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INSURANCE LAW BLOG

September 14, 2020

Fifth Circuit Holds Insurer Owes Duty to Defend Latent Condition Claim That Caused Fire Damage to Property Years After Construction Work

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Most general liability policies only provide coverage for "property damage" that occurs during the policy period. Thus, when analyzing coverage for a construction defect claim, it is important to ascertain the date on which damage occurred. Of course, the plaintiffs' bar crafts pleadings to be purposefully vague as to the date (or period) of damage to property. A recent Fifth Circuit decision applying Texas law addresses this coverage issue in the context of allegations of a condition created by an insured during the policy period that caused damage after the policy expired.

In *Gonzalez v. Mid-Continent Cas. Co.*, 969 F.3d 554 (5th Cir. 2020), Gilbert Gonzales (the insured) was a siding contractor. In 2013, the underlying plaintiff hired Gonzales to install new siding on his house. In 2016, the underlying plaintiff's house was damaged in a fire. The underlying plaintiff sued Gilbert in Texas state court alleging that when Gonzalez installed the siding in 2013, he hammered nails through electrical wiring and created a dangerous condition that caused a fire three years later in 2016.

At the time Gilbert performed construction work, he was insured by Mid-Continent Casualty Company. Mid-Continent disclaimed coverage to Gonzales on the basis that the complaint unequivocally alleged that property was damaged in 2016 and there were no allegations that property damage occurred prior to 2016 or was continuing in nature.

The Fifth Circuit started its analysis by acknowledging Texas' strict eight-corners rule for determining an insurer's duty to defend. Relying on prior Texas and Fifth Circuit decisions (*Don's Building Supply, Inc. v. OneBeacon Insurance Co.*, *Wilshire Insurance Co. v. RJT Construction, LLC*, and *VRV Development L.P. v. Mid-Continent Casualty Co.*), the court narrowed its focus to "actual, physical damage alleged in the underlying litigation." The court reasoned, "[i]f the only alleged damage occurred outside of the policy period, then there is no duty to defend. But if *any* of the alleged damage occurred during the policy period, then the duty to defend attaches."

The court held that the underlying lawsuit "plainly alleges physical injury to property that occurred within the policy period." The court identified three reasons for its holding: (1) the underlying complaint stated that the 2016 fire "relates back to [the] construction and/or installation of siding" in 2013, (2) the policy defined "property damage" to include "all resulting loss of use of that property," so damage to the wire includes damage to the entire house, and (3) the underlying plaintiff's claim of damages alleged that "the electrical wires were damaged in 2013."

Judge Catharina Haynes dissented, explaining that she would hold that property damaged occurred after the policy period ended, when the fire broke out in 2016. Judge Haynes agreed that the court is bound by *Don's Building*, *Wilshire*, and *VRV Development*, but she emphasized that those cases also hold that when an underlying plaintiff alleges actual, physical damage due to the insured's negligent conduct, the alleged property damage does not relate back to the time of the negligent act when determining when the property damage occurred. Judge Haynes criticized the majority for focusing on the time of the negligent conduct.

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The *Gonzales* decision highlights the importance of analyzing each allegation in an underlying pleading to determine when any physical injury may have occurred. The dissent also leaves the door open for a different panel of Fifth Circuit judges to distinguish or reverse *Gonzales*.

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