

THOUGHT LEADERSHIP

News

“OWN, RENT, OR OCCUPY” EXCLUSION IS UNAMBIGUOUS AND DOES NOT REQUIRE EXCLUSIVE CONTROL

Newsbrief

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In *Liberty Mutual Fire Ins. Co. v. Lexington Ins. Co.*, 2014 WL 4823614 (Tex.App.-San Antonio Sept. 30, 2014), Total Warehousing, Inc’s employee struck a warehouse structural support column with his forklift, causing the building’s roof to collapse. The owner of the property, DCT Rittman suffered \$2.9 million in damages. Lexington Insurance Company insured DCT’s property, and indemnified DCT for the damages. Liberty Mutual insured Total for its operations on the premises under a CGL policy. Liberty denied the claim on the basis that the CGL policy’s “own, rent, or occupy” exclusion was triggered because Total occupied the premises. Lexington filed this declaratory judgment, and the parties presented the issue to the court on cross motions for summary judgment.

The parties agreed on the core facts: Liberty issued a CGL policy to Total, the policy was in effect, and Total’s employee was responsible for the damages. Thus, Liberty was obligated to reimburse Lexington unless the exclusion applied. Additionally, the parties agreed: Total did not own or rent the premises, Total was authorized to be on the premises, and Total was conducting authorized operations on the premises. The issue was whether Total’s operations constituted “occupying” the damaged premises.

The Court of Appeals ultimately held that “occupy” was not an ambiguous term. “[W]e hold that occupy comprises (1) a continued physical presence on the premises, and (2) control of the premises for the insured’s own benefit.” Because DCT had a contractual right to operate the premises as a third party logistics facility under a 2002 lease and under a 2006 lease assignment, the Court of Appeals held DCT met the definition of occupy under the exclusion. The fact that the lessor and another party retained some right to enter the premises under certain conditions (*i.e.* tenant default, etc.) did not change this result. While Total had assigned the lease to a third party, Total continued to operate the premises as the agent of the third party. The court found: “Total generally controlled access to the premises.” Therefore, Liberty was not obligated to reimburse Lexington.