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DALLAS COURT OF APPEALS UPHOLDS SUMMARY JUDGMENT AGAINST LANDLORD SUING AS LOSS PAYEE UNDER TENANT'S POLICY

The Dallas Court of Appeals recently affirmed a summary judgment granted against a commercial landlord holding the landlord was not entitled to sue based on property insurance policy that named the landlord only as a loss payee. In *Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co.*, No. 05-11-00143-CV, 2012 WL6559516 (Tex. App.—Dallas Dec. 13, 2012), the landlord had sued following a claim for fire damage at the subject property, asserting claims including breach of contract, violations of the Texas Deceptive Trade Practices Act and Insurance Code, negligence, and negligent misrepresentation. The trial judge granted summary judgments on all claims but one on various traditional and no-evidence grounds, and the landlord voluntarily non-suited the remaining claim.

The court of appeals affirmed the trial court's judgment in all respects. The breach of contract claim under the policy did not survive, first, because the landlord as loss payee was not a party to the policy, and second, because the landlord did not qualify as a third party beneficiary. The court of appeals acknowledged that no Texas case had explicitly evaluated whether being named as a loss payee confers third party beneficiary status. After reviewing the parties authorities and extrinsic evidence, the court determined that "the insurance policy does not clearly and fully spell out" an intention by the tenant and the insurer to confer a direct benefit on the landlord. A secondary breach-of-contract claim based on a document entitled "Evidence of Property Insurance" ("EPI") also failed because it was not a contract directly between the landlord and the insurer.

As for the extra-contractual claims, the Court first disposed of the landlord's DTPA and Insurance Code claims by determining that nothing was misleading about the policy or EPI certificate. While the documents may have been "unclear as to what rights [the l]andlord enjoyed under the policies," but clearly set forth that the landlord was a loss payee only, and not an additional insured. The negligent misrepresentation claim failed for the same reasons. Finally, the negligence claim was unsupported by any evidence of a duty on the part of the insurer. The tenant requested that the landlord be added to the policy as a loss payee, which the insurer did; there was no duty to provide coverage beyond this request.

SOUTHERN DISTRICT DISMISSES EC CLAIMS IN FIRST-PARTY ACTION ARISING OUT OF CONSTRUCTION DEFECT LAWSUIT

Judge Keith Ellison of the Southern District of Texas last month in a multi-party coverage and bad faith action granted several defendants' 12(b)(6) motions to dismiss extra-contractual claims asserted against a number of different insurers. The principal disputes in *Burlington Ins. Co. v. Ranger Specialized Glass, Inc., et al*, Civ. No. 4:12-CV-1759, are between Lyda Swinerton Builders, Inc., and insurers for several of its subcontractors on a major construction project in College Station, Texas. Swinerton Builders was sued in Texas state court by the owner of the project, and in turn sued its subcontractors as third-party defendants. Swinerton Builders also sought defense coverage as an additional insured under the subcontractors' liability policies. The coverage requests resulted in the federal court litigation, in which Swinerton and the subs' insurers disputed whether Swinerton qualified as an additional insured under the policies.

Swinerton Builders not only asserted a right to a defense, but urged bad faith claims as well. Many of the insurers filed 12(e) motions for more definite statements and 12(b)(6) motions to dismiss the bad faith allegations. Judge Ellison denied the 12(e) motions, but granted the 12(b)(6) motions. The insurers contended that there is no cause of action for bad faith in the third-party context. Swinerton Builders did not dispute this; instead, it argued that its claims were for violations of the Texas Deceptive Trade Practice Act and the Texas Prompt Payment of Claims Act.

Judge Ellison first agreed that Texas does not extend the common law bad faith tort to third-party claims. Second, Judge Ellison concluded that Swinerton Builders' third-party petition did not allege a DTPA claim. He further ruled that while the petition did not explicitly urge a prompt payment claim, it did allege facts to support a prompt payment claim. Judge Ellison therefore granted the 12(b)(6)

motions as to the extra-contractual claims alleged, but granted Swinerton Builders leave to amend to plead prompt payment violations. Swinerton Builders' contract claims remain pending.

[Editor's Note: Chris Martin and Amber Dunten of our firm assisted third-party defendant Travelers Lloyds Insurance Company with its 12(b)(6) motion in this case. We congratulate all the movants on their successful motions.]

ASSAULT BY DRIVER NOT COVERED BY UNDERINSURED MOTORIST PROVISIONS OF AUTO POLICY

The Dallas Court of Appeals recently reversed a trial court's denial of summary judgment holding that a physical assault by a passenger following an automobile collision did not fall within the underinsured motorist provisions of the assault victim's auto policy. In *Home State County Mutual Ins. Co. v. Binning*, No. 05-12-0246-CV, 2012 WL 6510165 (Tex. App.—Dallas Dec. 14, 2012), the insurance claim and lawsuit followed an incident in a parking lot where the insured was rear-ended, then attacked by the passenger of the car that rear-ended him. The passenger hit the insured on the head with a pistol when the insured was exiting his car, but fled the scene when he heard sirens. The police did not catch the attacker.

Coverage was the sole issue on appeal. The court was tasked with determining whether the injuries the insured suffered bore a causal connection with the use of the motor vehicle. The three factors to consider are (1) whether the accident arose out of the inherent nature of the automobile, (2) whether the accident arose with "the natural territorial limits of the automobile," and (3) whether the automobile did not merely contribute to cause the condition that produced the injury, but itself produced the injury." The insured contended that his injuries arose out of the use of a motor vehicle in an attempting carjacking.

