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COURT ADDRESSES WHETHER ADDITIONAL INSURED ON POLICY MAY OBTAIN COVERAGE FOR ITS CONTRACTUAL INDEMNITY OBLIGATIONS TO THIRD PARTY

Recently, a Federal District Court Judge from the Southern District of Texas, in *Federal Insurance Company v. Mariner Energy, Inc.*, 2006 WL 3447750 (Nov. 27, 2006), addressed whether an additional insured on a CGL policy may obtain coverage for its contractual indemnity obligations to one other than the named insured on the policy. In *Mariner Energy*, Federal Insurance insured MacNett Environment Services, a tank cleaning company. Trico owned a vessel which Mariner chartered. Mariner contracted with MacNett to provide services upon the chartered vessel. One of MacNett's employees was injured while servicing a tank in the course and scope of her employment with MacNett while under contract with Mariner. The employee sued Mariner and Trico. Trico asserted a cross-claim against Mariner for indemnity. Upon motion for summary judgment, the trial court found that Mariner was required to indemnify Trico for the employee's claims.

Mariner subsequently settled the employee's case based on its contractual indemnity obligation to indemnify Trico. Mariner then made demand upon MacNett for contractual defense and indemnity coverage as an additional insured under the MacNett liability policy with Federal. Federal then sought declaratory relief regarding whether it was obligated to provide coverage for the amounts paid by Mariner to settle the employee's case.

The Court began its analysis by noting Mariner's claim for coverage derived from MacNett's contractual obligation to name Mariner as an additional insured under the Federal policy and Federal's obligation to ensure the parties named as additional insureds under any of MacNett's contracts. Notably, the Federal policy expressly provided "no party shall be deemed an Additional Assured and no waiver or release of subrogation shall extend to any extent greater than required by the agreement entered into between such party [the additional insured] and the Assured." Further, the Court noted the MacNett/Mariner Contract limited the insurance coverage which was to be afforded to Mariner. The MacNett/Mariner Contract limited Mariner's standing to claim additional insured coverage as follows: ". . . The Mariner Group will not be entitled to assert a claim against Contractor's insurance with respect to liabilities and losses assumed by Mariner or as to which Mariner has indemnified Contractor under this Contract."

Federal argued such contract language limited Mariner's additional insured standing and that coverage under the Federal policy was precluded for Mariner's indemnity obligation to Trico since that indemnity was a liability or loss "assumed by Mariner." Mariner countered that the words "under this Contract" modified the phrase "liabilities and losses assumed by Mariner." Thus, Mariner conceded the Trico indemnity was a liability or loss assumed by Mariner but argued it was not assumed under this Contract, so it was not encompassed by the MacNett/Mariner Contract additional insured limitation.

The Court determined the clause in the MacNett/Mariner Contract limiting Mariner's qualification as an additional insured excluded two categories of loss: (1) those assumed by Mariner and (2) those for which

Mariner had agreed to indemnify the Contractor under the MacNett/Mariner Contract. The indemnity owed to Trico was a loss assumed by Mariner and was therefore excluded from Mariner's coverage as an additional insured.

WHETHER ALLEGATIONS OF NEGLIGENTLY SELLING DEFECTIVE HOMES AT INFLATED PRICES TO NON-CREDITWORTHY BUYERS QUALIFIES AS AN "OCCURRENCE" RESULTING IN "PROPERTY DAMAGE"

