THOUGHT LEADERSHIP

News

COURT HOLDS INSURER MAY RELY ON "VACANCY CLAUSE" OF HOMEOWNER'S POLICY WITHOUT SHOWING PREJUDICE

Newsbrief
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The Dallas Court of Appeals on Thursday reversed a summary judgment in favor of an insured, holding that the trial court was incorrect when it concluded that Farmers Insurance Exchange was required to show that it was prejudiced in order to rely on a policy defense based on a vacancy clause. In *Farmers Ins. Exch. v. Greene*, 2012 WL 3132440 (Tex. App.—Dallas Aug. 2, 2012), the court reviewed a trial judge's ruling that the insured's "violation of the purported vacancy clause does not render the policy void and does not constitute a defense" to the insured's contract claim. The court of appeals disagreed, rejecting the insured's argument that Farmers' was alleging a breach of the contract. Because a defense under a vacancy clause was not an allegation of a breach, it was not subject to Texas precedent requiring a showing that the insured was "prejudiced" or a statute requiring that the breach contributed to the loss.

The underlying facts were not in dispute. In November 2007, a fire damaged real property belonging to the plaintiff. The plaintiff, however, had moved to a retirement community four months earlier and placed her house on the market, and had notified Farmers that she was doing so. She made a claim for the fire loss, and Farmer's denied the claim based on the clause in the Farmer's policy stating that:

> If the insured moves from the dwelling and a substantial part of the personal property is removed from that dwelling, the dwelling will be considered vacant. Coverage that applies under Coverage A (Dwelling) will be suspended effective 60 days after the dwelling becomes vacant. This coverage will remain suspended during such vacancy.

The trial court held that the insured "violated" this provision, and that the "violation" did not void the policy.

The Court of Appeals disagreed with the trial court's interpretation of the policy. The vacancy clause did not mean that the insured forfeited coverage; instead, it suspended coverage for dwelling damage, while other provisions of the policy remained in effect. There was no promised performance that the insured had breached. Since breach was not at issue, the common law requirement of a showing of prejudice did not apply.

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The Court of Appeals also rejected the insured's argument that section 862.054 of the Texas Insurance Code negated Farmer's vacancy defense. That statute provides that "Unless the breach or violation contributed to cause the destruction of the property, a breach or violation by the insured … is not a defense to a suit for loss." First, as there was no breach alleged, the statute did not apply by its terms. The court also analyzed the history of the statute and its application in detail, noting that its predecessor was known as the "anti-technical" statute. The vacancy clause, said the court, was not a technicality, and the court declined "to engraft by judicial fiat additional terms requiring [Farmer's] to assume liability for a risk the Policy specifically excluded."