UPDATES FROM THE INSURANCE DOCKETS

NEW YORK

No Coverage Under Collapse Provision Where Building Was Still Standing

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An appellate court in New York recently held that a collapse provision in a homeowners insurance policy did not cover damage to exterior posts supporting a deck containing hidden decay and rot because the insureds' home had not yet collapsed due to decay and rot pursuant to the policy's definition of "collapse." *See Squairs v. Safeco National Ins. Co.*, 2016 WL 534016, *1 (N.Y. App. Div. 4th Dep't Feb. 11, 2016).

In *Squairs*, Insureds filed a claim on their homeowners policy after four exterior posts supporting a deck were damaged by hidden decay and rot. *Id*. The deck was structurally integrated into the second floor of the home. *Id*.

The policy provided coverage for "collapse of a building or part of a building." *Id*. The policy defined "collapse" as "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purposes." *Id*.

However, the policy excluded coverage for "wear and tear," "wet or dry rot" and "settling" or "cracking" of foundations, patios, walls, floors, roofs and ceilings. *Id*. The policy provided that a "building or any part of a building that is in danger of falling down or caving in is not considered to be in the state of collapse." *Id*. The policy further provided that a "building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion." *Id*.

The court reasoned that the policy did not afford coverage because the insureds' home did not "collapse" as there was no "abrupt falling down or caving in" pursuant to the unambiguous language of the policy. *Id*. The court continued by stating that even if the rot caused the home to be in a state of "imminent collapse," the policy would not cover the loss as the building had not yet collapsed. *Id*. Accordingly, the court dismissed the insureds' complaint. *Id*.

CONNECTICUT

Provision Excluding Coverage for Bodily Injury to Named Insured Must Be Set Forth in Separate Endorsement as Required by Statute

The Connecticut Supreme Court recently held that a Connecticut statute bars automobile liability insurers from excluding coverage for personal injuries caused to a named insured unless the exclusion is set forth in a separate endorsement. *See Dairyland Ins. Co. v. Mitchell*, 320 Conn. 206, 206-07 (2016).

In *Dairyland Ins. Co.*, an insured died in a motor vehicle accident as a passenger in his own insured vehicle. *Id*. at 207. The insured's estate filed a wrongful death action against the driver, who was covered as a permissive driver under the decedent-insured's policy. *Id*.

The insurer then filed a declaratory judgment action seeking a ruling that the policy did not provide coverage because exclusion 11 of the

policy precluded coverage for claims of bodily injury to a named insured. *Id*. at 208. The insured's estate conceded that the language of exclusion 11 precluded coverage. However, the insured's estate argued that the exclusion violated Connecticut law because the exclusion was located within the body of the policy, not in a separate endorsement. *Id*. at 208-10. Specifically, C.G.S. § 38a-335(d) requires that "[w]ith respect to the insured motor vehicle, the coverage afforded under the bodily injury liability and property damage liability provisions in any such policy shall apply to the named insured and relatives residing in such insured's household unless any such person is specifically excluded by endorsement." *Dairyland Ins. Co.*, 320 Conn. at 211; C.G.S. § 38a-335(d).

The insurer argued that the exclusion complied with the statute because it "unambiguously disallowed liability coverage" and it would be "illogical" to conclude that the exclusion was "invalid simply because it was a part of the original terms of the policy rather than set forth in an amendatory endorsement." *Dairyland Ins. Co.*, 320 Conn. at 209.

The court disagreed with the insurer's argument that "the exclusion's clarity excuses it from the statutory requirement that it be set forth in an endorsement." *Id*. at 213. Moreover, the court notes that "[p]resumably, the legislature considered exclusions such as exclusion 11 to be counterintuitive to the lay consumer of insurance and, therefore, required them to be set forth in a conspicuous fashion." *Id*. Accordingly, exclusion 11 was void because it was not set forth in an endorsement as clearly and unambiguously required by statute. *Id*. at 207.

