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COURT HOLDS INSURER MAY RELY ON "VACANCY CLAUSE" OF HOMEOWNER'S POLICY WITHOUT SHOWING PREJUDICE

The Dallas Court of Appeals on Thursday reversed a summary judgment in favor of an insured, holding that the trial court was incorrect when it concluded that Farmers Insurance Exchange was required to show that it was prejudiced in order to rely on a policy defense based on a vacancy clause. In *Farmers Ins. Exch. v. Greene*, 2012 WL 3132440 (Tex. App.—Dallas Aug. 2, 2012), the court reviewed a trial judge's ruling that the insured's "violation of the purported vacancy clause does not render the policy void and does not constitute a defense" to the insured's contract claim. The court of appeals disagreed, rejecting the insured's argument that Farmers' was alleging a breach of the contract. Because a defense under a vacancy clause was not an allegation of a breach, it was not subject to Texas precedent requiring a showing that the insured was "prejudiced" or a statute requiring that the breach contributed to the loss.

The underlying facts were not in dispute. In November 2007, a fire damaged real property belonging to the plaintiff. The plaintiff, however, had moved to a retirement community four months earlier and placed her house on the market, and had notified Farmers that she was doing so. She made a claim for the fire loss, and Farmer's denied the claim based on the clause in the Farmer's policy stating that:

> If the insured moves from the dwelling and a substantial part of the personal property is removed from that dwelling, the dwelling will be considered vacant. Coverage that applies under Coverage A (Dwelling) will be suspended effective 60 days after the dwelling becomes vacant. This coverage will remain suspended during such vacancy.

The trial court held that the insured "violated" this provision, and that the "violation" did not void the policy.

The Court of Appeals disagreed with the trial court's interpretation of the policy. The vacancy clause did not mean that the insured forfeited coverage; instead, it suspended coverage for dwelling damage, while other provisions of the policy remained in effect. There was no promised performance that the insured had breached. Since breach was not at issue, the common law requirement of a showing of prejudice did not apply.

The Court of Appeals also rejected the insured's argument that section 862.054 of the Texas Insurance Code negated Farmer's vacancy defense. That statute provides that "Unless the breach or violation contributed to cause the destruction of the property, a breach or violation by the insured … is not a defense to a suit for loss." First, as there was no breach alleged, the statute did not apply by its terms. The court also analyzed the history of the statute and its application in detail, noting that its predecessor was known as the "anti-technical" statute. The vacancy clause, said the court, was not a

technicality, and the court declined "to engraft by judicial fiat additional terms requiring [Farmer's] to assume liability for a risk the Policy specifically excluded."

FIFTH CIRCUIT HOLDS "NOTICE PROVISION" JURISPRUDENCE APPLIES TO EXCESS CARRIERS THE SAME AS TO PRIMARY CARRIERS

The Fifth Circuit Court of Appeals determined that there was a fact issue concerning whether an excess insurer was prejudiced by lack of notice of a lawsuit prior to a jury verdict, reversing summary judgment rendered in favor of the primary insurer and remanding to the trial court for further proceedings. In *Berkley Regional Ins. Co. v. Philadelphia Indemnity Ins. Co.*, 2012 WL 3126739 (5th Cir. August 2, 2012), Nautilus Insurance Company was the primary insurer for the defendant in an underlying slip-and-fall suit, with a policy limit of $1 million per occurrence. Philadelphia was the defendant's excess insurer, with a limit of $20 million excluding the primary policy. The plaintiff in the underlying suit was a dentist who was unable to continue her practice because of her injuries, and her experts valued her damages at $1.25 million. Although the numbers exchanged at mediation were well below Nautilus' policy limits, negotiations failed and the case went to trial. The jury ultimately awarded the plaintiff more than $1.6 million, and the trial court's final judgment added post-judgment interest and costs.

Philadelphia contested coverage based on late notice, contending that the first time it knew of the suit or the claim was after judgment, when it was asked to pay the excess amount. The parties (plaintiff-appellant Berkley Regional Insurance Company had obtained the rights of Nautilus and the underlying parties against Philadelphia) filed competing motions for summary judgment, and the District Court for the Western District of Texas ruled as a matter of law that Philadelphia was not prejudiced by lack of notice prior to the adverse verdict. The Fifth Circuit performed a detailed review of the history of notice provisions and the prejudice requirement in Texas Courts, observing that the notice requirements affords insurers valuable rights, including the ability to join in an investigation of the claim, to settle a case or claim, and to interpose and control the defense. On the other hand, the Court concluded, it was clear that for an insured's breach to defeat coverage, the breach must prejudice the insurer. The Fifth Circuit saw no reason that these principles should apply any differently to an excess carrier than to a primary carrier.

The Court disagreed that the facts before it in *Berkley* paralleled various cases in Texas courts where notice was "better late than never." To the contrary, Philadelphia was not notified late — it was not notified at all, until the case was at a conclusion and could only be appealed. Philadelphia could not investigate the case or perform its own analysis. Most importantly to the Fifth Circuit, Philadelphia could not participate in mediation. Since mediation is a "dynamic process," the Court could not determine what effect Philadelphia's participation might have had. In a closing metaphor, the Court stated that "the cows had long since left the barn when Philadelphia was invited to close the barn door."

The Fifth Circuit declined, however, to render judgment for Philadelphia, holding that fact issues still existed as to whether Philadelphia was prejudiced as a matter of law. The Court did not identify the facts that could have demonstrated that Philadelphia was not prejudiced, but remanded to the District Court for a determination of the remaining summary judgment issue.

JUDGE LEONARD DAVIS FROM EASTERN DISTRICT OF TEXAS IS FOURTH TO ISSUE RULES RELATING TO MOCK TRIALS, FOCUS GROUPS

Judge Leonard Davis of the U.S. District Court for the Eastern District of Texas followed three of his colleagues in issuing a standing order governing trials of cases where the litigants have conducted mock

jury research. Because the Eastern District is a popular venue for patent litigation, the federal bench has become concerned that the jury pool will be tainted, especially given the sparse population of the region.

Judge Davis' order, which tracks the orders issued by Judges Everingham, Ward, and Folsom, requires parties to retain certain identifying information of the participants of mock trials, focus groups, or similar studies. If a case goes to trial, the party or parties conducting the studies are to advise the other parties at least ten days before the pre-trial conference, and are to check the jury list against the list of study participants. The parties are also required to provide the judge with a copy of the list of participants for an *in camera* review.