Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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GALVESTON FEDERAL COURT RULES CONTRACTUAL "ADDITIONAL INSURED" PROVISION REQUIRES PRIMARY COVERAGE

Recently in *Pac-Van, Inc. v. CHS, Inc*., 3:12–CV–341, 2014 WL 1322761 (S.D. Tex. Mar. 31, 2014), Federal District Court Judge Gregg Costa from Galveston granted summary judgment for the carrier finding a contractual requirement to provide "Commercial General Liability Insurance" requires a primary policy.

Plaintiff Pac–Van, a company that leases and sells portable buildings for nonresidential use, leased a work trailer to Defendant CHS. The leased Pac–Van trailer was being used as a temporary office building at CHS's Galveston location when one of CHS's employees fell through a soft spot on the floor of the trailer and injured himself. The employee sued Pac–Van for his injuries. Pac–Van and its insurance carrier gave CHS notice of the lawsuit and demanded that CHS defend Pac–Van pursuant to the parties' Master Services Agreement. CHS and its insurance carrier refused.

The relevant provision of the Agreement provided:

INSURANCE: [CHS], at its own expense, shall insure for risks of loss or damage. [CHS] must carry commercial general liability insurance insuring both [Pac–Van] and [CHS] against loss. The general liability insurance amounts must not be less than $1,000,000 bodily injury per person, $1,000,000 bodily injury per occurrence, $1,000,000 property damage per occurrence, and [Pac–Van] must be named as an additional insured.

The insurance policy that CHS purchased named Pac–Van as an additional insured and had a per-occurrence limit of $1 million. But, it was an "excess" policy requiring Pac–Van to exhaust the first $2 million relating to any occurrence. The additional insured provision stated that "insurance provided to the Additional Insured is excess over the 'self-insured amount.'" The Court clearly and concisely framed the question as follows: when a company agrees to purchase "commercial general liability insurance" that lists another entity as an additional insured, must the insurance provide primary coverage? CHS maintained that because the contractual provision did not specify "primary" insurance the excess policy was sufficient to satisfy the additional insured requirement.

CHS attempted to rely on three Texas cases from the First Court of Appeals in Houston. The Court distinguished each of those cases and based its decision, instead, on basic contract interpretation principles. The Court found that the ordinary meaning of "general commercial liability policy" refers to a policy that provides primary coverage and that any other reading would render the obligation illusory.

In conclusion, the Court found that CHS was obligated to purchase a primary commercial general liability policy that provided insurance up the first million dollars of liability. By failing to do so, CHS breached its contractual obligations to Pac–Van. Thus finding when a company agrees to purchase "commercial general liability insurance" that lists another entity as an additional insured, the insurance must provide primary coverage.

NORTHERN DISTRICT RESOLVES CONFLICT-OF-LAW QUESTIONS AND DENIES DEFENDANT'S MSJ REGARDING RIGHT TO CONTROL DEFENSE

In *Centex Homes v. Lexington Ins. Co*, 3:13–cv–719–BN, 2014 WL 1225501 (N.D. Tex. Mar. 25, 2014), Magistrate Judge David Horan denied an insurer's motion for partial summary judgment regarding the right to control defense and select counsel.

The Plaintiff in this lawsuit was in the business of designing, developing, and constructing condominiums and other housing complexes throughout the country. Plaintiff purchased "wrap" insurance policies which cover Plaintiff as a general contractor and all subcontractors performing work in connection with the insured project. Two of the policies were at issue in Defendant's Motion for Partial Summary Judgment regarding construction projects in San Diego and Sacramento, California.

The parties disagreed with respect to the following: Plaintiff's exhaustion of the retention amounts under the Policies; the timing of Defendant's agreement to provide a defense; Defendant's reservation of rights explanation; Defendant's payment of defense costs; and the time when Defendant provided notification that Plaintiff's selected counsel was not acceptable. Defendant claimed Plaintiff did not provide the proof of its payment and satisfaction of the applicable Retained Amounts the "Underlying Litigation" as required under the Policies. Defendant took the position that, in the face of Defendant's stance on legal counsel, Plaintiff refused to switch counsel in violation of Plaintiff's obligations under the Policies. Plaintiff maintained that Defendant failed to make all payments required under the Policies and improperly refused to let Plaintiff select its defense counsel.

The insurer moved for partial summary judgment on one of its counterclaims, which sought declaratory judgment on the following three issues: (a) Defendant has the right to control the defense; (b) Plaintiff is not entitled to the appointment of independent counsel under California Civil Code § 2860; and (c) Plaintiff breached its duty to cooperate under the Polices by refusing to acknowledge that Defendant had a right to control the defense and select counsel and by insisting that Defendant continue to pay fees and costs to Plaintiff's selected counsel.

The Court first dealt with whether Texas and California law are consistent with respect to what constitutes a breach of a duty to defend and whether a breach of a duty to defend forfeits the insured's right to control the defense. The Court found that Texas and California law is consistent on this issue and applied Texas law. The Court also found that California and Texas law is "essentially the same" on the issue of what constitutes a conflict of interest, in the duty to defend context, and applied Texas law.

