NATIONAL UPDATE FROM THE COURTS:

SUBROGATION

Defendants' Negligent Design and Construction Were Not the Cause of the Collapse of 7 World Trade Center on September 11, 2001

In Aegis Ins. Servs., Inc. v. 7 World Trade Co., 737 F.3d 166 (2d Cir. 2013), the United States Court of Appeals for the Second Circuit affirmed the district court's dismissal of the plaintiffs' complaint, holding that the alleged negligent design and construction of 7 World Trade Center were not the cause of its collapse following the events of September 11, 2001.

In 1970, plaintiff, Consolidated Edison Company (Con Ed), built a substation on the grounds of 7 World Trade Center to provide electric power to the World Trade Center complex. In 1980, the defendants constructed 7 World Trade Center above the substation.

On September 11, 2011, Towers One and Two of the World Trade Center collapsed after Al Qaeda terrorists crashed two planes into the buildings. As a result of the collapse of the Twin Towers, flaming debris disbursed throughout the entire World Trade Center complex causing devastating structural damage and other fires to the surrounding buildings. Many of these fires went unattended as the New York City Fire Department (NYFD) focused its efforts on rescuing those trapped in the Twin Towers. Although World Trade Center 3, 4, 5, and 6 sustained significant damage, only 7 World Trade Center experienced a complete collapse.

Prior to its collapse, 7 World Trade Center burned unattended for seven hours as NYFD created a collapse zone around the building. NYFD explained that the collapse of the Twin Towers destroyed the water main that normally brought water to 7 World Trade Center. In addition, during this time period, NYFD officials consulted with structural engineers who informed them that 7 World Trade Center would collapse. Provided with this information, NYFD officials calculated that it was not worth risking the lives of additional firefighters in an attempt to save the building.

When 7 World Trade Center collapsed, it crushed Con Ed's substation. As a result, Con Ed and its insurers, as subrogees, sued the designers and operators of 7 World Trade Center in federal district court under theories of negligent design and construction of the building. The district court dismissed the plaintiffs' complaint finding that the defendants' duty to the plaintiffs did not encompass the unforeseeable events of September 11.

On appeal, the Second Circuit affirmed the lower court's determination on different grounds. The Second Circuit reasoned that the district court erred because a massive fire at 7 World Trade Center was a foreseeable risk. The court explained that the issue of how the fire originated played no part in the foreseeability analysis when determining whether the defendants owed a duty to the plaintiffs. However, on the issue of causation, the court explained that the plaintiffs could not establish a causal connection between the destruction of the substation and the defendants' alleged negligent design and construction of 7 World Trade Center. The court highlighted that although courts generally focus on a proximate cause analysis when determining whether an individual's actions are a substantial factor in a plaintiff's injury, the general rule remains that a plaintiff must still prove that the defendant's acts factually caused the plaintiff's injury. In this instance, the court reasoned that the plaintiffs' expert reports were too speculative and failed to adequately address the interaction between the identified vulnerabilities in the design and construction of 7 World Trade Center and the unprecedented set of causal factors that set forth the events of September 11. Accordingly, the Second Circuit upheld the dismissal of the plaintiffs' complaint because it was "simply incompatible with common sense and experience to hold that defendants were required to design and construct a building that would survive the events of September 11, 2001."

APPRAISAL

Appraisal Panel has Authority to Interpret Policy Provisions When Determining Damages

In Cedar Bluff Townhome Condo. Assoc., Inc. v. Am. Family Mut. Ins. Co., 2013 WL 6223454 (Minn. Ct. App. Dec. 2, 2013), the Minnesota Court of Appeals held that an appraisal panel was within its authority when considering the meaning of policy language to determine the amount of damage covered under an insurance policy.

Plaintiff, Cedar Bluff Townhome Condominium Association, Inc. (Cedar Bluff), is a townhome association that experienced storm damage to the exterior siding on its buildings. Defendant, American Family Mutual Insurance Company (American), was Cedar Bluff's insurer. The American insurance policy obligated it to "[r]epair, rebuild or replace the property with other property of like kind and quality." The policy defined replacement property as property "of comparable material and quality." The policy also provided that if American and the insured could not agree on the amount of loss incurred, either party could demand an appraisal of the loss.

When adjusting the claim, American proposed replacing the damaged siding with the closest color manufactured in an attempt to match the non-damaged siding. Cedar Bluff, however, demanded that all the siding be replaced so that the buildings matched. As a result of this dispute, the parties submitted to an appraisal. Finding that replacement of the damaged siding alone was not a repair or replacement with comparable materials of like kind and quality because the siding would not match, the appraisal panel concluded that the loss consisted of the cost of replacing all of the siding.

