UPDATES FROM THE INSURANCE DOCKET

MASSACHUSETTS

Insured's Vacation Home Constitutes a "Residence" for Purposes of Personal Property Sublimit

A Massachusetts Superior Court recently ruled that the insureds need not have been actually living in their vacation home for it to constitute a "residence" for purposes of policy sublimits on coverage for personal property destroyed by fire. *See Entwistle v. Safety Indem. Ins. Co.*, No. CIV.A. 13-2526-D, 2015 WL 1602599 (Mass. Super. Mar. 31, 2015).

There, the insured's lived in their home in Massachusetts, but also owned houses in Vermont and New Hampshire. After a fire at their VT house caused significant damage that exhausted the limits of the policy taken out on the house, the insureds sought coverage for their personal property under the policies insuring both the MA and NH houses. When their insurers sought to apply a policy sublimit to these losses, the insured brought suit alleging breach of contract and bad faith. The court heard cross motions for summary judgement on all claims.

Both the NH policy and the MA policy provided coverage for losses to personal property of the insured destroyed by fire while anywhere in the world. However, the policies provided only limited coverage for personal property usually located in an insured's residence other than the "residence premises," i.e., the residence that was the primary subject of the insurance. The dispute concerned whether the VT house was a "residence" under the policy so as to trigger the sublimits.

The insureds argued that the term residence should be narrowly construed to mean "a place where the insured was actually living at the time of the loss." Because they were not living in their VT home at the time of the loss, the full policy limits should apply. The insurers, however, argued that there was no requirement that an insured live in the house for it to be deemed a residence.

Applying NH law to the NH policy and MA law to the MA policy, the court found that the VT house was a residence under both policies and, therefore, the policy sublimits for personal property usually kept in another residence of the insured applied. In construing this provision, the court looked to the policy as a whole.

Specifically, the court looked to the policies' theft exclusions to conclude that the policies did not require an insured to be living in a home for it to be deemed a "residence." Both policies excluded from coverage loss of personal property caused by theft that occurs off the residence premises while the personal property is at "any other *residence* owned by, rented to, or occupied by an 'insured,' except while an 'insured' is temporarily living there." (emphasis added by the court). The court reasoned that if the term "residence" required an insured to live at the property, the above exception for a residence at which an insured is temporarily living would be rendered redundant or meaningless.

Because the policies must be construed as a whole and courts are to avoid interpretations that would render terms meaningless, the court found that the insured's interpretation could not apply. Accordingly, the loss of personal property usually kept in the VT home was subject to the sublimit of the NH and MA policies and summary judgment on this issue was entered for the insurers.

FEDERAL COURTS

Reinsurance Information and Communications May Be Subject to Discovery

In the course of coverage disputes with their insureds, insurers often seek to protect from discovery information and communications pertaining to reinsurance that they deem privileged and confidential. As a general rule, such information is irrelevant to the interpretation of unambiguous policy terms and, therefore, will not be discoverable in many coverage disputes. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Mead Johnson & Co.*, No. 3:11-CV-00015-RLY-WG, 2014 WL 931947, at *4 (S.D. Ind. Mar. 10, 2014). However, a few cases from the federal dockets over the past year have helped to highlight some circumstances in which such information may in fact be discoverable.

For instance, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Donaldson Co.*[1] revolved around a coverage dispute as to whether the applicable $500,000 deductible would apply separately to each individual claim from underlying product-liability suits or whether one single deductible would apply to all claims. The plaintiffs, insurers of defendant Donaldson Co., sought a declaratory judgement that Donaldson and its excess insurer must reimburse them for settlement funds paid in the underlying suits that fell within the $500,000 deductible. Donaldson brought cross claims alleging that the insurers acted in bad faith by promising for eight years that all claims would be treated as a single occurrence before changing their position on the eve of mediation.

Before the court were several objections to discovery orders issued by the Magistrate Judge, including an order compelling plaintiffs to produce communications with reinsurers. The plaintiffs argued that the communications were irrelevant to the interpretation of the unambiguous policy. However, the court noted a split among courts as to the general discovery of such information. Where the communications were sought in connection with the bad faith claims and concerned the insurers' knowledge throughout the claims handling process, it was not error for the Magistrate Judge to order their production.

Similarly, the defendant in *Klein v. Fed. Ins. Co.*[2] opposed the plaintiffs' motion to compel the production of reinsurance information, arguing that the information was irrelevant to policy interpretation. The defendant further argued that courts protect reinsurance information because it is a critical aspect of the insurer's financial stability that is due strict protection and because the purchase of reinsurance is a business decision unrelated to claim evaluation or policy interpretation.

