THOUGHT LEADERSHIP

News

FIFTH CIRCUIT REAFFIRMS LACK OF BAD FAITH IN 3RD PARTY LIABILITY CLAIMS

Newsbrief
04 MAR 2013

The Fifth Circuit recently reaffirmed that Texas law does not recognize a cause of action for breach of the duty of good faith and fair dealing by an insurance company for the handling of third-party tort claims against its insured. In *Mid-Continent Casualty Company v. Eland Energy, Inc. and Sundown Energy LP*, No. 11-10649 (5th Cir., February 22, 2013), Sundown's oil and gas production facility in Port Sulphur, Louisiana was severely damaged by Hurricane Katrina, causing storage tanks with crude oil to spill into the surrounding area. Sundown filed a claim under it CGL policy with Mid-Continent for reimbursement of government-mandated clean-up costs. At the same time, surrounding property owners and commercial fisherman filed multiple lawsuits against Sundown and Eland, which Sundown tendered to Mid-Continent for defense. One property owner not in a lawsuit contacted Mid-Continent directly to make a third-party claim and tried to negotiate a settlement, which Mid-Continent unsuccessfully attempted to do without Sundown's knowledge.

Mid-Continent agreed to defend the lawsuits and eventually paid to Sundown the $1 million dollar primary policy limit and the $5 million umbrella policy limit for clean-up costs. With policy limits exhausted, Mid- Continent withdrew from defending the lawsuits. Sundown, however, refused to accept the $6 million, advised Mid-Continent it wished to hold the clean-up claim "in abeyance," and asked Mid-Continent to continue defending the lawsuits. Mid-Continent filed a declaratory judgment in the U.S. District Court in the Dallas Division of the Northern District of Texas seeking to clarify its duties and responsibilities under the policies, and Sundown filed counterclaims for bad faith, Insurance Code violations and other counter- claims.

In three opinions, Judge Sid Fitzwater granted summary judgment to Mid-Continent for some of the relief it sought, and the case went to trial on Sundown's remaining counter-claims, including a claim Mid-Continent breached a duty of good faith and fair dealing by attempting to settle the claim of one property owner without Sundown's knowledge or consent. The jury returned a verdict in favor of Sundown, but the district court granted Mid-Continent's motion for judgment as a matter of law overturning the jury verdict. See *Mid-Continent Casualty Company v. Eland Energy*, 795 F. Supp.2d 493 (N.D. Tex. 2011).

Sundown complained on appeal that Mid-Continent's offer of settlement to a third-party claimant was bad faith, relying on *State Farm v. Traver* and *Republic Ins. Co. v. Stoker.* Sundown argued both *Traver* and *Stoker* expanded an insurer's liability in the third-party context if it "consciously undermined" the insured's defense, or committed some

act, so extreme, that it would cause injury independent of the policy claim. The 5th Circuit said neither of the passages taken from *Traver* and *Stoker* established Texas law, and, in the seventeen years since *Stoker*, the 5th Circuit noted no Texas court had ever held that recovery was available under Texas law for an insurer's allegedly "extreme act" causing injury independent of the policy claim in the first-party context, let alone in the third-party context. The 5th Circuit refused to do so here and affirmed the district court's final judgment.

[**Editor's Note**: Martin, Disiere, Jefferson & Wisdom was proud to represent Mid-Continent in this case with a trial team led by Chris Martin, Robert Dees and Ethan Carlyle, and the appellate team led by Levon Hovnatanian and Bruce Ramage, along with many other MDJW lawyers and staff over the 7-year legal battle through trial court and the Fifth Circuit. We congratulate Mid-Continent for having the courage to try the case and fight the appeal.]