The Court first held the parties presented conflicting evidence regarding when evidence Plaintiff had actually exhausted its retained amounts on the Policies was provided to the insurer and conflicting evidence regarding whether any delays in accepting the defense on the part of the insurer were reasonable and justified. Because of this conflicting evidence, it could not grant summary judgment as to the insurer's right to control the defense. The Court then found that, because Texas law applied, the Court could not grant the California Civil Code § 2860 declaratory judgment claim as requested because California law did not apply to the selection of independent counsel. The Court further found that, even under Texas law, the reservation of rights and the underlying facts did not establish an absence of a conflict of interest as a matter of law. Applying the Texas standards, the Court found the insurer would have to provide "evidence that proves, as a matter of law, it would not be in its interest to take positions in the Underlying Litigation that might support its position regarding coverage." Finally, the Court ruled because it could not grant summary judgment on the previous two issues, it could not hold Plaintiff breached its duty to cooperate by refusing to acknowledge that Defendant had a right to control the defense and insisting that Defendant continue to pay Plaintiff's selected counsel.

HOUSTON FEDERAL COURT EXAMINES WHEN A FOREIGN INSURER CAN BE SUED IN TEXAS

On March 31st, Federal District Court Judge Lee Rosenthal from Houston issued a lengthy pair of opinions dismissing claims brought by a foreign company against a foreign insurance carrier, a related domestic entity, and individual defendants. In *Air Tropiques, SPRL v. Northern & Western Ins. Co. Ltd*., et. al., cause No. 4:13-cv-0148 (S.D. Tex. March 31, 2014), the court granted motions to dismiss under Fed. R. Civ. P. 12(b)(2), 12(b)(6) and 9(b).

This case was a first party coverage dispute which included allegations of fraud, conversion, violations of the Texas Insurance Code, the Texas Prompt Payment Statute, and breaches of the duties of good faith and fair dealing. Plaintiff Air Tropiques provides airplane charter services and is organized under the laws of the Democratic Republic of Congo. Plaintiff sued Northern & Western Ins. Co., an insurance company organized under the laws of the Federation of St. Kitts & Nevis. Air Tropiques also sued Supra Management Solutions, Inc. (formerly known as NWIC Management Corp, a Texas entity (and related to NWIC). Finally, Air Tropiques also sued the President of NWIC and the Senior Vice President of NWIC Management, individually.

Air Tropiques owned a 1972 Beechcraft King Air 100 aircraft which was insured by NWIC for a time. The insurance policy was brokered overseas through a foreign broker and agent. On December 4, 2011, the aircraft crashed while attempting a landing at Point Noire Air Port in the Republic of Congo. After reporting the accident, the parties disputed choice of law and the aircraft's value. While Air Tropiques initially demanded arbitration, it ultimately sued all the parties in Texas.

Plaintiff asserted the court had jurisdiction over Defendants because underwriting and claims handling activity occurred through NWIC Management and/or NWIC's administrative office in Texas. Defendants moved to dismiss claims against all Defendants. After extensive briefing, the court issued opinions *granting* motions to dismiss under Fed. R. Civ. P. 12(b)(2), (6) and 9(b).

While the court noted NWIC conducted some activity in Texas, it did not insure any property in Texas and NWIC directed all communications, including underwriting communications outside the state regarding insured property in Africa. After acknowledging a nonresident entity could structure its conduct so as to avoid being brought into court in a particular state, the court analyzed and applied the recent Supreme Court of the United States opinion in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (U.S. 2011).

The court held that in order to establish personal jurisdiction over a foreign corporation, that corporation's contacts with the forum must be continuous and systematic such that the company is "...essentially at home in the forum state" The court held it is the parent corporation's home, and not its subsidiary's corporate home, which must be considered in this analysis. Likewise, activity and communication emanating from, but directed outside Texas, did not create any foreseeable Texas consequences sufficient to create personal jurisdiction. The court dismissed NWIC based on Fed. R. Civ. P. 12(b)(2).

As to other defendants, the court dismissed fraud allegations under Fed. R. Civ. P. 9(b). The court also dismissed claims related to agency and alter ego theories of recovery, including claims for breach of contract and conversion. The court dismissed all claims against NWIC Management and the individual defendants under Fed. R. Civ. P. 12(b)(6) for failing to state claims.

The court granted Plaintiff leave to amend by April 25, 2014, however, in a further significant ruling, the court held that English law applied to the dispute. In light of this, the court dismissed the Texas-based claims under the DTPA and insurance code. Finally, the court charged the Plaintiff with re-pleading to "… make clear the effect of the parties' agreement that English law applies and what claims are asserted under English law."

[**Editor's Note**: Martin, Disiere, Jefferson & Wisdom's attorneys Chris Martin, Barrie Beer and Greg Finney represented all Defendants in this action and wish to congratulate our clients on this significant ruling and thank them for the opportunity to represent them in this matter.]

View Document(s):

Memorandum and Opinion - Documents 026 & 027