

‘Final judgment’ or ‘final adjudication’ - what’s the difference?

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Most D&O insurance policies specify that fraud or misconduct exclusions only apply if there has been an admission or a judicial determination that the precluded misconduct has occurred. What specific judicial determination is required to trigger the exclusion is usually dependent on the wording. The recent New York case of [Cumis Speciality Insurance Co v Alan Kaufman](#), considered whether a policy covered the costs of a pending appeal.

Facts of case

An executive at a credit union was charged with accepting a gratuity in breach of federal laws. The credit union’s D&O insurer covered attorney’s fees incurred to defend the charges. The executive was convicted and sought indemnity for the costs of appealing the conviction.

The insurer argued that the insurance policy did not cover appeal costs owing to the application of the policy’s fraud exclusion, which precluded cover for any claim based upon ‘any deliberately dishonest, fraudulent, intentional or wilful misconduct or act’.

The executive argued the exclusion only applied after a ‘final adjudication’, and that as an appeal was pending there was no final adjudication.

Judgment

Originally, the judge held that New York law considers a criminal trial to be finally adjudicated upon conviction. Therefore, the exclusion prevented coverage for the appeal costs requested. The executive filed a motion for reconsideration of this judgment.

The judge’s initial ruling was based on cases involving policies in which the exclusion at issue ruled out coverage due to a ‘final judgment’ rather than a ‘final adjudication’. The executive argued that in the cases involving ‘final adjudication’ language, rather than ‘final judgment’ language, the court had held that the costs of appeal following a criminal conviction were covered. As such, the executive argued that the cases relied upon to support the ruling was inapplicable, because the courts relied on a case involving policies that referred to a ‘final judgment’.

In upholding the original decision, the judge stated that:

‘New York courts have drawn no distinction between the terms ‘final judgment’ and ‘final adjudication... even if New York courts had not used the phrases ‘final adjudication’ and ‘final judgment’ interchangeably, [the executive] has still failed to provide any reason why ‘final adjudication’ should be interpreted differently from the term ‘final judgment’ here.’

Considerations for underwriters and insurers

In order to address the issue that arose in this case, insurers are advised to ensure policy wordings are explicit as to whether or not appeal costs are covered. For example, additional language may be included to specify that the relevant exclusion will not apply until all appeals have been fully and finally exhausted or the insured waives or otherwise does not pursue any remaining right of appeal. Alternatively, policies may specify that a first instance finding is sufficient for the exclusion to apply. Either way, insurers should be clear about what they are, and are not, prepared to cover.

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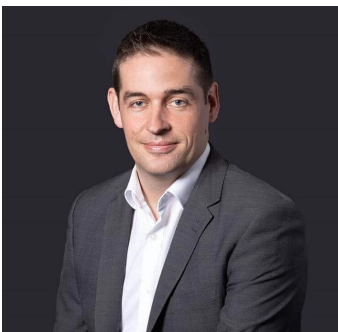
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