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LEGAL LIABILITY COVERAGE FOR GOODS IN TRANSPORT IS FIRST-PARTY COVERAGE SUBJECT TO ANTI-TECHNICALITY STATUTE AND PROMPT PAYMENT OF CLAIMS ACT

Last Monday, the Fifth Circuit Court of Appeals analyzed a trucking company's insurance policy providing legal liability coverage for loss or damage to goods in transit and determined that the coverage was first-party coverage subject to Texas Anti-Technicality Statute and Texas Insurance Code Chapter 542 (the Prompt Payment of Claims Act). In *W.W. Rowland Trucking Co., Inc. v. Max America Insurance Co.,* 2014 WL685217 (5th Cir. (Tex.), February 24, 2014), the trucking company transported a load of video game consoles valued at $354,000 to a terminal in Dallas. Thieves then stole the tractor/trailer loaded with the consoles from the terminal. The trucking company submitted the claim to its insurer which provided $300,000 in legal liability coverage, including coverage for direct physical loss to property of others while in transit. The policy also required that the terminals be 100% fenced, gated and locked or the coverage would be null and void.

The insurer investigated the claim and found that the thieves entered the terminal and left with the property by cutting a hole in the fencing along the eastern perimeter of the terminal. But, the insurer's investigation also found there were gaps in the fence along two perimeters which violated the Policy's 100% fencing requirement. As a result, the insurer denied the claim. The trucking company then sued its insurer for breach of contract and insurance code violations. On cross-motions for summary judgment, the district court applied Texas' Anti-Technicality Statute, Tex. Ins. Code Ann. § 862.054, which requires a causal link between the policy breach and the loss in order for the insurer to deny coverage, and the trial court found that there was no link between the breach and the theft loss therefore the loss was covered and the insurer breached the contract in failing to pay the claim. The trial court also awarded 18% interest and attorney fees to the insured under Texas Insurance Code Chapter 542. This appeal followed.

On appeal, the Fifth Circuit examined whether the claim was a first-party property claim subject to the Anti-Technicality Statute or, a third-party liability claim to which the statute would not apply. The court analyzed Texas law finding that the policy language will determine whether a policy is a property policy, a liability policy or both. And, after noting the distinction between the two, the court observed that policies providing coverage for theft of property in the insured's custody or control recognize the insured's insurable interest in that property and have previously been held to be "property policies" under Texas law.   In this case, the policy provided coverage for "loss of property of others...while in due course of 'transit' including loading and unloading." As a bailee, the trucking company had an insurable interest and the policy provided first-party property coverage to which the Anti-Technicality Statute applied. And, because the breach was not proven to be material to the loss, coverage was not void due to unrelated openings in the fence.

The court then turned its attention to Texas Insurance Code Chapter 542, The Prompt Payment of Claims Act, which applies to first-party insurance claims. Based on its finding that the claim was a first-party property claim, the court concluded that Chapter 542 applied and the award of 18% interest and attorney fees to the insured was proper. The court also addressed arguments over the accrual date for the penalty. The insurer argued that the April 11, 2011, accrual date applied by the district court was improper because the insured did not provide proof of the cargo's value until March 15, 2013. But the court found that the insurer's own initial report showed that the loss exceeded the $300,000 policy limit and having not paid the claim within 60 days, the accrual date applied by the district court was proper and summary judge in favor of the insured including penalties, interest and attorney fees under Chapter 542 was affirmed.

MDJW First Friday Webinar - E-Discovery and Electronically Stored Information in Claims Litigation

Vicki Kurhajec and Damon Goodner - presenters

Our next First Friday will be held on March 7, 2014 at noon **Central** Time.

Vicki Kurhajec and Damon Goodner, paralegals in the Austin office, will present E-Discovery and Electronically Stored Information in Claims Litigation. In today's litigation practice, electronic discovery affects all of us. For adjusters, it impacts how they evaluate claims and set reserves for litigation expenses. For attorneys, it impacts case strategy, how discovery is obtained and processed, the creation of litigation budgets and the attorney/client relationship.

Ms. Kurhajec earned her Bachelors of Business Administration from Texas State University. She became a licensed property and casualty insurance adjuster in 1992 working as a claims litigation adjuster for Farmers Insurance handling personal and commercial lines claims. During her eleven year tenure with Farmers, she also served on the American Arbitration Association panel for three years and participated in numerous in-house insurance seminars giving presentations on first party claims handling and coverage issues. Ms. Kurhajec joined Martin, Disiere, Jefferson and Wisdom as a litigation paralegal in 2011. Ms. Kurhajec has continued to maintain an active insurance license.

Mr. Goodner studied Telecommunications Engineering at DeVry and holds a Paralegal Certificate from the University of Texas at San Antonio. He worked as a Paralegal Case Assistant at the United States Attorney's Office in Dallas and a litigation paralegal in Dallas before joining Martin, Disiere, Jefferson and Wisdom's Austin office in 2011.

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