

THOUGHT LEADERSHIP

News

FEDERAL JUDGE ENFORCES CONTRACTUAL LIABILITY EXCLUSION, FINDS NO DUTY TO DEFEND

Newsbrief

02 OCT 2018

A federal district judge in Sherman recently construed an unusually broad contractual liability exclusion and concluded an insurer had no duty to defend a breach of contract suit against its insured. In *Conifer Health Solutions, LLC, et al, V. QBE Specialty Ins. Co.*, 4:17-CV-00664, 2018 WL 4620613 (E.D. Tex. Sept. 26, 2018), Conifer contracted with a hospital to manage its entire revenue cycle. The hospital sued Conifer, alleging Conifer had badly bungled numerous aspects of the contracted work, causing damages of over \$35 million. The hospital asserted causes of action including breach of contract, breach of express warranty, unjust enrichment, and gross negligence/willful and wanton conduct.

The Policy contained a broad Contract exclusion which excluded coverage for:

“...any liability in connection with any contract, agreement, warranty or guarantee to which an Insured is a party, provided this Exclusion B shall not apply to Loss to the extent that such Insured would have been liable for such Loss in the absence of such contract, agreement, warranty or guarantee.”

Conifer argued the exclusion did not apply because the live pleading did not allege Conifer was a party to the contract, but instead alleged Conifer had assumed responsibility for the contract by way of an assignment or transfer, and an assignee or transferee is distinct from a party to a contract. The court disagreed, noting that a fundamental principle of Texas law holds that an assignee stands in the shoes of its assignor.

Conifer also argued the suit alleged wrongful acts that were independent of the contract, thus requiring QBE to defend the entire suit. However, focusing its inquiry on the alleged facts and not the asserted legal theories of recovery, the court concluded all of the allegations were in fact connected to Conifer's performance of the contract, regardless of the fact that some causes of action more properly sounding in tort were alleged. The court observed that without the contract in place, Conifer could not be held liable for failing to meet contractual performance standards which it had no obligation to meet.

Editor's Note: The contract exclusion in this policy was unusually broad and quite different from the language commonly found in ISO policy forms, which typically refer to the assumption of liability in a contract, rather than merely the performance of a contract. Thus, the court did not discuss *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014) and the limitations it placed on the more common Contractual Liability exclusion.