

THOUGHT LEADERSHIP

News

NORTHERN DISTRICT RESOLVES CONFLICT-OF-LAW QUESTIONS AND DENIES DEFENDANT'S MSJ REGARDING RIGHT TO CONTROL DEFENSE

Newsbrief

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In *Centex Homes v. Lexington Ins. Co.*, 3:13-cv-719-BN, 2014 WL 1225501 (N.D. Tex. Mar. 25, 2014), Magistrate Judge David Horan denied an insurer's motion for partial summary judgment regarding the right to control defense and select counsel.

The Plaintiff in this lawsuit was in the business of designing, developing, and constructing condominiums and other housing complexes throughout the country. Plaintiff purchased "wrap" insurance policies which cover Plaintiff as a general contractor and all subcontractors performing work in connection with the insured project. Two of the policies were at issue in Defendant's Motion for Partial Summary Judgment regarding construction projects in San Diego and Sacramento, California.

The parties disagreed with respect to the following: Plaintiff's exhaustion of the retention amounts under the Policies; the timing of Defendant's agreement to provide a defense; Defendant's reservation of rights explanation; Defendant's payment of defense costs; and the time when Defendant provided notification that Plaintiff's selected counsel was not acceptable. Defendant claimed Plaintiff did not provide the proof of its payment and satisfaction of the applicable Retained Amounts the "Underlying Litigation" as required under the Policies. Defendant took the position that, in the face of Defendant's stance on legal counsel, Plaintiff refused to switch counsel in violation of Plaintiff's obligations under the Policies. Plaintiff maintained that Defendant failed to make all payments required under the Policies and improperly refused to let Plaintiff select its defense counsel.

The insurer moved for partial summary judgment on one of its counterclaims, which sought declaratory judgment on the following three issues: (a) Defendant has the right to control the defense; (b) Plaintiff is not entitled to the appointment of independent counsel under California Civil Code § 2860; and (c) Plaintiff breached its duty to cooperate under the Policies by refusing to acknowledge that Defendant had a right to control the defense and select counsel and by insisting that Defendant continue to pay fees and costs to Plaintiff's selected counsel.

The Court first dealt with whether Texas and California law are consistent with respect to what constitutes a breach of a duty to defend and whether a breach of a duty to defend forfeits the insured's right to control the defense. The Court found that Texas and California law is consistent on this issue and applied Texas law. The Court also found that California and Texas law is "essentially the same" on the issue of what constitutes a conflict of interest, in the

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duty to defend context, and applied Texas law.

The Court first held the parties presented conflicting evidence regarding when evidence Plaintiff had actually exhausted its retained amounts on the Policies was provided to the insurer and conflicting evidence regarding whether any delays in accepting the defense on the part of the insurer were reasonable and justified. Because of this conflicting evidence, it could not grant summary judgment as to the insurer's right to control the defense. The Court then found that, because Texas law applied, the Court could not grant the California Civil Code § 2860 declaratory judgment claim as requested because California law did not apply to the selection of independent counsel. The Court further found that, even under Texas law, the reservation of rights and the underlying facts did not establish an absence of a conflict of interest as a matter of law. Applying the Texas standards, the Court found the insurer would have to provide "evidence that proves, as a matter of law, it would not be in its interest to take positions in the Underlying Litigation that might support its position regarding coverage." Finally, the Court ruled because it could not grant summary judgment on the previous two issues, it could not hold Plaintiff breached its duty to cooperate by refusing to acknowledge that Defendant had a right to control the defense and insisting that Defendant continue to pay Plaintiff's selected counsel.