

THOUGHT LEADERSHIP

News

FIFTH CIRCUIT AFFIRMS SUMMARY JUDGMENT AND ATTORNEY'S FEES AWARDED AGAINST INSURED IN DECLARATORY JUDGMENT ACTION

Newsbrief

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Last Tuesday, in *Philadelphia Indem. Ins. Co. v. SSR Hospitality, Inc.*, No. 11-50282 (5th Cir. Jan. 17, 2012) (slip opinion) (not designated for publication), the Fifth Circuit affirmed a district court's orders granting summary judgment to Philadelphia Indemnity Insurance Company ("PIIC") and awarding it more than \$300,000 in fees and expenses. SSR owned a hotel in Austin, Texas. SSR Hospitality, Inc. ("SSR") purchased an insurance policy from PIIC that provided property damage coverage for the period of March 2, 2007 to March 2, 2008. In August 2007, the floor of a conference room in the hotel collapsed. PIIC determined that the property damage predated the policy's inception. Nonetheless, PIIC also stated that some expenses for repairs to the conference room floor would be covered. PIIC then wrote a letter of "partial declination" to SSR, explaining that it was partially denying SSR's claim. After receiving the denial of coverage, SSR executed a release in consideration of a payment of \$13,984.39, being the cost of the floor repairs minus the deductible, which named "Philadelphia Insurance Company" – a related entity – as the released party. After receiving PIIC's payment for the floor repairs, SSR filed a claim for the additional damages arising out of the August 2007 collapse, but PIIC denied SSR's additional claims.

SSR continued to pursue its claims, so PIIC filed a diversity jurisdiction-based declaratory judgment action. PIIC moved for summary judgment, which the district court granted. PIIC then filed a Rule 54 motion for attorney's fees, claiming such fees under the Texas Declaratory Judgment Act. The district court granted PIIC's motion, awarding it \$280,641.38 in attorney's fees and \$26,070.53 in costs.

On appeal, SSR argued that (1) the release did not effectively name PIIC and was, therefore, invalid, (2) the release was unconscionable and, therefore, unenforceable, and (3) attorney's fees are barred by the district court's summary judgment and final order and are unreasonable. The Fifth Circuit concluded the parties intended PIIC to be the released party even though the release named "Philadelphia Insurance Company" instead of "Philadelphia Indemnity Insurance Company." The Fifth Circuit also concluded SSR failed to establish unconscionability under either a procedural or substantive theory.

With regard to the award of attorney's fees, the Fifth Circuit noted SSR did not appeal the district court's award of attorney's fees under the Fifth Circuit's holding in *Utica Lloyd's of Tex. v. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998), which states that "a party may not rely on the [Texas Declaratory Judgment Act] to authorize attorney's fees in a

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diversity case because the statute is not substantive law.” Instead, the Fifth Circuit, noted that the Texas Declaratory Judgment Act was procedural law, and thus not controlling in federal court, requested and received additional briefing with respect to (1) our holding in *Utica* that “a party may not rely on the Texas DJA to authorize attorney’s fees in a diversity case because the statute is not substantive law” and (2) the consequences of SSR’s failure to raise this argument either in the district court or on appeal.

Having reviewed the issue, the court did not believe that plain error existed in these circumstances. The court stated that in light of the holding in *Utica*, the district court’s award of attorney’s fees pursuant to the Texas DJA was in all likelihood an error that was plain and affected SSR’s substantial rights. Nonetheless, the court found an award of attorney’s fees under the Texas DJA did not “seriously affect the fairness, integrity, or public reputation of judicial proceedings.” The court stated that “this is not a case in which attorney’s fees would be unjustified” and pointed to SSR’s baseless contention that the release was ineffective because of what essentially amounted to a typographical error.