NEW JERSEY

Demonstration of Appreciable Prejudice Not Necessary For Insured's Breach of Notice Provision of "Claims Made" Policy

The Supreme Court of New Jersey recently held that an insurer of a "claims made" policy can disclaim coverage when the insured fails to comply with the policy's notice provision and that an insurer need not demonstrate appreciable prejudice. *See Templo Fuente De Vida Corp. v. National Union Fire Ins. Co. of Pittsburg*, No. A-18, 2016 WL 529602, *11 (N.J. Feb. 11, 2016).

In *Templo Fuente De Vida Corp.*, the insured was a defendant in an underlying suit stemming from a real estate and financing transaction. *Id*. at *1. As part of the settlement agreement, the insured assigned the plaintiffs its rights and interests under a "claims made" policy with National Union Fire Insurance Company of Pittsburg. *Id*. at *2. The policy contained notice provisions, which required, *inter alia*, that the insured provide National Union with notice of claims "as soon as practicable." *Id*. National Union denied coverage of the claim because the insured did not provide National Union with notice of the claim until six months after the underlying action was filed and after the insured retained counsel and filed an answer. *Id*. The plaintiffs then initiated a declaratory judgment action against National Union seeking coverage under the policy. *Id*.

In reaching its decision, the court discussed how notice provisions play a distinctive role in "claims made" policies as opposed to "occurrence" policies, because, in "claims made" policies, the claim itself is the peril insured against. *Id*.

at *5. Particularly, the Supreme Court of New Jersey had previously acknowledged that notice provisions in "occurrence" policies "are written 'to aid the insurance carrier in investigating, settling, and defending claims.'" *Id. quoting Zuckerman v. National Union Fire Insurance Co.*, 100 N.J. 300, 323 495 A.2d 395 (1985). On the other hand, "'claims made' policies commonly require that the claim be made and reported within the policy period, thereby providing a fixed date after which the insurance company will not be subject to liability under the policy." *Templo Fuente De Vida Corp.*, 2016 WL 529602 at *6.

The court previously held that, relative to occurrence policies such as an automotive policy, an insurer must prove both a breach of the notice provision and a likelihood of appreciable prejudice. *Templo Fuente De Vida Corp.*, 2016 WL 529602 at *7; *Cooper v. Government Employees Insurance Co.*, 51 N.J. 86, 94, 237 A.2d 870 (1968). That holding was premised on the reasoning that, because occurrence policies are adhesion contracts, it would be against public policy to require strict compliance with notice requirements absent appreciable prejudice. *Id.* Notably, the court previously declined to extend the requirement of appreciable prejudice to "claims made" policies where the policy expired. *Templo Fuente De Vida Corp.*, 2016 WL 529602 at *7; *Zuckerman*, 100 N.K. at 322-24. Here, however, the insured provided notice within the policy period. *Templo Fuente De Vida Corp.*, 2016 WL 529602 at *9.

The Supreme Court of New Jersey declined to "make a sweeping statement about the strictness of enforcing the 'as soon as practicable' notice requirement in 'claims made' policies generally." *Id.* However, the court nonetheless enforced the notice requirement as the insurance contract was entered into between two "sophisticated business entities." *Id.* at *11. Further, because the policy conformed to the objectively reasonable expectations of the insured, the requirement did not violate public policy. *Id.* Therefore, National Union was not required to demonstrate appreciable prejudice in addition to the insured's breach of the bargained for policy. *Id.*

MINNESOTA

Trier of Fact Permitted to Consider Embedded-Labor-Cost Depreciation When Calculating ACV

The Minnesota Supreme Court recently held that the trier of fact is permitted to consider embedded-labor-cost depreciation when calculating "actual cash value" when "actual cash value" is not defined in a homeowners insurance policy. *See Wilcox v. State Farm Fire and Cas. Co.*, No. A15-0724, 2016 WL 516707, *3 (Minn. Feb. 10, 2016).