The court disagreed and granted the plaintiffs' motion to compel. Importantly, the dispute revolved around coverage for settlement payments agreed to between the plaintiffs and the defendant's insured. Where the coverage dispute involved the issue of notice to the defendant of the underlying claims, the reinsurance information sought was relevant to this contested question. Moreover, the defendant alleged only general concerns about protection of insurer financials and business decisions related to reinsurance. Where the reinsurance information at issue was nearly 30 years old, the defendant could not show why discovery was inappropriate in this case.

[1] No. CIV. 10-4948 JRT/JJG, 2014 WL 2865900 (D. Minn. June 24, 2014)

[2] No. 7:03-CV-102-D, 2014 WL 3408355 (N.D. Tex. July 14, 2014).

INDIANA

Issues of Fact Existed Concerning Presence of "Special Relationship" Between Agent and Insured

The Supreme Court of Indiana recently held that there were conflicting inferences surrounding the existence of a "special relationship" between the insured and its insurance agent such that summary judgement was inappropriate on the insured's claims that its insurance agent should be held liable for its failure to procedure adequate coverage for the insured. The case is *Indiana Restorative Dentistry, P.C. v. Laven Ins. Agency, Inc.*, 27 N.E.3d 260, 263 (Ind. 2015)

There, the plaintiffs suffered a fire loss at their dental office causing over $700,000 in damage to the building and its contents. When they submitted their claim to their insurer, they learned that the policy only provided coverage of up to $204,371. Left with a shortfall of roughly $500,000, the plaintiffs sought to hold their long-time insurance agent responsible, alleging both a special relationship between that parties that required the defendant to advise them of adequate coverage as well as an implied agreement that the defendant would procure adequate coverage. The Supreme Court considered the Court of Appeals' holding that (1) a special relationship existed such that the defendants were obligated to advise the plaintiffs of adequate coverage and (2) no implied contract existed between the parties to procure full coverage.

Under Indiana law, an insurance agent found to have a special relationship with the insured has a duty to advise the insured on the issue of adequate coverage. The creation of the duty hinges on the nature, not the length, of the relationship and turns largely on four factors. Namely, whether the agent (1) exercises broad discretion to meet the insured's need; (2) counsels the insured concerning specialized insurance; (3) holds oneself out as an insurance expert, which the insured relies on; and (4) is paid a premium for this expert advice. The factors are not exhaustive and no single factor is dispositive.

While the parties agreed that the defendant was not paid an extra commission for its expertise, there was a dispute as to the other three factors. For instance, while the plaintiff first purchased all the insurance coverage recommended by the defendant in 1978, it was unclear whether the defendant continued to exercise such discretion. Also, while defendant sent marketing materials to the plaintiff proclaiming its expertise in administrating insurance plans for dental offices, these were generic promotional materials drafted by a third party. Similarly, although the policy covered highly specialized equipment, the coverage itself was a standard business personal property policy.

In reaching its decision, the court noted that only once in 30 years has an agent been found to have had a special relationship with the insured in Indiana and only one other time has an Indiana appellate court found even the existence of a material question of fact on the issue. However, where the facts before it could lead to conflicting inferences as to the nature of the relationship, the court held that the "high bar" for summary judgement under Indiana law was not met and the decision below was overturned.

As to the implied contract, the court found that there were no facts to suggest that the parties had ever reached an agreement, implied or otherwise, for the defendant to procure full coverage. Accordingly, summary judgment for the defendant on this issue was affirmed.

NEW JERSEY

Court Rules Superstorm Sandy Losses Caused by "Storm Surge" not Subject to Policy Sublimits for "Flood"

A New Jersey Superior Court Judge recently ruled that an insured's losses caused by storm surges during Superstorm Sandy would not be subjected to policy sublimits for losses caused by "flood." The case is *Public Service Enterprise Group, Inc. v. Ace American Ins. Co.*, 2015 WL 1384325 (N.J.Super.L. March 23, 2015).

There, the insured sought coverage for damages caused by Superstorm Sandy that it estimated to exceed $500 million. The policies in question provided a total amount of coverage of $1 billion. Though the policy did not contain a separate sublimit for losses caused by "named windstorms" occurring outside of Florida, they did limit liability for losses caused by "flood" to $250 million. The parties' dispute concerned which limit applied to the losses caused by "storm surge" – "a hurricane-generated inundation of water."