The court of appeals disagreed finding that the events underlying the claim did not qualify for coverage. First, the insured's only legal authority was from outside the state of Texas. Second, even if the court considered the insured's citations holding that carjackings could support a UIM claim, there were insufficient facts to establish conclusively that the events constituted a carjacking. Finally, the automobile itself did not produce the damages alleged; it was, instead, the assault, and not the car that caused the insured's injuries. The court of appeals reversed the trial court's denial of summary judgment and remanded for further proceedings.

SAN ANTONIO APPELLATE COURT JUSTICE ENCOURAGES SUPREME COURT TO REVIEW *LYND V. RSUI INDEMNITY* OPINION

Last April, we reported an opinion from the San Antonio Court of Appeals in a Hurricane Rita case that rendered judgment of $7.5 million against an insurer of a number of apartment complexes. In *Lynd Co. v. RSUI Indem. Co.*, 2012 WL 1030343 (Tex. App.—San Antonio March 28, 2012), the court held that the insurer was required to use the same method to calculate damages to various properties caused by one "occurrence," i.e., the storm. Accordingly, the court of appeals recalculated damages based on the parties stipulations and rendered judgment in that amount.

Late last month, the court of appeals denied the insurer's motion for *en banc* reconsideration. However, one justice dissented from the denial. Justice Rebecca Simmons would have held that the policy in question was a "scheduled" policy and not a "blanket" policy, and therefore would have followed the insurer's proposed interpretation. A second justice, while voting to deny reconsideration, wrote separately to state that Justice Simmons' analysis "has substantial merit," and that the Texas Supreme Court should review the panel opinion and dissent to resolve the disagreement.

FIFTH CIRCUIT RULES INSURER HAS NO DEFENSE OBLIGATION IN MISREP SUIT OVER WEIGHT LOSS PRODUCTS

In *CSA Nutraceuticals GP, L.L.C. v. Chub Custom Ins. Co.*, No. 12-10317, 2013 WL 28399 (5th Cir., Jan. 2, 2013), the Fifth Circuit affirmed a district court's decision that an insurer did not owe a duty to defend to its insured. Chubb Custom Insurance Company ("Chubb") provided commercial general liability insurance to CSA Nutraceuticals. According to the policy, Chubb agreed to defend, and if necessary, indemnify CSA Nutraceuticals against all suits alleging "bodily injury" arising from the products manufactured, sold, or distributed by CSA Nutraceuticals. CSA Nutraceuticals was sued in an underlying action for various injuries and damages arising from the purchase and use of its diet and nutritional products, and tendered to Chubb for defense and possible indemnification under the terms of the Policy. Chubb denied coverage because the complaints filed in the underlying suit did not allege recovery for "bodily injury" under the CGL policy.

CSA Nutraceuticals sued Chubb in district court, and the parties filed cross motions for summary judgment. The district court granted Chubb's Motion for Summary Judgment and denied CSA Nutraceuticals summary judgment on the issue of the duty to defend since no bodily injury claim was pled in the underlying suit. Specifically, the district court held, and the Fifth Circuit agreed, the complaints in the underlying suit clearly and unequivocally alleged that consumers were induced to purchase ineffective weight loss products by false and fraudulent misrepresentations. However, the complaints do not allege that any consumer suffered physical harm by the

ineffective weight loss products. Both courts observed that "failing to achieve weight reduction means the body basically did not change. It does not mean the body was injured." As such, the Fifth Circuit affirmed the district court's decision that the underlying case alleged financial harm, not physical injury. As such, Chubb did not owe a defense to CSA Nutraceuticals because no bodily injury claim was plead in the underlying suit to trigger coverage.

RESIDENT'S VIOLATION OF CONDO BYLAWS NOT AN OCCURANCE UNDER CONDO ASSOCIATIONS LIABILITY POLICY

The Dallas Court of Appeals recently affirmed an insurer's motion for summary judgment holding that it did not owe a duty to defend a condominium resident from the counterclaims brought forth by its condominium resident association in *Denise and Greg Brown v. American Western Home Insurance Company*, No. 05-11-00561-CV, (Tex.App.—Dallas, Jan. 4, 2013). The Browns owned a condominium in Dallas, Texas. Like many other condominium unit owners, the Browns were members of the "Forty-Four Hundred Condominium Residents' Association" and subject to its bylaws. The "Forty-Four Hundred" refers to the block numbers of the condominium units. Under the Association's bylaws, its elected board of directors was responsible for maintaining common areas, approving budgets, and collecting authorized dues. American Western Home Insurance Company issued a commercial property insurance policy to the "4400 Residents Association c/o Knobler Property Management." The named insured was the "4400 Residents Association."

The Browns sued the Association for their failure to maintain the portions common areas of the condominium complex thereby causing damage to the Browns. The Association filed a counterclaim against the Browns for their alleged violations of the Association's declarations, bylaws, and regulations. Specifically, the Browns allegedly violated restrictive covenants regarding poor upkeep and deterioration of the Browns' condominium unit.

The Browns subsequently joined American Western alleging causes of action against it for negligence and negligent misrepresentation, violations of the Texas Insurance Code, and Texas Deceptive Trade Practices Act, and breach of contract. The Browns' actions were premised on the Association's purchase of American Western policy of insurance coverage. American Western filed a traditional motion for summary judgment arguing that the Browns were not named insureds under the policy, and the Association's counterclaim does not qualify as an "occurrence" under the policy. The trial court agreed with American Western, and the Browns subsequently filed an appeal.

Applying the Texas eight corners test, the Court determined that American Western had no duty to defend the Browns against the Association's counterclaim because it did not qualify as an occurrence. The Court noted, the counterclaim was premised on the Browns' intentional violation of the Association's bylaws, and the insurance policy only applied to property damage caused by an "occurrence." Under the terms of the policy, an "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Court concluded the policy excludes intentional acts, and the Browns' deliberate breach of the Association's bylaws was not a covered occurrence under the terms of the policy.