In *Wilcox*, the insureds filed a claim on their homeowners insurance policy with State Farm following hail damage to their home. *Id.* at *2. In calculating the actual cash value of the damages, State Farm calculated the removal and replacement costs of the siding as a single cost, then depreciated it as a whole. *Id.* In doing so, State Farm depreciated the embedded labor costs. *Id.*

The insureds brought a putative class action in the United States District Court for the District of Minnesota alleging breach of contract. *Id*. The policy did not define "actual cash value." *Id*. at *1. Accordingly, the District Court certified a question to the Minnesota Supreme Court inquiring whether a trier of fact may consider labor-cost depreciation when determining "actual cash value" if the policy not does define "actual cash value" and the estimated cost to repair or replace the damage property includes both materials and embedded labor components. *Id*. at *3.

The court answered in the affirmative. *Id*. The court held that the term "actual cash value" is not ambiguous, rather it is a "legal term of art that refers to the 'actual loss' sustained by the insured." *Id*. Minnesota employs the "flexible" broad evidence rule to calculate "actual cash value," which allows the trier of fact to consider "every circumstance which would logically tend to the formation of a correct estimate of the loss." *Id*. at *4.

However, the Minnesota Supreme Court had previously never addressed whether labor is depreciable under the broad evidence rule. *Id*. The court declined to rule whether depreciated embedded-labor-costs is logical or helpful when determining "actual cash value." *Id*. However, the court reasoned that depreciated embedded labor costs are not so illogical that they may never be considered. *Id*. Rather, such is a question of fact as its relevance depends on the facts and circumstances of the particular case. *Id*. Accordingly, the court held that a trier of fact *may consider* embedded-labor-cost depreciation when calculating "actual cost value," but it is only one of many factors to be considered. *Id*. at *5.

Appraisal Award Not Subject to Prejudgment Interest

An appellate court in Minnesota recently held that an insured was not entitled to prejudgment interest on an appraisal award made pursuant to the terms of the policy without an underlying breach of contract or other actionable wrongdoing. *See Poehler v. Cincinnati Ins. Co.*, No. A15-0958, 2016 WL 281381, *1 (Minn. Ct. App. Jan 15, 2016).

In *Poehler*, an insured was awarded additional damages at an appraisal hearing following a loss to his home by fire. *Id*. The insured then filed an action seeking, *inter alia*, preaward interest under the Minnesota prejudgment interest statute. *Id*.

The court first acknowledged that Minnesota law requires policies to contain certain appraisal provisions. *Id*. at *3. The subject-policy's appraisal provision complied with the statutory requirement, and, in fact, it was more favorable to the insured than required by law. *Id*. The court then reasoned that since the insurer complied with the appraisal statute and appraisal provision in the policy, there was no breach of contract or other actionable wrongdoing. *Id*.

Minnesota's prejudgment interest statute provides for interest on pecuniary damages, but it excludes damages that are noncompensatory. *Poehler*, 2016 WL 281381 at *3; Minn. State. § 549.09 (1)(b). However, since the insurer did not breach the contract, the appraisal award was not a pecuniary damage under the statute. *Poehler*, 2016 WL 281381 at *3. Rather, the award was simply a payment made pursuant to a written contract. *Id*. at *4. Accordingly, the insured was not entitled to interest. *Id*.

PENNSYLVANIA

<u>"Surface Water" Exclusion Includes Man-Made Sources</u>

A federal district court in Pennsylvania recently dismissed an insured's claim against its insurer finding that the policy's "surface water" exclusion applied to man-made sources in additional to natural sources. *See Citi Gas Convenience, Inc. v. Utica Mutual Ins. Co.*, 2016, No. 15-6691, WL 492474, *4 (E.D. Penn. Feb. 9, 2016).

In *Citi Gas Convenience*, an insured filed a claim against its insurer after it sustained damage resulting from a water main break. *Id*. at *1. The insurer denied the claim and the insured filed a breach of contract action. *Id*.

The policy excluded coverage for "surface water," but it failed to define "surface water." *Id*. at *3. Therefore, as the court noted, the case hinged on the definition of "surface water." *Id*.

