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FIFTH CIRCUIT AFFIRMS SUMMARY JUDGMENT AND ATTORNEY'S FEES AWARDED AGAINST INSURED IN DECLARATORY JUDGMENT ACTION

Last Tuesday, in *Philadelphia Indem. Ins. Co. v. SSR Hospitality, Inc.*, No. 11-50282 (5th Cir. Jan. 17, 2012) (slip opinion) (not designated for publication), the Fifth Circuit affirmed a district court's orders granting summary judgment to Philadelphia Indemnity Insurance Company ("PIIC") and awarding it more than $300,000 in fees and expenses. SSR owned a hotel in Austin, Texas. SSR Hospitality, Inc. ("SSR") purchased an insurance policy from PIIC that provided property damage coverage for the period of March 2, 2007 to March 2, 2008. In August 2007, the floor of a conference room in the hotel collapsed. PIIC determined that the property damage predated the policy's inception. Nonetheless, PIIC also stated that some expenses for repairs to the conference room floor would be covered. PIIC then wrote a letter of "partial declination" to SSR, explaining that it was partially denying SSR's claim. After receiving the denial of coverage, SSR executed a release in consideration of a payment of $13,984.39, being the cost of the floor repairs minus the deductible, which named "Philadelphia Insurance Company" – a related entity – as the released party. After receiving PIIC's payment for the floor repairs, SSR filed a claim for the additional damages arising out of the August 2007 collapse, but PIIC denied SSR's additional claims.

SSR continued to pursue its claims, so PIIC filed a diversity jurisdiction-based declaratory judgment action. PIIC moved for summary judgment, which the district court granted. PIIC then filed a Rule 54 motion for attorney's fees, claiming such fees under the Texas Declaratory Judgment Act. The district court granted PIIC's motion, awarding it $280,641.38 in attorney's fees and $26,070.53 in costs.

On appeal, SSR argued that (1) the release did not effectively name PIIC and was, therefore, invalid, (2) the release was unconscionable and, therefore, unenforceable, and (3) attorney's fees are barred by the district court's summary judgment and final order and are unreasonable. The Fifth Circuit concluded the parties intended PIIC to be the released party even though the release named "Philadelphia Insurance Company" instead of "Philadelphia Indemnity Insurance Company." The Fifth Circuit also concluded SSR failed to establish unconscionability under either a procedural or substantive theory.

With regard to the award of attorney's fees, the Fifth Circuit noted SSR did not appeal the district court's award of attorney's fees under the Fifth Circuit's holding in *Utica Lloyd's of Tex. v. Mitchell*, 138 F.3d 208, 210 (5th. Cir. 1998), which states that "a party may not rely on the [Texas Declaratory Judgment Act] to authorize attorney's fees in a diversity case because the statute is not substantive law." Instead, the Fifth Circuit, noted that the Texas Declaratory Judgment Act was procedural law, and thus not controlling in federal court, requested and received additional briefing with respect to (1) our holding in *Utica* that "a party may not rely on the Texas DJA to authorize attorney's fees in a diversity case because

the statute is not substantive law" and (2) the consequences of SSR's failure to raise this argument either in the district court or on appeal.

Having reviewed the issue, the court did not believe that plain error existed in these circumstances. The court stated that in light of the holding in *Utica*, the district court's award of attorney's fees pursuant to the Texas DJA was in all likelihood an error that was plain and affected SSR's substantial rights. Nonetheless, the court found an award of attorney's fees under the Texas DJA did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings." The court stated that "this is not a case in which attorney's fees would be unjustified" and pointed to SSR's baseless contention that the release was ineffective because of what essentially amounted to a typographical error.

FEDERAL DISTRICT COURT GRANTS SUMMARY JUDGMENT ON HOTEL OWNER'S BUSINESS INTERRUPTION CLAIM

Recently, in *H & H Hospitality LLC v. Discover Specialty Ins. Co.*, C.A. No. H–10–1886, 2011 WL 6372825 (S.D. Tex. Dec. 20, 2011), U.S. District Court Judge Werlein (from the Houston Division of the Southern District) granted summary judgment in favor of Discover Specialty on its insured's business interruption claim made following Hurricane Ike. The plaintiff/insured, H & H Hospitality LLC was, at the time Hurricane Ike struck Houston in September 2008, the named insured on a commercial property insurance policy issued by Discover Specialty covering a Super 8 Motel located in Spring, Texas. Approximately 40 hotel rooms were rendered unrentable by the storm. In spite of the damages sustained, H & H had some undamaged, rentable rooms available and kept the property open continuously after the storm. H & H claimed business interruption losses of $293,191.00, of which Discover paid only $51,971.02.