The insured noted that the policy specifically defined "named windstorm" to include "storm surges," but did not reference "storm surge" or wind-driven water in its definition of "flood." Because there was no separate limit for the "named windstorm" in question, the insured argued that the policies provided coverage for "storm surge" up to the full policy limits. Moreover, the insured argued that under New Jersey's efficient proximate cause doctrine, the losses in question were caused by wind. The insurers argued that under the policy's definition of "flood," i.e., "the overflowing or breaking of boundaries of natural or man-made bodies of water," a storm surge is simply a type of flood, triggering the policy's flood sublimits.

Because no New Jersey case law had previously addressed the issue, the court looked largely to two cases from other jurisdictions, each of which held that losses caused by storm surge were not subject to flood sublimits. *See SEACOR Holdings, Inc. v. Commonwealth Ins. Co.*, 635 *F.3d* 675 (5th Cir. 2011); *Pinnacle Entertainment, Inc. v. Allianz Global Risks U.S. Ins. Co.*, 2008 WL 6874270 (D. Nev. March 26, 2008).

In addressing losses caused by Hurricane Katrina in *SEACOR Holdings*, the 5th Cir. held that the term "windstorm" – undefined by the policy in question – must be interpreted to include wind and wind-driven objects, including water, and the damage they caused. Accordingly, the court reasoned that damage caused by "storm surge" would fall under the umbrella of damage caused by "named windstorm" and would not be subjected to flood sublimits. The 5th Cir. reached its decision despite the policy's definition of "flood" as including "wind driven water."

In *Pinnacle Entertainment*, the insured's policy contained coverage for "weather catastrophe occurrence," defined as certain loss caused by a named "storm or weather disturbance." The policy specifically stated that "storm or weather disturbance" included flood. The policy's definition of "flood," however, did not reference "storm surge" or "wind-driven water." While acknowledging that a storm

surge is a specific type of flood, the court nonetheless found that the policy language signaled an intention that flood damage caused during a named storm would not fall under the flood exclusion.

In *Public Service Enterprise Group*, the court chose to follow the reasoning employed in *SEACOR Holdings* and *Pinnacle Entertainment* to find that the damage caused by storm surge would not be subjected to the flood sublimits. The court found support for this position from New Jersey law governing contracts interpretation and from the extrinsic evidence presented by the parties.

Under New Jersey law governing the interpretation of contracts, courts apply the specific-over-general principal, which states that "when two provisions dealing with the same matter are present, the more specific provision controls over the more general." Here, whether the term "storm surge" was included only in the definition of "named windstorm" or in both the definition of "named windstorm" as well as "flood" would have massive coverage implications. Under this approach, the court reasoned the more specific inclusion of "storm surge" in the definition of "named windstorm" should control over the general "flood" definition.

Moreover, the court noted that extrinsic evidence may be considered to determine the meaning of seemingly ambiguous policy language. Where the extrinsic evidence suggested that underwriters for the insurers did not expect or intend the flood sublimit to apply to damage caused by storm surge, the court found further support for its conclusion that storm surge losses were not subject to flood sublimits.

Lastly, the court looked to New Jersey's Efficient Proximate Cause Doctrine to find that the full limits of coverage applied. That doctrine states that "in situations in which multiple events, one of which is covered, occur sequentially in a chain of causation to produce a loss… the loss is covered if a covered cause starts or ends the sequence of events leading to the loss." In the case of storm surge, the court reasoned that wind, a covered cause of loss, would necessarily have had to have started the chain of events that leads to damage.

The decision, if followed by other courts, could have large implications for the many hotly contested coverage disputes arising in the aftermath of Superstorm Sandy. As we continue to follow these important decisions, we will be sure to keep you as up to date as possible.

NEW RHODE ISLAND OFFICE

We are pleased to announce that effective June 1, 2015, Sloane and Walsh will be opening a new Rhode Island office at 652 George Washington Highway, Suite 302 in Lincoln, Rhode Island 02865.

SLOANE AND WALSH LLP
ATTORNEYS AT LAW
THREE CENTER PLAZA
BOSTON, MA 02108
T: 617-523-6010
F: 617-227-0927
WWW.SLOANEWALSH.COM

RHODE ISLAND OFFICE:
Effective June 1, 2015
652 GEORGE WASHINGTON HIGHWAY
SUITE 302
LINCOLN, RI 02865
T: 401-490-9987

CONNECTICUT OFFICE
100 PEARL STREET, 14TH FLOOR
HARTFORD, CT 06103
T: 860-249-758

NEW HAMPSHIRE OFFICE
1 TARA BOULEVARD, SUITE 200
NASHUA, NH 03062
T: 603-324-7134