

TEXAS INSURANCE LAW NEWSBRIEF

MAR 27, 2018

FEDERAL COURT APPLIES TEXAS LAW TO "PROPERTY DAMAGE" COVERAGE QUESTION

Last week, federal district judge Sam R. Cummings in Abilene adopted the recommendation of a magistrate granting summary judgment finding that Colony Insurance Company had no duty to defend or indemnify Rentech Boiler Systems, Inc. in relation to claims asserted against Rentech. In *Colony Ins. Co. v. Rentech Boiler Sys., Inc.*, No. 1:16-CV-159-C, 2018 WL 1418185, (N.D. Tex. Mar. 21, 2018), the insurer filed a declaratory judgment action asking the court to find that it had no duty to defend or indemnify Rentech for claims pending in North Carolina. Suit had been filed against Rentech asserting breach of contract, fraud in the inducement, negligent misrepresentation, violation of the North Carolina DTPA, and breach of an express warranty. Rentech had constructed a "heat recovery steam generator" in its Abilene facility and delivered it to North Carolina. Rentech had contracted with Colony for two consecutive general liability policies and two consecutive errors and omissions policies. Colony believed the terms of the policies and applicable law rendered Rentech exempt from coverage under the policies, and filed a declaratory judgment action.

The court first analyzed the claims under the CGL policy. Colony pointed to the definition of Property damage as "physical injury to tangible property, including all resulting loss of use of that property ...; or loss of use of tangible property that is not physically injured." Rentech argued the North Carolina suit is covered by this policy, asserting that some portions of the complaint meet the definition of "property damage" under the policy. But the court found that Rentech conceded that this damage is excluded from coverage because it is part of Rentech's "product." Rentech also argued that the loss of use allegations in the underlying complaint implicates liability coverage under the policy. Colony pointed to Exclusion (m) and the definition of "impaired property" as tangible property, other than your product or your work that cannot be used or is less useful because it incorporates your product or your work that is known or thought to be defective, deficient, ... or dangerous, or you have failed to fulfill the terms of a contract ..., if such property can be restored to use by the repair, replacement, adjustment or removal of your product or your work or [you] fulfilling the terms of the contract or agreement.

The court relied on *U.S. Metals, Inc. v. Liberty Mutual Grp., Inc.*, 490 S.W.3d 20 (Tex. 2015), in finding that the GCL policy by its terms excluded Rentech from coverage of its product directly and the property of others that is impaired by the product. The court then turned to the potential coverage under the E&O policies. Rentech argued that the professional services of design, manufacture, and installation of the generator were covered by the E&O policy. Colony pointed to endorsement exclusions, stipulating that the E&O policy does not cover repair, replacement, or withdrawal of the generator, or any failures or delays to perform professional services. The court found those terms "clearly preclude coverage for damages related to and stemming from its generator."

The district court accepted the Report and Recommendation of the United States Magistrate Judge granting Colony's Motion for Summary. The court further issued a separate judgment declaring Colony owed no duty to defend Rentech against the claims in the underlying litigation or to indemnify them for any judgment or settlement entered in connection with the underlying lawsuit.