Discover moved for partial summary judgment on the business interruption claim, contending that it does not apply because the hotel never closed and therefore had no "necessary suspension of operations" to trigger coverage under the relevant policy. Discover argued that a "necessary suspension of your 'operations'" means a complete cessation or stoppage of business activities at the covered premises. H & H countered that the court should consider "the nature of the premises at issue" in determining what constitutes a "necessary suspension of operations," and that as a hotel with rooms to rent, the business interruption provision should be construed to provide coverage because some of its rooms were damaged by the storm and as to those rooms, "their use as a revenue generating good was ... 'suspended' as a result of Hurricane Ike."

The policy did not define "necessary suspension of your operations." But the court noted courts have interpreted identical or similar language to cover the risk of a complete cessation of business activities at the covered premises. In contrast, courts have construed policy provisions that state "necessary or *potential* suspension" of business operations or "necessary interruption of business, whether total or *partial"* to allow coverage for a partial cessation of business without requiring a total business shut down. The policy at issue contained no qualifying clause to cover the risk of "potential" or "partial" suspension. The court further noted that H & H presented no evidence to raise a fact issue that it was unable to meet customer demand for rooms. H & H did not claim, nor did it submit evidence to show, that it could not fulfill its customers' demand with the inventory of rooms for rent that it had available, or that it ever once had to turn customers away. Hence, the court concluded that although H & H may have sustained a business slowdown, the uncontroverted summary judgment evidence was that it did not suffer a "necessary suspension of operations" such as to trigger coverage under the business interruption clause of the Policy. Accordingly, the court granted Discover's motion for summary judgment on H & H's business interruption claim.

FEDERAL DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER & FINDS EXTRA-CONTRACTUAL CLAIMS BARRED BY LIMITATIONS

Also recently, in *Painter Family Investments, Ltd., L.L.P. v. Underwriters at Lloyds, Syndicate 4242 Subscribing to Policy Number 42-7560009948-L-00*, C.A. No. 1:10–cv–262, 2011 WL 6755839 (S.D. Tex. Dec. 23, 2011), U.S. District Judge Hanen (from the Brownsville Division of the Southern District) granted summary judgment in favor of a Lloyds insurer on extra-contractual claims asserted against it on grounds that the statutes of limitations barred all such claims. The extra-contractual claims asserted were (1) violations of Section 542 of the Texas Insurance Code, (2) breach of the duty of good faith and fair dealing, and (3) violations of the Deceptive Trade Practices Act, all of which are subject to a two-year limitations period.

The plaintiff, APC Home Health Service, Inc., claimed Hurricane Dolly damaged its properties in Harlingen, Los Fresnos, and Raymondville on July 23, 2008. On July 30, 2008, APC filed a claim on its policy. A claims examiner responded on behalf of the Lloyds syndicate by letter dated September 4, 2008, accepting some claims but denying others. The letter was received by the insured on September 16, 2008. On July 30, 2009, APC sent a letter requesting release of $4,100.64, an amount held back from the initial claim disbursement as "recoverable depreciation." It is unclear whether there was any response to this request. On November 17, 2010, APC was added was added as a named plaintiff to ongoing litigation filed by a related entity.

Lloyds asserted that APC's extra-contractual claims were time-barred because they were commenced more than two years after APC's claims were denied, which, at the latest, occurred on September 16, 2008, the date the insured received the coverage-payment position letter. APC argued, among other things, that the issues presented involve mixed questions of law and fact. According to APC, the "discovery rule" governed the accrual date for the extra-contractual claims at bar, and the application of the discovery rule involves questions of fact.

In discussing the relevant case law, the court noted that when insurance benefits are the subject of any of the extra-contractual claims at bar, the statute of limitations begins to run when the insurer denies the claim for those benefits. If a court finds that there has been an "outright denial," then, the court is presented with questions of law in resolving the accrual date. The court found the clear denial of APC's claims in the letter received on September 16, 2008 obviates application of the discovery rule because it unequivocally stated there was no coverage and provided a sufficient reason for the denial as to some of the claims submitted on behalf of APC. Thus, the court concluded the discovery rule did not apply to the accrual date of APC's claims and the statute of limitations barred all claims not brought before September 16, 2010. The court rejected APC's contention that the claims accrued on or after it made its claim for distribution of "recoverable depreciation" because it was merely a request for the release of a previously agreed-upon amount withheld from the original disbursement and it did not affect the initial denial provided to APC with facts that allowed it to pursue a judicial remedy.

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