In affirming the appraisal award, the Minnesota Court of Appeals explained that the scope of an appraiser's power is limited to determining damage questions. In contrast, liability questions are reserved for the court. Although the determination of where this line is drawn may be difficult, an appraiser maintains the ability to determine more than the mere value of property. The court explained that an appraiser has authority to consider the meaning of the phrases "replace . . . with other property of like kind and quality" and "replace . . . with other property . . . [o]f comparable material and quality" when determining the value of the loss.

Additionally, the court explained that the policy provisions in question: "of like kind and quality" and "of comparable material and quality" were ambiguous. Accordingly, the court resolved the ambiguity in Cedar Bluff's favor, holding that replacement material of the same color was reasonable and required under the policy.

INTENTIONAL LOSS EXCLUSION

Innocent Co-Insured Doctrine Does Not Apply Where Policy Explicitly Excludes Loss Resulting From Co-Insured's Act

In Deeter v. Indiana Farmers Mut. Ins. Co., 2013 WL 6252421 (Ind. Ct. App. Dec. 4, 2013), the Indiana Court of Appeals held that the innocent co-insured doctrine is inapplicable when a policy explicitly excludes loss resulting from an intentional act by a co-insured.

Defendant, Indiana Farmers Mutual Insurance Company (Farmers), insured a home owned by Callie and Rick Deeter. The policy contained an exclusion for intentional acts committed by an insured with the intent to cause a loss. Both Callie and Rick Deeter were listed as insureds on the policy.

During the policy period, Callie Deeter intentionally set fire to the house. After the fire, Rick Deeter pursued a claim under the policy and Farmers refused to pay, referencing the intentional loss exclusion.

The court affirmed the order granting Farmer's motion for summary judgment. The court reasoned that it was clear both Callie and Rick Deeter were listed as insureds on the policy, the policy excluded loss resulting from an intentional act of an insured, and Callie Deeter intentionally set

fire to the home. Accordingly, the policy language justified Farmers' denial of Rick Deeter's claim.

INSURANCE PROCEEDS IN BANKRUPTCY

Bankruptcy Judge Calls for Legislative Attention to Insured's Plight in Massachusetts While Simultaneously Denying Insured's Claim for Exemption of Insurance Proceeds

In In re Plant, No. 13-13607-WCH (Bankr. D. Mass. Dec. 30, 2013), the Eastern Division of the United States Bankruptcy Court for the District of Massachusetts denied a bankrupt individual's claim that the proceeds of her homeowner's insurance policy, earmarked to replace personal property, should be exempt from the proceedings.

The bankrupt, Eileen Plant (Ms. Plant), owned a primary residence in Massachusetts that was in active foreclosure proceedings. A homeowner's insurance policy issued by Arbella Mutual Insurance Company (Arbella) covered both the residence and the contents of the residence. On March 23, 2013, a fire destroyed Ms. Plant's residence and the contents within. Ms. Plant made a claim under her homeowner's policy and Arbella paid the claim. Subsequent to this payout, Ms. Plant filed a Chapter 13 petition and claimed the insurance proceeds as an exemption under Massachusetts law.

The bankruptcy court denied Ms. Plant's exemption claim, explaining that it could not use its equitable powers to redraft the General Exemption Statute, Mass. Gen. Laws ch. 235, § 34. The court reasoned that although a debtor can claim exemptions under applicable state law, the Massachusetts General Exemption Statute did not expressly protect insurance proceeds, nor allow them to be substituted for any of the specified personal property exemptions. Due to the omission of insurance proceeds from the statutory language, the court further reasoned that it was unlikely that the Massachusetts legislature intended insurance proceeds to be protected because of the long established tradition in Massachusetts that insurance proceeds do not represent damaged property and both the Homestead Statute, Mass. Gen. Laws ch. 188, and the General Exemption Statute had recently been amended without adopting the concept of earmarking insurance proceeds, despite the Legislature's awareness of the issue.

In dicta, the court called on the legislature to address the gap in the Massachusetts exemption statute to provide for the protection of insurance proceeds in the future.

STATUTORY UPDATE

ADJUSTERS

New York Public Adjusters Beware: New Statutory Duty to Work for the Benefit of the Insured and Disclosure Requirements

Effective January 1, 2014, public adjusters in New York are now statutorily mandated to work in the best interests of the insured who has retained their services. Act of Dec. 18, 2013, 2013 N.Y. Laws 546. Enacted to combat a perceived trend of adjusters acting in their own interests, resulting in insureds not receiving the best offers to settle their claims, the Act additionally establishes clear conflict of interest standards and disclosure requirements.

When a public adjuster refers an insured to an entity or individual, the public adjuster must now "*prominently and clearly*" disclose the following in the contract with the insured:

- Any compensation the adjuster will receive for the referral;
- Any ownership/financial interest in the entity; and/or
- Any close familial relationships with the owner of the entity, including a spouse, child, grandchild, sibling, parent or grandparent.

Failure to comply with the requirements of the Act may result in suspension or revocation of the adjuster's license and possibly civil liability.

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