UNDERWOOD PERKINS, P.C.

Experienced Attorneys
Trusted Counselors
Since 1971

Insurance Coverage Case Law Update

January, 2013

STEPHEN BLAINE SMITH

Senior Counsel at Underwood Perkins, P.C. practicing in insurance coverage, property liability coverage, common carrier liability and coverage and commercial litigation.

PLAINTIFF'S PETITION MUST CONTAIN FACTS ALLEGING COVERED PROPERTY DAMAGE TO TRIGGER DUTY TO DEFEND

PPI Technology Services, L.P. v. Liberty Mutual Insurance Company, 12-4189 (N. Dist. Tx. November 29, 2012)

The insured claimant, PPI Technology Services, L.P. ("PPI") performed well planning and assisted with overseeing well drilling operations on oil leases. A well it was servicing was drilled on the wrong lease, resulting in a dry hole. PPI was sued by the drilling company and the non-operator working interest owners, and sought defense and indemnity from Liberty Mutual under a CGL policy.

The Federal Court stated there was no duty to defend because Plaintiff's petition did not allege facts sufficient to constitute covered property damage. The petition stated only that PPI's negligence caused "property damage." Absent specific facts of the type or kind of harm alleged, the court held simply stating that property damage occurred, is not in and of itself sufficient to allege property damage based on the facts of this case. There must be some indication from the petition of harm to tangible property. As the only factual allegations were that PPI drilled on the wrong tract, without any additional description of damage, there was no potentially covered property damage alleged in the petition.

LOSS PAYABLE CLAUSE AND EVIDENCE OF INSURANCE ARE INSUFFICIENT TO CREATE AN INSURANCE CONTRACT BETWEEN LANDLORD AND INSURER OF TENANT

Ostrovitz & Gwinn LLC v. First Specialty Ins. Co., 2012WL5986478 (Tex. App. Dallas, November 29, 2012)

This case involved a fire loss to property which the claimant owned and leased to tenant. Although the lessee maintained a policy of insurance, the insurance company denied that there was coverage for the landlord/owner under that policy. The Court examined several arguments made by the landlord in favor of coverage.

Loss Payable Clause

The landlord ("Ostrovitz") was not a named insured, so there was no standing to maintain suit for breach of contract. The Court then reviewed Ostrovitz' claim that it was a third-party beneficiary of the insurance contract between the tenant and First Specialty Ins. Co. ("First Specialty"). Ostrovitz was named as a loss payee in the policy, and the language in the policy stated that First Specialty could negotiate with and pay the owner directly.

After reviewing the lease and looking at Texas and out of state case law, the Court held this language was not specific enough to make the landlord a third-party beneficiary of the policy in question. The court also noted that the out-of-state cases involving similar policy provisions, indicate that the third-party beneficiary relationship was not established solely by a "loss payable" clause.

The policy in question provided as follows:

> For Covered Property in which both you and a Loss Payee shown in the Schedule or in the Declarations have an insurable interest, we will:
>
> 1. Adjust losses with you; and
>
> 2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

Evidence of Insurance

The lease agreement mandated the tenant provide evidence of insurance coverage. Ostrovitz also argued that the "evidence of insurance" clause ("EPI Certificate") also provided the basis for a contract of insurance between it and First Specialty. The court held that the EPI certificate constituted evidence only that an insurance contract existed as specified. It did not create an insurance contract between landlord and First Specialty.

The "evidence of insurance" provision is discussed by the court as follows:

> "The EPI Certificate states at the top, "This is evidence that insurance as identified below has been issued, is in force, and conveys all the rights and privileges afforded under the policy." The certificate has several blanks that have been filled in with typewritten information. For example, the policy involved in this case is identified by policy number and policy period, and the policy period includes the date of the fire involved in this case. "Ostrovits [sic] & Gwinn, LLC" is listed in a box labeled "Additional Interest." There are three small boxes labeled "mortgagee," "loss payee," and "additional insured" respectively; only the loss-payee box is marked with an "X." A box labeled "REMARKS (Including Special Conditions)" contains the following typewritten language:
>
> > $10,000 Loss Limit per Occurrence/Certificate Holder is Loss Payee with respect to their interest as Landlord/Owner in the above locations / 30 day notice of cancellation except 10 days for nonpayment of premium
>
> Another box labeled "CANCELLATION" contains the sentence, "The policy is subject to the premiums, forms, and rules in effect for each policy.

Misrepresentation

The court also dismissed the action under the Deceptive Trade Practices Act and Insurance Code. While the court admitted that portions of the EPI certificate noted above were not clear, given that there incorporated the specific terms of the insurance policy, they could not be held to be misleading.