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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JUL 16, 2018

HOUSTON FEDERAL COURT APPLIES EIGHT-CORNERS RULE STRICTLY TO REJECT EXTRINSIC EVIDENCE AND FIND DUTY TO DEFEND IN CONSTRUCTION DEFECT CASE

A Federal District Court Judge in Houston recently examined the duty to defend under the eight-corners rule and refused to allow any exception for the consideration of extrinsic evidence under a professional liability policy. In *Everest Nat'l Ins. Co. v. Gessner Engineering*, CV H-17-2981, 2018 WL 3361458 (S.D. Tex. July 10, 2018), the court gave a demonstration of just how broad the duty to defend can be when no extrinsic evidence whatsoever is considered.

The underlying suit involved alleged construction defects at a church. Gessner had provided engineering services for a construction project that began in 2013. The church first noticed water infiltration issues in 2014, and first filed suit against Gessner, among others, in February 2015. The church dropped the first suit, but sued again in April 2016.

Everest first began insuring Gessner in August 2015, after the first suit was filed, but before the second suit was filed. Everest's policy only covered "wrongful acts arising out of professional services" if no insured had knowledge of such wrongful act and had no basis to reasonably anticipate that a claim would be made prior to the inception of the policy. Everest sought a declaratory judgment that it owed no duty to defend Gessner, arguing the court should consider the previously filed and dismissed suit against Gessner prior to Everest's policy period, which clearly showed Gessner knew about the loss and the claim before the inception of Everest's policy.

The district court applied a strict reading of the eight-corners rule, citing *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305 (Tex. 2006) for the proposition that the Supreme Court of Texas has never ***actually allowed*** any such exception, but only provided guidelines for a hypothetical exception: when (a) it is impossible to discern whether coverage is potentially implicated, and (b) the proffered evidence goes only to a fundamental issue of coverage and does not overlap the merits of the underlying suit.

The court observed that the new lawsuit did not mention the original lawsuit or in any way allude to Gessner's knowledge of the damage at any time prior to the inception of Everest's policy. The court refused to consider any extrinsic evidence regarding when Gessner first knew about the loss, even though that question did not overlap with the merits of the suit. The court held it was not "initially impossible to discern whether coverage is potentially implicated" because the new petition's silence about the history of the claim had to be interpreted as potentially implicating coverage. Thus the court granted summary judgment in favor of Gessner, holding Everest had a duty to defend the suit as a matter of law.

Editor's Note: Carriers such as Everest might be forgiven for thinking this fact pattern would result in a finding of no duty to defend. The court's holding, though issued as a brief memorandum opinion, may represent a change in direction from the last ten years of practice in the federal courts of Texas. In the wake of *Fielder Road*, some federal courts set a trend of reading the eight-corners rule and the hypothetical exception mentioned by *Fielder Road* liberally, and allowed extrinsic evidence in a number of circumstances. *See, e.g., Star-Tex Res., L.L.C. v. Granite State Ins. Co.*, 553 Fed. Appx. 366 (5th Cir. 2014); *Ooida Risk Retention Group, Inc. v. Williams*, 579 F.3d 469 (5th Cir. 2009); *Hallmark County Mut. Ins. Co. v. Ace Am. Ins. Co.*, 283 F. Supp. 3d 559 (W.D. Tex. 2017); *Sentry Select Ins. Co. v. Drought Transp., LLC*, 15-CV-890, 2016 WL 6236375 (W.D. Tex. Oct. 24, 2016); *State Farm Lloyds v. Dinh*, 1:14-CV-536-LY, 2015 WL 11422319 (W.D. Tex. Jan. 13, 2015), report and recommendation adopted sub nom. *Lloyds v. Dinh*, 1:14-CV-536-LY, 2015 WL 11430787 (W.D. Tex. Feb. 3, 2015).

On the other hand, the district court here cited several Houston, Southern District, and Eastern District cases in which extrinsic evidence was rejected. We may be seeing a split in authority among the four federal districts of Texas with regard to extrinsic evidence, with the Southern and Eastern Districts favoring a narrower application of the rule, while the Western District favors a more liberal approach. The extremely strict approach taken by the district court here makes it quite easy for claimants to plead into coverage by simply amending their pleadings until all facts that might take the claim outside the policy period have been expunged.

FORT WORTH FEDERAL COURT FINDS ROCK DUST IS AN EXCLUDED POLLUTANT WHEN IMPROPERLY DISCHARGED

A Federal District Court Judge in Fort Worth recently granted summary judgment in favor of a CGL carrier finding it had no duty to defend or indemnify its insured in a pollution case involving the discharge of rock fines, or very fine dust, into a waterway. In *Great American Ins. Co. v. Ace American Ins. Co.*, 4:18-CV-114-A, 2018 WL 3370620 (N.D. Tex. July 10, 2018), the underlying suit against the insured involved an accidental discharge of rock fines from settling ponds where they are ordinarily settled out, dried, and either used as reclamation fill in the insured's quarry operations, or sold as commercial fill.

The court found that characterizing the rock fines as a valuable commodity while they were in their proper place in the settling ponds did not change their role as a pollutant once they escaped the settling ponds and damaged the waterway. The court observed that a substance does not have to be inherently irritating, toxic, or otherwise deleterious to become a contaminant when it is in the wrong place. Therefore, the carrier had no duty to defend the suit seeking remediation costs, and the court also concluded the carrier had no duty to indemnify for the same reasons.