized removal of minerals from a neighboring property was an "occurrence" that unintentionally caused "property damage" as defined by the mining company's commercial general liability policy ("CGL Policy").

Beginning in 2007, the insured mining company, Ikerd Mining, LLC ("Ikerd"), removed tons of coal from land belonging to Peters Farms, LLC ("Peters"), under Ikerd's mistaken belief the land belonged to Ikerd. Ikerd knew it mined some of the coal from land that belonged to Peters pursuant to an oral lease agreement. Peters sued Ikerd and Ikerd's commercial general liability insurer, American Mining Insurance Company, Inc. ("AMIC"), for Ikerd's "willful and wanton trespass" onto Peters' property and conversion of coal from it.

AMIC argued it did not have to cover the claim because the losses claimed by Peters were not an "occurrence".[2] The state appeals panel found that the injuries to Peters' property were the result of two separate and distinct mistakes committed by Ikerd. First, an Ikerd employee testified that the removal of some of the coal from Peters' property "occurred because of an 'accident' and a 'mistake' as to the location of the boundary line." Second, another Ikerd employee testified that some other portion of the coal was knowingly removed from Peters' property, because Ikerd's employees mistakenly believed Ikerd had permission from Peters to mine it. The state appeals panel determined that both of Ikerd's mistakes in mining Peters' property were "accidents" which meant each was an "occurrence" under the CGL Policy.

On appeal, the Kentucky Supreme Court reversed the ruling of the state appeals panel finding that the intentional removal and conversion of coal was not an "accident" constituting an "occurrence," regardless of whether the trespass was willful or innocent. The Kentucky Supreme Court recognized that the requirement that the loss be fortuitous, i.e. not intended, is a concept inherent in all liability policies. Analyzing the matter under Kentucky trespass law, the Kentucky Supreme Court reasoned that although it may not have been Ikerd's intent to mine Peters' coal specifically, Ikerd *did* intend to mine and sell the coal it extracted. Regardless of whether Ikerd's trespass was willful or innocent, Ikerd intended to act.

The Kentucky Supreme Court advised that the facts of this case were distinguishable from those in another Kentucky Supreme Court case, *Bituminous Casualty Corp. v. Kenway Contracting, Inc.*,[3] in which the Supreme Court found that liability coverage was available for the unintended consequences of intentional acts. The Kentucky Supreme Court reasoned that the Bituminous insured never had the intent to demolish its customer's house, whereas, here, Ikerd fully intended for its employees to mine the coal. Moreover, the Kentucky Supreme Court found the because the actions taken by Ikerd which led to the property damage were entirely under its control, and Ikerd fully intended to execute the excavation plan as it did, the Kentucky Supreme Court could not say the resulting damage throughout the property was an accident. Since Ikerd's mining activities were intentional, even though the trespass was not, the property damage they caused was not covered by the CGL Policy.

This decision is unfortunate for policyholders seeking coverage under commercial general liability insurance, especially since the Kentucky Supreme Court seems to be taking the position that any mistake by the insured was within their control and not covered by the insurance policy which arguably renders liability insurance meaningless. As best articulated by Kentucky Supreme Court Associate Justice Wright, "it is a slippery slope when you can make any mistake, claim it was within the control of the insured, and eliminate the coverage."

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[1] No. 2017-SC-000066-DG, 2018 WL 3913781, (Ky. Aug. 16, 2018)
[2] During the course of the litigation, Ikerd became insolvent, leaving AMIC as the only source for recovery
[3] 240 S.W.3d 633, 638-39 (Ky. 2007)