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TEXAS INSURANCE LAW NEWSBRIEF

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HOUSTON COURT OF APPEALS STRICTLY ENFORCES NOTICE PROVISION IN AN AUTO LIABILITY POLICY AND HOLDS DEFAULT JUDGMENT IS PREJUDICE AS A MATTER OF LAW

Last week, a Houston appellate court enforced a notice provision in an auto policy after a default judgment had been obtained against the policyholder. In *Lewis v. ACCC Insurance Company,* 2020 WL 4461338, Tex. App.—Houston [14th Dist.], Aug. 4, 2020, mem. op.), Lewis obtained a default judgment against ACCC Insurance Company's insured.

Lewis sued the insured and notified ACCC when he had been served. In response, ACCC stated that, as a courtesy, it would attempt to contact him; however, ACCC noted that the "policy requires the insured to forward lawsuit papers to ACCC and to request a defense in the lawsuit," and emphasized that it did not waive this condition. Lewis later sent ACCC a courtesy copy of a motion for default judgment. After the trial court granted the motion, Lewis also sent ACCC a courtesy copy of the notice of the hearing on unliquidated damages. The hearing resulted in a final judgment for Lewis. When Lewis asked ACCC to pay the judgment, ACCC refused on the ground that the insured's failure to advise the insurer of the suit or request a defense had prejudiced ACCC. Lewis then sued ACCC for breach of contract, promissory estoppel, and negligent misrepresentation. ACCC filed a motion for summary judgment in which it asserted there was no evidence that the insured complied with the policy's notice provisions and that the default judgment conclusively established that the failure to notify ACCC of the suit and request a defense prejudiced ACCC as a matter of law. The trial court granted the motion, and Lewis appealed the judgment as to the breach-of-contract claim. On appeal, Lewis argued that ACCC was not prejudiced as a matter of law because they had actual notice of the suit.

The court began by observing that ACCC's policy requires the person covered by the policy to promptly send the insurer "copies of any notices or legal papers received in connection with [an] accident or loss" and cooperate with the insurer "in the investigation, settlement or defense or any claim or suit." The policy further states that ACCC may deny coverage if ACCC can show that the covered person's failure to comply with those terms materially prejudiced the insurer. The court found that under Texas law an insurer has no duty to defend if the insured never requests a defense. The court conclude that when a default judgment is rendered against an insured who has failed to notify the insurer of the lawsuit or request a defense, the insurer is prejudiced as a matter of law, regardless of whether the insurer has actual notice of the suit. Further, the refusal to request a defense is binding on any third-party beneficiaries. Accordingly, the trial court's judgment was affirmed.

FIFTH CIRCUIT AFFIRMS DENIAL OF COVERAGE UNDER BUILDERS RISK POLICY EXCLUSION

The Fifth Circuit recently affirmed a summary judgment in favor of an insurer after coverage was denied under a builders-risk policy. In *Balfour Beatty Construction, L.L.C. v. Liberty Mutual Fire Insurance Company*, 2020 WL 4435430, (5th Cir. Aug. 3, 2020), Balfour sought coverage for damage done to windows during a welding project on a commercial office building. When Liberty denied coverage, Balfour sued for breach of contract and violations of the Texas Insurance Code. Liberty removed to federal court and the parties cross-moved for summary judgment solely with respect to the breach of contract claim. The district court granted Liberty's motion for summary judgment and denied Balfour's motion.

On appeal, the parties agreed that the claim involved "direct physical loss or damage" that falls within an Exclusion because it resulted from an act of construction, workmanship, or installation. Therefore, absent the Exception to the Exclusion, Balfour is not entitled to coverage. The parties disputed whether the Exception to the Exclusion applies. Balfour argued that the Exception reinstates coverage for their claim or, in the alternative, that the Exclusion and the Exception are ambiguous, and that the language of those clauses should be construed in their favor.

As an initial matter, the Fifth Circuit reasoned that they need not determine whether the Policy is an "all-risks" policy because each policy must be interpreted individually. Second, the court found the ensuing loss Exception did not reinstate coverage because it would require two separate events to occur. Here, the welding operation and falling slag that caused the damage were not two separate events. The court also found that the Policy was not illusory because it would provide coverage in certain situations. Further, the court concluded that any argument regarding ambiguity had been waived and the policy was not ambiguous. The court found that the claim does not fall within the Exception and therefore was excluded. Summary Judgment in favor of the insurer was affirmed.