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FIFTH CIRCUIT REVERSES DECLARATORY JUDGMENT IN COVERAGE CASE, HOLDS AFFIDAVIT, APPLICATION SHOULD NOT HAVE BEEN CONSIDERED

A three-judge panel of the Fifth Circuit Court of Appeals on August 24 reversed a summary judgment that a liability insurer did not owe defense and indemnity to its insured, holding that the district court improperly considered the affidavit of an underwriter and the application for the underlying policy. In *Colony National Ins. Co. v. Unique Industrial Product Co.*, No. 11-20355, 2012 WL 3641523 (5th Cir. Aug. 24, 2012), the court reviewed a judgment out of the Southern District of Texas that ruled that claims in two lawsuits against Unique were not covered under Unique's CGL policy from Southern. The underlying lawsuits, one in Texas and another in Minnesota (a class action in which Unique was a third-party defendant), were based on allegations that plumbing fixtures manufactured by Unique were failing, and causing damages to residences. The allegations against Unique in the underlying suits were by a company called Uponor, which purchased brass fittings and swivel nuts from Unique; Uponor claimed that Unique agreed to take responsibility for the failures of its products, but did not do so.

In the coverage action, the district court found that a "known-loss exclusion," which barred coverage where the insured knew of a loss before purchasing the policy, entitled Colony to summary judgment. In reaching this conclusion, the court reviewed the application for the policy and an affidavit. The Fifth Circuit panel held that this was improper under Texas' "eight-corners rule," whereby a trial court's review is restricted only to the four corners of the policy and the four corners of the petition of the underlying lawsuit. The panel also noted a number of issues not addressed by the trial court because of its application of the known-loss exclusion.

In a dissent from the panel's opinion, Judge Clement argued that the court should not have remanded for further proceedings. Specifically, while she agreed that it was error for the district court to consider extrinsic evidence, she would have held that Unique breached a separate consent-to-settle provision of the insurance contract and affirmed on that ground.

AFTER REMAND FROM TEXAS SUPREME COURT, COURT OF APPEALS REVERSES SUMMARY JUDGMENT IN INSURER'S FAVOR IN COVERAGE SUIT

The El Paso Court of Appeals on August 29 reversed a summary judgment that a railroad's comprehensive general liability policy did not cover a wrongful death suit arising out of allegations that improper failure to control vegetation led to an auto-train accident that killed two people and injured a third. *Burlington Northern & Santa Fe Railway Co. v. National Union Fire Ins. Co. of Pittsburgh*, No. 08-06-00022, 2012 WL 3728176 (Tex. App.—El Paso August 29, 2012), is the El Paso court's opinion following the Supreme Court's per curiam remand of the case last year, 334 S.W.3d 217 (Tex. 2011), in which the high court held that the pleadings by themselves did not establish that the contractual provisions and other extrinsic

evidence could not bring the vegetation control operations within the indemnity coverage of the applicable policy.

The vegetation control program at issue was performed by a company called SSI Mobley pursuant to a three-year contract with Burlington Northern & Santa Fe ("BNSF"). BNSF was named as an additional insured under SSI Mobley's CGL policy from National Union. In its original opinion, the El Paso court had applied the eight corners rule to evaluate the duties to defend and indemnify. The court then determined that the pleaded facts established that the policy's "completed operations" exclusion applied, and affirmed the trial court's judgment without considering extrinsic evidence. The Supreme Court assumed without deciding that the court of appeals correctly determined that National Union owed no duty to defend, but that the court of appeals should have considered all the evidence presented by the parties in determining whether National Union was under a duty to indemnify BNSF.

On remand, the El Paso court first reconsidered its earlier opinion on the duty to defend, and, while still applying the eight-corners rule and refusing to consider extrinsic evidence, it changed its mind and held that the pleadings and policy established that National Union owed BNSF a defense. Previously, the Court had relied on the fact that the underlying plaintiffs' pleadings were in the past tense to determine that the "completed operations" provisions applied; in the new opinion, the Court decided that use of past tense in a petition is not unusual, and was not determinative. The underlying petitions' allegations established that the coverage exclusion that National Union relied on did not apply; thus, National Union owed a duty to defend.

The El Paso court then reconsidered its previous holding on the duty to indemnify in light of the Supreme Court's opinion. The court listed several pieces of evidence provided by both parties, and, without specific explanation, stated that the evidence raised fact issues that defeated summary judgment on that issue. The court remanded to the trial court for further proceedings.

SOUTHERN DISTRICT OF TEXAS JUDGE REMANDS TWO BAD FAITH CASES TO STATE COURT BASED ON CLAIMS AGAINST TEXAS ADJUSTERS

Federal Judge Kenneth Hoyt of the Southern District of Texas on August 31 granted two plaintiffs' motions to remand to state court based on the plaintiffs' claims against non-diverse defendant adjusters. In *Nichols v. Allstate Texas Lloyds*, Civ. No. 4:12-cv-01524, 2012 WL 3780308 (S.D. Tex. Aug. 31, 2012), a homeowner's case based on damage from a wildfire, and *Benton v. Lexington Ins. Co.*, No. 4:12-cv-01546, 2012 WL 3780312 (S.D. Tex. Aug. 31, 2012), a windstorm claim, the defendants had removed the claims to federal court based on contentions that in-state defendants were improperly joined. Judge Hoyt disagreed, remanding both cases on identical grounds and using substantially identical language.

The property claim underlying the *Nichols* lawsuit arose out of a September 2011 fire that damaged a number of homes in Matagorda County. The Plaintiff sued Allstate and the adjuster assigned to the claim, alleging various generic first-party causes of action against Allstate individually, the adjuster individually, and both defendants together. In *Benton*, the plaintiff's insurance claims arose out of a July 2011 storm in Harris County. The Plaintiff sued, alleging similar causes of action against Lexington, an independent adjusting company, and the adjuster assigned to the claim. Both insurers filed notices of removal, asserting that the Plaintiffs' claims against the in-state defendants were "vague" (*Nichols*) or "conclusory" (*Benton*), contained no more than verbatim recitation of statute, and that these pleading deficiencies established that the in-state defendants had been improperly joined.

In both opinions, after discussing the general standard of review and the parties' arguments, Judge Hoyt determined that the plaintiffs' pleadings established that the in-state adjusters "could *potentially* be held personally liable[.]" (Emphasis in originals.) Judge Hoyt stated that the insurers were under a "heavy burden to establish with certainty that the plaintiff has *no reasonable possibility* of recovery against [the

adjusters] individually," and that the insurers had not provided any evidence to meet this burden. (Emphasis in originals.) Judge Hoyt, therefore, granted the plaintiffs' motions and remanded both cases.