In *Nautilus Insurance Company v. ABN-AMRO Mortgage Group, Inc.*, 2006 WL 3545034 (Dec. 08, 2006), a Texas Federal District Court recently addressed whether allegations of negligently selling purportedly defective homes at allegedly inflated prices qualified as an "occurrence" resulting in "property damage" so as to invoke CGL coverage. This coverage disputed involved two underlying lawsuits. In the first suit, ABN-AMRO, a nationwide mortgage lender, sued the insureds, the Emerson Defendants, alleging that the Emerson Defendants caused it injury by negligently selling defective homes at inflated prices. ABN-AMRO also alleged that the Emerson Defendants were guilty of negligent misrepresentation, fraud and conspiracy. Specifically, ABN-AMRO alleged that the Emerson Defendants negligently hired and supervised the mortgage broker and loan officers, appraisers, insurers, and other employees, which led to erroneous valuations of the properties and the borrowers' assets and income. ABN-AMRO also alleged that the Emerson Defendants were negligent and violated state law in completed the sales by conducting two transactions: a pre-closing which vested title in the borrower and created a lien in favor of the seller, and a refinance mortgage closing to pay off the pre-existing debt to the Emerson Defendants. This practice, ABN-AMRO alleged, was used to avoid the more stringent requirements of a purchase mortgage. Finally, ABN-AMRO alleged that several homes were poorly constructed, leading to property damage that caused the borrowers to abandon the homes. This alleged construction purportedly included negligently joined two halves of a double-wide manufactured home, allowing water to seep in, that wastewater and sewage systems were improperly installed, and improper land development. ABN-AMRO alleged that its collateral value was severely diminished because of the damage to the homes. ABN-AMRO also alleged that the facts pleaded also constituted common law and statutory fraud, conspiracy, fraudulent concealment, and fraudulent transfer.

The second lawsuit was filed in state court by 928 individual home buyers. In their petition, the home buyers alleged that the Emerson Defendants were negligent in hiring, supervising and training its employees and contractors that "mistakenly and unintentionally" resulted in misleading advertising, deficient site preparation, deficient foundation construction, deficient assembly of manufactured homes, and deficient attachment of the homes to their foundations. Alternatively, the home buyers alleged that the Emerson Defendants engaged in fraudulent real estate transactions.

After setting forth the rules of insurance policy construction and interpretation, including black letter law governing the duty to defend versus the duty to indemnify, the Court examined what constitutes an "occurrence" under the CGL policy at issue. Nautilus argued that the factual recitations in the ABN-AMRO complaint constituted only intentional actions, regarding of ABN-AMRO's use of the word "negligence." The Court, however, found Nautilus's argument without merit and distinguished the cases relied upon by Nautilus. The Court noted ABN-AMRO factually alleged that the Emerson Defendants negligently hired and supervised insurers, mortgage brokers and loan officers and well as negligently constructed and attached the manufactured homes. "These are not negligence theories super-imposed on allegations of intentional conduct. Instead, these are factual allegations that support a theory of ordinary negligence." The Court did, however, note ABN-AMRO's allegations of intentional and knowing fraud and illegal pre-closing practices failed to qualify as "occurrences" under the policy.

Next, the Court examined whether the factual allegations of "occurrence" resulted in potentially covered "property damage." The Court determined ABN-AMRO's allegations of water damage, improperly installed

waste systems, and other types of physical damage to the structures and land satisfy the policy's definition of "property damage." Notably, it was the home buyer who sustained the direct injury and "property damage," raising questions on how far courts will extend the "property damage" requirement versus how remote one may be to assert injury from the "property damage."

The Court then addressed the pure economic loss rule, noting that alleged economic damages, i.e., loss of the benefit of a bargain, do not by themselves constitute "property damage." The issued framed by the Court was whether the policy extended to economic damage when the insured is also accused of causing property damage.

ABN-AMRO argued its economic damages arose from or related to the "property damage" and should therefore be covered by the Nautilus policy. Notably, ABN-AMRO alleged the Emerson Defendants caused the property damage, which it then claimed gave rise to the economic damages. The Court examined ABN-AMRO's factual allegations: ABN-AMRO alleged that the defects caused many of the home buyers to abandon their homes, leaving ABN-AMRO to foreclose on and resell the properties. The Court determined the costs associated with ABN-AMRO's foreclosures and sales were caused by the property damage and therefore were potentially covered by the Nautilus policy. However, abandonment for reasons other than property damage would not be covered by the policy.

ABN-AMRO also alleged that its collateral value was severely diminished due to the property damage. Again, the Court determined the diminution of value of the properties attributable to the physical defects would be covered by the policy.

Next, the Court summarily addressed various policy exclusions, including the Business Risks Exclusions. Because the land upon which the homes were situated was not the Emerson Defendants' work or product, and ABN-AMRO alleged damage to the "properties," potentially including the land, the Court found a fact issue as to the application of the Business Risks Exclusions. Then, the Court noted the similarity in the home buyers' pleadings and the ABN-AMRO pleadings. The Court applied a comparable analysis to the home buyers' pleadings and factual allegations.

