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Insurance Coverage Case Law Update

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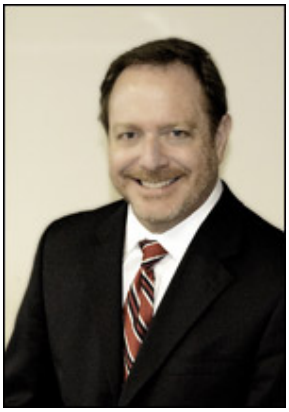

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Warranties and Personal Property in Inland Marine Terminal Coverage

W.W. Rowland Trucking Co., Inc. v. CRC Ins. Services, Inc., et al., 12-91 (S.D. Tex. January 13, 2013)

W. W. Rowland Trucking Co., Inc. ("Rowland") purchased terminal coverage from Alterra Insurance Company ("Alterra'). One night, thieves stole a truck containing $354,000 in cargo from one of Rowland's terminals. Fencing was down in several areas. The thieves ignored those gaps, although they created their own large hole in the fence as an escape route. Rowland filed a theft insurance claim with Alterra under its terminal coverage.

Alterra denied coverage, making two separate arguments. First, Alterra cited policy language that voided coverage if W.W. Rowland breached its warranty to keep all truck terminals "100% fenced." There was no dispute that the gaps in the fence constituted a breach of that provision. However, Texas has a number of "antitechnicality statutes", designed to prohibit technical policy violations by an insured interfere with coverage. One such article is Tex. Ins. Code Ann. Art 862.054 (West 2009), which reads:

> Sec. 862.054. Fire Insurance: Breach by Insured; Personal Property Coverage.
>
> Unless the breach or violation contributed to cause the destruction of the property, a breach or violation by the insured of a warranty, condition, or provision of a fire insurance policy or contract of insurance on personal property, or of an application for the policy or contract:
>
> (1) does not render the policy or contract void; and
> (2) is not a defense to a suit for loss.

As a result Rowland argued that a warranty cannot void a policy on *personal property* unless the violation of warranty contributes to the loss. The court held here that under the statute the existing gaps in the fence at the time of the theft did not contribute to the loss because the thieves did not use the existing gaps to commit the theft.

Second, Alterra argued that the cargo was not "personal property" under the "antitechnicality statute". As "personal property" meant property *owned* by the insured. Because Rowland was merely a bailee in charge of the cargo, the antitechnicality statute provision did not apply. The court disagreed, holding that the phrase

"personal property" was meant to contrast with *real* property and had nothing to do with ownership. The court reasoned that because owners may hold bailees accountable for property loss, bailees presumptively have the same recovery rights as owners. Therefore, the antitechnicality statute did apply to allow coverage.

Jamestown Ins. Co., RRG, v. Reeder, No. 12-20437, slip op. (5th Cir. Jan. 17, 2013)

Policy
Wendell Reeder had a CGL policy with Jamestown Insurance Co. ("Jamestown"). The policy provided defense and indemnity coverage for harm arising from an "occurrence." The policy defined and *occurrence* as an "accident." The policy also required Reeder to notify Jamestown of an occurrence as soon as practicable and to send it any legal papers immediately.

First Underlying Lawsuit
In 2004, Reeder sued his business partners in Wood County. Reeder was countersued. Reeder lost, but counterclaims filed by his business partners' counterclaim were successful. Reeder then appealed the case to the Texas Supreme Court. The Supreme Court reversed and rendered a take nothing judgment as to the business partners' counterclaims, leaving no party with a judgment against the other.

Second Underlying Lawsuit
Meanwhile, some Reeder-affiliated entities sued several of the Wood County defendants in a suit in Red River County. The defendants filed counterclaims alleging that Reeder had fraudulently transferred property to avoid paying the Wood County judgment.

Tender of Both Lawsuits
In November 2010, Reeder tendered both suits to Jamestown claiming a duty to defend and indemnify in both underlying cases. Jamestown filed a declaratory judgment action to establish that it had no such duties. The District Court ruled in Jamestown's favor, and the 5th Circuit affirmed.

Disposal of First Lawsuit
Under Texas law, an insured's breach of contract forgives a carrier's duties *only if* the carrier was prejudiced. The court held that the delay by Reeder of 56 months after filing of the first counterclaim and 31 months following final judgment was a breach of the duty to notify Jamestown as a matter of law. Further, the 5th Circuit reasoned that Jamestown was prejudiced by the delay. Even though the notification had occurred before the judgment was final and nonappealable, the late notice precluded any liability on the part of Jamestown for defense costs. Noting that the purpose of the notice provision was to allow an insurer to form an intelligent estimate of its rights and liabilities before it is obligated to pay, the late notice precluded Jamestown from deciding whether because it could have mounted a defense or arranged a reasonable settlement in the case- possibly for less than defense costs. Further, Jamestown had no duty to indemnify. Because the Supreme Court had overturned the counterclaim against Reeder, there was "nothing to…indemnify."

