

Insured v. Insured Exclusion Applies to Lawsuit Spearheaded by Insured

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The United States District Court for the Southern District of New York, applying Kentucky law, has held that an insured v. insured exclusion bars coverage for a lawsuit brought by both insured and non-insured security holders as well as a non-security-holder, non-insured entity. *Gregory v. Navigators Ins. Co.*, No. 2022 WL 17551995 (S.D.N.Y. Dec. 9, 2022). The court found that an exception to the exclusion did not apply because an insured provided substantial assistance in bringing the case against the company's directors and officers.

A Kentucky farm equipment company's directors and officers were sued in an action that included claims by security holders—some of which were insureds—as well as a non-insured, non-security-holder entity. The company's directors and officers insurance policy excluded coverage for "Loss, including Costs[]of Defense, in connection with any Claim made against any Insured . . . by or on behalf of any Insured or any security holder of the Company" (the "insured vs. insured exclusion"). However, the policy provided that such exclusion did not apply to "any Claim . . . brought by a security holder of the Company, whether directly or derivatively, if the security holder bringing such Claim is acting totally independently of, and without the solicitation, assistance, active participation or intervention of, the Company or any Insured Person" (the "assistance exception"). One of the company's officers sought coverage for the lawsuit, and the insurer denied coverage based on the exclusion. Coverage litigation followed.

The court granted the insurer's motion to dismiss, determining that the insured v. insured exclusion applied because some of the plaintiffs were insureds and/or security holders. It further concluded that the assistance exception did not apply because this was not a situation where a passive shareholder joined a larger suit. Rather, court emphasized that the lawsuit was "spearheaded" by an insured.

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The court also rejected an argument that there should be coverage for the portion of the lawsuit brought by the non-security-holder, non-insured entity based on the policy's allocation provision. It reasoned that claims brought by insureds and others still fell within the terms of the insured v. insured exclusion and that the assistance exception, rather than the allocation provision, controlled whether the exclusion was implicated. The court determined that the allocation provision mattered only where the exclusion did not apply in the first instance.