Finally, the Court addressed apportionment of defense costs. The Court noted because the claims against the Emerson Defendants are not all covered by the Nautilus policy, it may be proper for the Emerson Defendants to bear part of the defense costs. The Court relied upon the Fifth Circuit's adoption of the reasoning in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), which provided: An insurer contracts to pay the entire cost of defending a claim which has arisen within the policy period. The insurer has not contracted to pay defense costs for occurrences which took place outside the policy period. Where the distinction can be readily made, the insured must pay its fair share of the defense of the non-covered risk.

COURT ADDRESSES BREACH OF CONTRACT FOR INSURED'S ALLEGED FAILURE TO PROCURE COVERAGE

Last week, in *Bell Helicopter Textron Inc. v. Global Technical Services, Inc.*, 2006 WL 3627150 (Dec. 14, 2006), the Fort Worth Court of Appeals addressed whether one party to a contract breached that contract's insurance requirements when its insurer denied coverage to the additional insured. Global contracted with Bell/Textron, to provide technical labor for Bell. The contract required Global to provide CGL insurance naming Bell as an additional insured. To satisfy this contractual obligation, Global obtained CGL coverage from National Union Fire Insurance Company. The CGL policy issued by National Union clearly and unambiguously excluded personal and advertising injury coverage.

As part of its agreement to provide Bell with temporary contract labor, Global sent Wayne Fowler to work at Bell. Subsequently, Fowler sued Bell for copyright infringement, among other claims, alleging that Bell had

unlawfully copied Fowler's software in the course of advertising its helicopter and maintenance and support services.

Bell then requested defense and indemnity from National Union. National Union denied coverage to Bell, stating that Fowler's lawsuit was essentially a copyright infringement case, which was excluded under the National Union policy. Bell then sued Global for breach of contract for failure to obtain the contractually required insurance coverage. Global sought summary judgment relief claiming that: (1) Global had no duty to defend or indemnify Bell for Fowler's claims in the underlying lawsuit because Fowler's claims were advertising injury claims that were not covered by the National Union CGL policy; and (2) that the Bell/Global contract only required Global to obtain CGL insurance and to name Bell as an additional insured – it did not require or specify that Global was to obtain advertising injury coverage.

In affirming summary judgment in favor of Global, the Court noted the Bell/Global contract was unambiguous: the contract merely provided that Global would procure CGL coverage including blanket contractual liability and broad form property damage coverage with Products Liability/Completed Operations coverage. Bell's argument would have the Court ignore and hold meaningless the parenthetical that followed the contractual term which specifically delineated the coverage Bell expected – blanket contractual liability and broad form property damage with Products Liability/Completed Ops coverage. Because the Bell/Global contract omitted any "advertising injury" coverage in its delineation of coverages required, rules of construction support Global's position that advertising injury was not a contractual requirement and, thus, Global did not breach its contract with Bell.

HOUSTON COURT EVALUATES PRE-LOSS RELEASES AND CONTRACTUAL INDEMNITIES

In *RLI Insurance Company v. Union Pacific Railroad Company*, 2006 WL 3505117 (Dec. 01, 2006), one of the Federal District Court Judges from Houston recently addressed the elements of a pre-loss release and the validity of contractual indemnities. The Court found that a pre-loss provision which "shall apply, to the greatest extent allowed by Texas law, regardless of any negligence, misconduct or strict liability of any Indemnified party . . ." was broad enough ("any negligence") to encompass an intent to release the indemnitee for its own negligence. Also, "any negligence" was broad enough to include allegations of gross negligence and negligence per se.

NEWSBRIEF HOLIDAY SCHEDULE

In consideration of the Christmas and New Year's holidays, our research and writing staff will be taking time off to spend with their families. Our firm's Texas Insurance Newsbrief will resume publication January 08, 2007. From all of the lawyers and staff at Martin, Disiere, Jefferson & Wisdom L.L.P., we wish you and your families a Merry Christmas and safe and restful holiday season.