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INSURANCE LAW UPDATE

By Jennifer Kelley

THE FIFTH CIRCUIT

1. PPI Technology Services, L.P. v. Liberty Mutual Insurance Company, 701 F.3d 1070 (5th Cir. 2012).

The United States Court of Appeals for the Fifth Circuit, construing Texas law, affirmed a summary judgment ruling in favor of the insurer, holding that the insurer did not have a duty to defend the policyholder under a commercial general liability ("CGL") policy because, under Texas's "eight corners" rule, the allegations of "property damage" in the underlying complaint were not *factual* allegations that triggered the duty to defend.

In *PPI Technology*, the underlying plaintiffs filed suit alleging that the policyholder negligently drilled an oil and gas well at an incorrect location, resulting in a "dry hole." The underlying plaintiffs expressly alleged that the policyholder caused "property damage" including "physical injury to tangible property, including all resulting loss of use of the property," and sought more than $4.7 million in drilling costs and delay rental fees.

The policyholder sought a defense from its CGL insurer. After the insurer denied coverage on the ground that the suit did not allege property damage, the policyholder sued the insurer for breach of contract, violation of the Texas Insurance Code, and bad faith. The federal district court agreed with the insurer that property damage was not alleged and granted summary judgment in its favor.

On appeal, the Fifth Circuit recognized that the policyholder bears the burden to establish that a claim is potentially within the policy's coverage, but noted that if doubt exists, the allegations should be construed in favor of the policyholder when deciding if there is a duty to defend. However, even under this broad duty to defend standard, the Fifth Circuit found the allegations in the underlying suit too conclusory to trigger a duty to defend. The court agreed with the insurer's argument that drilling costs and rental fees—i.e., economic losses—did not constitute injury to tangible property because "tangible property" is understood as capable of being handled or touched. The court also held that the allegation of "property damage" in the plaintiffs' complaint was a label or legal theory rather than a factual allegation. In reaching its conclusion, the court explained that "[w]e do not consider mere use of the phrase 'property damage' and parroted Policy language as sufficient factual allegations. None of the assertions of 'property damage' in the underlying lawsuits are accompanied by facts illustrating specific harm or damage to tangible property."

***2. Pride Transportation v. Continental Casualty Company*, No. 11-10892, 2013 U.S. App. LEXIS 2575 (5th Cir. Feb. 6, 2013) (unpublished opinion).**

The United States Court of Appeals for the Fifth Circuit, construing Texas law, affirmed the district court's ruling granting two insurers summary judgment in a case where the insurers, a primary carrier and an excess carrier, settled for the policy limits for an additional insured, leaving the named insured without coverage.

In *Pride Transportation*, an employee of Pride Transportation (an interstate motor carrier) was involved in an accident in which the employee rear-ended a pick-up truck driven by Wayne Hatley. Mr. Hatley was rendered a paraplegic. Pride was insured under a $1 million primary policy and a $4 million excess policy. The primary insurer undertook the defense of both the employee and Pride.

The Hatleys made a time limit settlement demand to the employee alone to settle their claims for the combined $5 million limits of both policies. The demand did not include their claims against Pride. Pride's counsel demanded that the primary insurer tender its policy limits to the excess insurer, which it did. The excess insurer then took over the settlement negotiations. The excess insurer attempted to respond to the Hatleys' offer by seeking permission to make a counteroffer settling all claims against both defendants for the limits of both policies. The Hatleys, however, refused to include Pride in the settlement. The employee's counsel demanded that the excess insurer accept the offer on behalf of the employee. The excess insurer accepted the offer on the employee's behalf. The Hatleys signed a formal settlement agreement containing a release of all of the Hatleys' claims against the employee. Because its policy limits were now exhausted, the excess insurer withdrew from further defense of Pride. Pride then settled the Hatleys' claims for an additional $2 million.

Pride then sued its primary and excess insurers for breach of contract and violation of the Unfair Claims Settlement Practices Act. The Northern District of Texas held that despite the problems the settlement created for Pride, the insurers acted reasonably in accepting the Hatleys' demand for policy limits, which had been directed to one, but not both, of the insureds. Pride, therefore, had no claim against its insurers.

On appeal, the Fifth Circuit declined to extend the *Stowers* duty to insurers *accepting* demands, noting that the *Stowers* duty imposes liability on insurers who *reject* reasonable demands covered under their policies. With regard to Pride's argument that the settlement was unreasonable, the court noted that due to "the likelihood and degree of potential exposure to excess judgment for [the employee], the Settlement was reasonable as a matter of law and did not result in a breach of the insurance contracts." As to Pride's statutory claims, the Fifth Circuit concluded that Pride's speculations as to what the insurers' motives were in settling, were insufficient to create a fact issue.