The insured argued that that the "plain and ordinary" definition of "surface water" is water from naturals sources, pursuant to the definitions of "surface water" in four dictionaries. *Id*. However, the policy language stated that "[t]his exclusion applies regardless of whether any of the above in Paragraph 1. through 5. is caused by an act of nature or is otherwise caused." *Id*. Accordingly, the court dismissed the complaint reasoning that the plain language of the policy, particularly the phrase "otherwise caused," excluded surface water from man-made sources, such as water main breaks. *Id*. at *4.

CALIFORNIA

<u>Excess Policy Does Not Cover UM/UIM Claims</u>

An appellate court in California recently ruled that an excess liability insurance policy that "follows form" to an underlying policy need not also afford uninsured motorist and underinsured motorist coverage when the excess liability policy unambiguously limits the insurer's indemnity obligation to third-party liability claims. *See Haering v. Topa Insurance Company*, No. B260235, 2016 WL 409532, *1 (Cal. Ct. App. Feb. 3, 2016).

In *Haering*, the plaintiff was injured in a motor vehicle accident. The plaintiff settled with the negligent driver for the driver's policy limit of $25,000. *Id*. at *2. The plaintiff then recovered the $1 million policy limit under the UM/UIM endorsement of his own policy. *Id*. The plaintiff then submitted a claim for $1 million under his excess policy. *Id*. The excess insurer denied the claim, asserting that the policy limited coverage to third-party liability and precluded coverage for UM/UIM claims. *Id*.

The excess policy was a "following form" policy that incorporated by reference the terms and conditions of the underlying primary policy. *Id*. at *4. However, the policy lacked an "broad as primary" endorsement which expressly enlarges the scope of coverage of the excess policy to that of the primary policy. *Id*. at *5. The excess policy also expressly limited the coverage to "losses for which the insured is liable," thereby limiting the coverage to third-party claims. *Id*.

The court reasoned that any inconsistency or conflict between the provisions of a "following form" excess policy and the provision of an underlying primary policy is resolved by applying the provisions of

the excess policy. *Id*. at *4. Accordingly, since UM/UIM claims are first-party and not third-party claims, the excess policy afforded no coverage. *Id*. at *5.

MARYLAND

Summary Judgment Granted Against Insurer In Subrogation Action After Insurer Demolished Property Before Defendant Inspected

An appeals court in Maryland recently affirmed the grant of a defendant's motion for summary judgment on an insurer's subrogation action where the insurer demolished the insured property thereby preventing the defendant from assessing the cause and origin of a fire. *See Cumberland Ins. Group v. Delmarva Power*, No. 72, 2016 WL 385209, *1 (Md. Ct. Special App. Feb. 1, 2016).

In *Cumberland Ins. Group*, The matter arouse from a loss by fire to an insured's home. The State Fire Marshal investigated the fire and concluded that the fire originated in the meter box. As a result, he removed the meter box from the scene to preserve the evidence. *Id*. at *1.

The insurer retained cause and origin and electrical engineer experts to investigate the loss. *Id*. Following an inspection of the home and meter box, the experts also concluded that the fire originated in the area of the meter box. *Id*.

The insurer then filed a subrogation action against Delmarva, Power, the insured's electric company. *Id*. Prior to the suit, Delmarva sent a lineman to disconnect the power supply in the house. *Id*. However, Delmarva never sent any personnel to inspect the property. *Id*. The insurer demolished the property on June 3, 2013. *Id*.

Delmarva moved for summary judgment on the grounds that the insurer destroyed the fire scene and irreversibly crippled Delmarva's ability to mount a meaningful defense. *Id*. at *2. The insurer controlled the fire scene and informed Delmarva for the purpose of pursuing its subrogation claim, but the insurer never told Delmarva of the scene's impending destruction. *Id*.

The insurer argued that its case centered on the preserved meter box. *Id*. at *8. However, the court held that the insurer deprived Delmarva of any opportunity to look to other possible causes of the fire or obtain evidence to rebut the insurer's theory because the insurer destroyed the scene. *Id*. at *10. As a result, the appellate court affirmed the lower court's grant of Delmarva's motion for summary judgment. *Id*.

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