Martin, Disiere, Jefferson & Wisdom

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WESTERN DISTRICT GRANTS RULE 12(B)(6) MOTION TO DISMISS IN FAVOR OF INSURER IN WIND/HAIL CLAIM FOR BREACH OF CONTRACT AND BAD FAITH

Last week, in *Burton v. Companion Property and Casualty Insurance Company*, Civil Action No. W-14-CV-054 (W.D. Tex. July 29, 2014), Federal District Court Judge Walter S. Smith, Jr. in the Waco division of the Western District of Texas dismissed all of the Insured's contractual and extra-contractual causes of action against Companion.

The Insured filed a homeowner's insurance claim with Companion for damages resulting from a wind and hailstorm that occurred on or around May 9, 2013. The Insured filed his lawsuit against Companion in state court asserting both contractual and extra-contractual claims. Companion promptly removed the case to Federal District Court on the basis of diversity jurisdiction. After removal, the Insured amended his complaint twice. In addition to his "laundry list" of insurance code allegations, the Insured also generally alleged that Companion "failed to properly adjust Plaintiff's claim" and "relied on biased adjusters and engineers."

After the Insured filed his Second Amended Complaint, Companion filed a Rule 12(b)(6) Motion to Dismiss on the basis that, even after two opportunities to amend his pleadings, Plaintiff's Second Amended Complaint still failed to properly plead a Breach of Contract claim under Federal Rule 8 and certainly failed to properly plead any extra-contractual causes of action under Rule 8 or the heightened pleading requirements of Rule 9(b).In his response, the Insured asserted that he had included sufficient facts to support his claims and that none of his claims were subject to the heightened pleading requirements of Rule 9(b).

The Court held that Plaintiff's Second Amended Complaint failed to state a claim for breach of contract. After stating the elements for a breached contract claim under Texas law, the Court found that the Insured failed to allege what provision of the contract was breached. Further, the Court found that the Insured failed to show how the amount offered by Companion was a breach of the contract or what he should have received under the Policy. In summary, the Court found that Plaintiff's breach of contract claim failed as a matter of law because his "allegations are conclusory, and lack sufficient factual support."

As to the Insured's extra-contractual claims, the Court found that the claims under the common law duty of good faith and fair dealing, the Texas Insurance Code and Deceptive Trade Practices Act also failed to state a claim under both Rule 8 and Rule 9(b). The Court unequivocally found that, despite Plaintiff's argument to the contrary, the heightened pleading requirements of Rule 9(b) applied to Plaintiff's extra-contractual claims. The Insured generally made allegations of misrepresentations but failed to specify who made them, when and where they were made or why such statements were misrepresentations. In sum, the Court found that the mere recitation of the elements of a cause of action is not enough to state a claim in federal court. As such, all of the extra-contractual claims were dismissed as well.

Although the Insured had already had the opportunity to replead, the Court dismissed all claims without prejudice and gave the Plaintiff "one last opportunity" to replead.

[Editor's Note: Companion was represented in this case by Mark Dyer, Kevin Sewell and Ryan Geddie of our firm and we are grateful for the opportunity to defend Companion in this case].

CORPUS CHRISTI COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT FOR INSURER FOR CRUDE OIL SPILL CLAIM UNDER "TRUCKER'S COVERAGE"

In *Superior Crude Gathering, Inc. v. Zurich American Insurance Company* No. 13-13-00235-CV, the Corpus Christ Court of Appeals affirmed summary judgment for Zurich that its Trucker's Coverage did not cover a crude oil leak from an aboveground storage tank.

On February 9, 2010, Superior Crude trucks unloaded oil into Tank 13 at its Ingleside, Texas terminal. Superior Crude reported crude oil leaking from that aboveground storage tank (the Event, oil spill, or oil release) that day. Superior Crude notified Zurich of the oil release and requested insurance coverage. Under the Policy, Zurich provided Superior Crude with the both Commercial General Liability (CGL) Coverage and (2) Truckers Coverage. Zurich denied Superior Crude's claim for coverage under both forms of insurance. Superior did not challenge the denial of the CGL coverage; but did challenge Zurich's denial under the Truckers Coverage.

In the trial court, Zurich moved for traditional motion for summary judgment and argued that Superior Crude was not entitled to coverage because the oil release did not result from the "ownership, maintenance or use" of a covered auto under the insuring agreement and that, in this case, there was "no nexus to a covered vehicle at all." In response to Zurich's position that the insuring agreement provision applied, Superior Crude asserted that "loading and unloading" were incorporated into the definition of "use" for purposes of coverage under the Policy. After considering both motions for summary judgment and reviewing the pleadings and papers on file, the trial court granted Zurich's summary judgment motion and denied Superior Crude's motion. The trial court further declared that "the Zurich Policy at issue does not provide coverage for claims related to the crude oil release that occurred on or about February 9, 2010." Superior Crude appealed from the trial court's final judgment.

The following issue was presented to the appellate court by Superior Crude:

In light of the fact that the Event arose out of or resulted from—and during—the *unloading* of oil from Superior's insured oil tanker trucks, did the trial court err in ruling that the Zurich Policy did not provide coverage for claims related to the Event; notwithstanding the existence of a 'Pollution Liability-Broadened Coverage for Covered Autos—Business Auto,

The Court first determined that it was the Truckers Coverage insuring agreement that controls the determination of coverage. The insuring agreement provided that Zurich would pay "all sums an 'insured' legally must pay as a 'covered pollution cost or expense' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of covered 'autos.'" Specific to this provision Superior Crude set out that "the question is simply whether or not the leak *arose out of* or *resulted from the unloading* of the oil into Tank 13. This question addressed the "use" of covered tankers.

The Court found that the Texas Supreme Court has consistently held that the "use" language found in an insuring agreement requires a causal relation between the covered auto and the injury or damage. The Court further found that the summary judgment evidence established that the cause of the oil release was subsidence in the soil below Tank 13 that led to a crack in the tank floor. After examining the causal-relationship factors under Mid-*Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153, 156–64 (Tex. 1999), the Court concluded there was no causal connection between the tanker trucks and the oil spill. Because of this, the injury was not covered under the Policy's Truckers Coverage insuring agreement. Summary Judgment for Zurich was affirmed.