Disposal of Second Lawsuit
In this case the sole allegation of the counterclaim was for intentionally initiating a fraudulent-transfer by Reeder. As the act complained of was intentional, there was no duty to defend. While in Texas the duty to indemnify is separate from the duty to defend, and a determination of duty to indemnify should in many cases be deferred until after development of the facts in the underlying case, if it is impossible for facts elicited in the underlying case to provide coverage, a decision in favor of the insurer is appropriate. As the court noted, "no fact developed in the underlying suit can transform intentional conduct into an accident."

Conclusion – No Duty of Defense/Indemnity in Either Suit

KNOWLEDGE OF EVENT AND IMPUTATION OF KNOWLEDGE, CLAIMS MADE POLICY, PRIOR KNOWLEDGE

***Arboretum Nursing and Rehabilitation Center of Winnie, Inc. v. Homeland Ins. Co. of New York*, 10-69, (S.D. Tex. Dec. 11, 2012)**

In 2006, Hennring Thomsen ("Thomsen") a patient at Arboretum Nursing and Rehabilitation Center of Winnie, Inc.'s ("Arboretum") nursing home was hospitalized after a fellow patient struck him. Weeks later, he was hospitalized again because he began falling. Shortly after that, Thomsen became very aggressive. After a change in medication did not make him less aggressive, Arboretum decided to transfer Thomsen to another facility. Thomsen's family fought the transfer vigorously, even involving the president of Arboretum, Byron M. Burris II. Despite this, Thomsen was finally transferred to another nursing home, where he soon died.

On February 2, 2007, Arboretum bought a Claims Made and Reported Policy from Homeland Ins. Co. of N.Y. ("Homeland") that was retroactive to 1999 so long as claims were first made between the inception of the policy and February 2, 2008. The policy included a Prior Knowledge Exclusion, which denied coverage to any possible claim Arboretum knew or should have known about. The policy also included an Imputation of Knowledge Clause providing that "[n]o knowledge or information possessed by any Insured shall be imputed to any other Insured, except for material facts or information known to the person or persons who signed the [Policy] Application."

On January 4, 2008, the administrator of Thomsen's estate sued Arboretum blaming Thomsen's death on Arboretum's negligent care and treatment of Thomsen.

Arboretum filed a claim with Homeland for defense and indemnity, and Homeland denied. Arboretum settled the underlying case out of court. Arboretum sued Homeland. Both Arboretum and Homeland filed motions for summary judgment. Homeland claimed that Arboretum knew or should have known about Mr. Thompson's claim, so that the Prior Knowledge Exclusion eliminated coverage as a matter of law.

Applying the "eight corners" rule, the Court determined that the pleadings included ample facts to trigger coverage, and the pleadings did not include enough facts to invoke the Prior Knowledge Exclusion. Relying heavily on the Imputed Knowledge Clause, the Court reasoned that the Prior Knowledge Exemption could not be properly invoked unless the *signatory on the policy application* "knew, had been told, or should have known" about a possible claim. It was not enough that many other Arboretum employees had such knowledge. Arboretum's only policy application signatory was Arboretum's president, Mr. Burris. Thomsen estate's pleadings never mention Mr. Burris—much less his knowledge of a possible claim. The Prior Knowledge Exemption could not be invoked, and Homeland had a duty to defend Arboretum as a matter of law.

Homeland also attempted to rely on the Prior Knowledge Exemption to claim that it had no duty to *indemnify* Arboretum as a matter of law. Unlike the duty to defend, the duty to indemnify is determined by the facts as they are developed in the underlying case. Arboretum settled its case with the Thomsen estate before trial, so the court had to deal with facts developed in discovery. The evidence showed that the application signator Mr. Burris was aware of some of the facts involved in the claim, including a meeting about Mr. Thomsen's aggressive behavior which resulted in his discharge. However, there was nothing definite as to whether Mr. Burris knew, was told, or should have known about the facts giving rise to the estate's allegations of assault and neglect resulting in his death. Even though Arboretum reported the incidents to the police and a state agency and conducted an internal "peer" review of the incidents, the Court held that it could not find, as a matter of law, that Mr. Burris knew, was told, or should have known of the incidents purportedly leading to Mr. Burris death. While Homeland contended that there were a number of post discharge incidents which should have given rise to knowledge of the claim, including requests for medical records, the court found that there were other reasons for those requests which had nothing to do with the claim, and therefore would not have put Arboretum on notice.