FALL 2014 NEWSLETTER

INSURANCE LAW UPDATE

By Jennifer Kelley

SUPREME COURT OF TEXAS

***Jaw the Pointe, LLC v. Lexington Ins. Co.*, No. 13-0711, 2014 Tex. LEXIS 851 (Tex. Oct. 3, 2014).**

The Supreme Court of Texas has agreed to hear oral arguments in a case involving the concurrent cause doctrine. The case concerns an apartment complex in Galveston that was severely damaged by Hurricane Ike. The insurer had issued a $25 million property policy on the apartment complex and other properties. The City of Galveston condemned the property, but the insurer refused to provide coverage for the demolition and rebuilding costs. The policy was subsequently exhausted by payments on other claims. The insured filed suit and recovered a jury verdict against the insurer for $1.2 million in compensatory damages and $2.5 million for knowing conduct. The Houston Court of Appeals, Fourteenth District, reversed the judgment on the concurrent causation doctrine because the City's condemnation order resulted from a covered peril (wind damage) and a non-covered peril (flood damage.). One of the issues before the Supreme Court of Texas is what burden should be placed on the insured to prove the amount of the covered loss when there are covered and non-covered perils that may have combined to cause a loss.

FIFTH CIRCUIT

***Nat'l Liab. & Fire Ins. Co. v. R & R Marine, Inc.*, 756 F.3d 825 (5th Cir. 2014).**

The Fifth Circuit recently recognized an exception to Texas's general rule that a tort claimant has no direct cause of action against the tortfeasor's liability insurer until the insured-tortfeasor is adjudged liable to the claimant. In *Nat. Liability & Fire Ins. Co.*, the insurer initiated a lawsuit to disclaim liability on a policy covering its insured, a shipyard owner, which had allegedly damaged a third-party's vessel during repairs. The third-party counterclaimed against the insurer, arguing the policy obligated the insurer to cover all sums for which the insured became obligated to pay. The insurer acknowledged that if its insured was negligent, it would have to pay up to the policy limits once a final judgment was entered, but it further argued that the third-party did not have standing to sue it because no final judgment had been entered. The third-party responded that it was forced to file its compulsory counterclaim under the federal rules of civil procedure.

On appeal, the Fifth Circuit found that, under these circumstances, the third-party's counterclaim was compulsory and, therefore, the third-party had standing to bring its claim against the insurer. The Fifth Circuit then upheld the district court's finding of negligence and damages against the insured for which the insurer was liable under the policy. With regard to

damages, however, the Fifth Circuit found the district court's application of the 18% statutory interest rate was improper because the Texas Insurance Code did not apply to marine insurance.

***Indemnity Ins. Co. of N. America v. W&T Offshore, Inc.*, 756 F.3d 347 (5th Cir. 2014).**

The Fifth Circuit examined the relationship between primary and umbrella insurance policies, and held that under the specific language of the policies in question, exhaustion of the primary insurance triggered the umbrella policy even though the claims which exhausted the primary coverage were not covered under the umbrella policy. In *Indemnity Ins. Co. of N. America*, the insured purchased a primary CGL policy, a primary "Energy Package" policy, and an umbrella policy. The Energy Package policy covered property damage and "operators' extra expenses," incurred by the insured itself, but the umbrella policy only covered claims made against the insured by third parties.

After Hurricane Ike, the insured submitted claims for property damage and extra expense for over 150 offshore drilling platforms, which exceeded $150 million. The insured was also legally required to remove the debris of the damaged platforms, for which it incurred another $50 million. After exhausting its total limits under the Energy Package policy with the $150 million in property damage and extra expense claims, the insurer tendered the debris removal claims to the umbrella carrier. The umbrella carrier refused the debris removal claims, asserting its coverage was not triggered because the claims which were paid by the underlying insurance were first-party claims, which are not covered by the umbrella policy.

The umbrella policy's insuring agreement covered claims in excess of the Retained Limit, which was defined to mean the limits of the underlying insurance or SIR. Nothing in the definition of the Retained Limit required that it be spent on claims which would be covered under the umbrella policy. On the other hand, the umbrella carrier argued that the policy contained a drop-down clause which stated its obligations if the Retained Limit was exhausted "by payment of one or more claims that would be insured by our Policy," and this clause showed that only covered claims could exhaust the underlying limits.

After a careful parsing of the language, the Fifth Circuit held the policy was unambiguous and the insuring agreement required the umbrella carrier to pay otherwise covered claims anytime the Retained Limit was exhausted, regardless of the type of claim that resulted in the exhaustion. The Fifth Circuit concluded that the existence of the drop-down clause did not limit liability, but outlined additional duties in the event the retained limit was exhausted by claims which were covered under the umbrella policy.

TEXAS COURTS OF APPEALS

***Liberty Mutual Fire Ins. Co. v. Lexington Ins. Co.*, No. 04-13-00586-CV, 2014 Tex. App. LEXIS 10867 (Tex. App.—San Antonio Sept. 30, 2014, no pet. h).**

In *Liberty Mutual Fire Ins. Co.*, the San Antonio Court of Appeals held that the use of the word "occupy" in an insurance policy was not ambiguous. In that case, a property owner suffered $2.9 million in damages. Lexington Insurance Company insured the property and Liberty Mutual insured the lessee 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 the lessee occupied the premises. Lexington filed a 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 the lessee, the policy was in effect, and the lessee's employee was responsible for the damages. Thus, Liberty was obligated to reimburse Lexington unless the exclusion applied. Additionally, the parties agreed: the lessee did not own or rent the premises, lessee was authorized to be on the premises, and lessee was conducting authorized operations on the premises. The issue, therefore, was whether the lessee's operations constituted "occupying" the damaged premises.

The San Antonio Court of Appeals ultimately held that "occupy" was not an ambiguous term and that "occupy" comprises (1) a continued physical presence on the premises, and (2) control of the premises for the insured's own benefit. Because the property owner 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 that the property owner met the definition of occupy under the exclusion. The fact that the lessee and another party retained some right to enter the premises under certain conditions (*i.e.* tenant default, etc.) did not change this result. While the lessee had assigned the lease to a third party, the lessee continued to operate the premises as the agent of the third party. The appellate court found: "Total [the lessee] generally controlled access to the premises." Accordingly, Liberty was not obligated to reimburse Lexington.

***Viewpoint Bank v. Allied Property and Cas. Ins. Co.*, No. 05-12-1370-CV, 2014 Tex. App. LEXIS 8701 (Tex. App.—Dallas Aug. 7, 2014, no pet.).**

In *Viewpoint Bank*, the Dallas Court of Appeals concluded that settlement obligations to pay a mortgagor are not discharged by sending a co-payable check to the insured. In that case, the insured issued settlement checks jointly payable to the insured and its mortgagor. The checks were delivered directly to the insured who deposited the checks without the consent or endorsement of the mortgagor. The mortgagor never received payment. The mortgagor then sued the insurer for breach of contract. The trial court granted summary judgment in favor of the insurer finding that it was no longer obligated on the checks or under the insurance contract based on its delivery of the jointly payable checks to the insured.

The Dallas Court of Appeals disagreed and reversed the summary judgment rendered in favor of the insurer. The appellate court held that the insurer still owed payment to the mortgagor because neither joint payee, acting alone, was entitled to negotiate the checks, thus payment to one (the insured) does not discharge the obligation to pay the other (the mortgagor). The Dallas Court of Appeals further held that the mortgagor was entitled to summary judgment as a matter of law because the checks had been improperly paid despite missing the bank's endorsement. The appellate court found that the insurer's remedy is to sue the bank that improperly paid the checks without all the necessary endorsements.