Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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NO EVIDENCE TO SUPPORT DRIVER'S REASONABLE BELIEF TO USE VEHICLE - SUMMARY JUDGMENT FOR INSURER AFFIRMED

Last Wednesday, the Dallas Court of Appeals reviewed a summary judgment in favor of an insurer based on the "reasonable-belief-of-entitlement-exclusion" and found no evidence to support that the driver had a reasonable belief that he had permission to drive the insured vehicle at the time of a single car accident. In Sederberg v. IDS Property Casualty Ins. Co., 2013 WL 1646398 (Tex.App.-Dallas, April 17, 2013), the insured's daughter, using the insured vehicle, attended a party with a male co-worker. On the way home, with the co-worker driving, the vehicle left the roadway, rolled and ejected the daughter who died as a result of the accident. The mother brought suit to recover against the driver under her own insurance policy covering the vehicle. The insurer moved for summary judgment based in part on the argument that the driver did not have permission to drive the vehicle and was therefore not a "covered person." Summary judgment was granted in the insurer's favor and this appeal followed.

On appeal, the court reviewed whether the insurer had met its burden of proof under a traditional motion for summary judgment to establish that the "reasonable-belief-of-entitlement-exclusion" applied. The court found that they did so by first proving that the exclusion existed. The court also found the insurer also proved that the mother did not know the driver, had never met him, did not give him permission to drive the car and did not know that he was driving at the time of the accident. With the burden then shifted to the insured to offer controverting evidence, she was unable to do. And based in part on testimony from the insured that she had told her daughter after a similar incident that the daughter needed to get her permission before she let anyone else drive the car, summary judgment in favor of the insurer was upheld.

FEDERAL DISTRICT COURT FOR NORTHERN DISTRICT OF TEXAS DECLINES JURISDICTION OVER AN INSURER'S DECLARATORY JUDGMENT ACTION REGARDING ITS DUTY TO INDEMNIFY

A Federal District Court Judge in the Northern District of Texas, Dallas Division, recently exercised discretion to decline jurisdiction over an insurer's declaratory judgment action seeking a declaration that it had no duty to indemnify. First Mercury Ins. Co. v. Horizon Roofing, Inc., 2013 WL 1481988, Civil Action No. 3:12–cv–03393–O (N.D. Tex. – Dallas, Apr. 9, 2013).

The declaratory judgment action filed by First Mercury Insurance Company involved an insurance coverage dispute arising out of an underlying lawsuit in Texas state court by a property owner alleging negligence and breach of contract against Horizon Roofing, Inc. First Mercury insured Horizon and agreed to defend Horizon in the underlying lawsuit subject to a full and complete reservation of its rights.

In August 2012, before the Texas state court reached a determination of Horizon's liability in the underling action, First Mercury filed a declaratory judgment action seeking a declaration that it had no duty to indemnify Horizon. In response, Horizon filed a motion to dismiss, arguing the declaratory judgment action was not ripe for resolution because such resolution was dependent on factual findings and factual development in the underlying suit.

The Court agreed with Horizon that the matter was not ripe for determination stating the case would not be ripe until after the Texas state court's determination of liability in the underlying suit. The Court also considered whether "limited circumstances" existed which would make the question of First Mercury's duty to indemnify justiciable before the Horizon's liability was determined and found none. (Under the Griffin exception, "[T]he duty to indemnify is justiciable before the insured's liability is determined in the liability lawsuit when the insurer has no duty to defend and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify." Farmers Tex. Cnty. Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 84 (Tex 1997)).

The Court also pointed out that there had been no briefing or arguments by the parties as to whether First Mercury had a duty to defend and, further, First Mercury had agreed to defend Horizon in the underlying lawsuit under a reservation of rights. Accordingly, the Court found that the case was not ripe and exercised its discretion not to make a declaration as to the duty to indemnify. The Court then granted Horizon's Motion to Dismiss for Lack of Subject Matter Jurisdiction and dismissed the action without prejudice.

SOUTHERN DISTRICT OF TEXAS DISTRICT COURT HOLDS "CONSTRUCTION OF RESIDENTIAL PROPERTY EXCLUSION WITH EXCEPTION FOR APARTMENTS" POLICY PROVISION RELIEVED INSURER FROM DUTY TO DEFEND

On March 21, 2013, Judge Keith Ellison of the Southern District of Texas, Houston Division, determined that the "Construction of Residential Property Exclusion with Exception for Apartments" provisioncontained in a commercial general liability policy relinquished the insurer's duty to defend its insured in a construction defect lawsuit. American Empire Surplus Lines Ins. Co. v. Nat. Fire Ins. Co. of Hartford, 2013 WL 1194866, Civil Action No. H–12–2313 (S.D. Tex. – Houston, Mar. 21, 2013).

The salient facts are as follows: Plaintiff American Empire Surplus Lines Insurance Corporation and First Specialty Insurance Corporation issued insurance policies to ARCI, Ltd. for different policy periods. First Specialty issued a General Liability Policy to ARCI with a policy period from 2003 to 2004, during which time ARCI performed roofing, sheet metal, and chimney flashing work in the construction of an apartment complex in Florida. In 2006, the apartments were converted to condominiums. ARCI was later sued in a Florida state court for its work in the apartment complex construction. First Specialty argued that its obligation to defend ARCI in the Florida state action was precluded by the relevant policy endorsement entitled "Construction of Residential Property Exclusion with Exception for Apartments."

The pertinent language of First Specialty's endorsement provided that no duty to defend was provided for any claim, including but not limited to, claims for "bodily injury," "property damage," "personal and advertising injury" arising out of the construction of residential properties, except apartments, but including and not limited to condominiums. The provision went to state that if any apartment was converted to a condominium, then coverage under the policy would be excluded for any claims for "bodily injury," "property damage," "personal and advertising injury," arising out of the construction of the apartments which occurred after the conversion of the apartment into a condominium.

Plaintiff American Empire filed suit in the Southern District of Texas seeking a declaration that First Specialty was also obligated to defend ARCI in the construction defect lawsuit in Florida. American Empire argued that First Specialty's policy excluded only injuries and damages that occurred after the conversion of the apartments into condominiums and, because the alleged construction defects (property damage) occurred before conversion, First Specialty's policy did not exclude coverage for the alleged apartment complex defects. In response, First Specialty argued that the provision excluded coverage for all claims made after the conversion of the apartments to condominiums and, since the claims for construction defects were made after the conversion to condominiums, the claims asserted against ARCI in the Florida suit were outside First Specialty's coverage.

As a matter of first impression (the parties agreed that the particular language at issue had never before been construed by a court in Texas or any other jurisdiction), Judge Ellison found that although "the draftsmanship was less than perfect" the logical interpretation of the policy language was that all claims made after the conversion of the apartments to condominiums were excluded from coverage. Therefore, the Court held First Specialty did not have a duty to defend ARCI in the Florida state action and dismissed the case with prejudice.