THOUGHT LEADERSHIP

News

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

Newsbrief
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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.