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Texas Federal Court Applies “Default Rule” to Find That Vague Allegations Regarding Dates of Loss Triggers the Duty to Defend

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In the recent case of *Crum & Forster Specialty Ins. Co. v. Chemicals Inc.*, No. CV H-20-3493, 2021 WL 3423111 (S.D. Tex. Aug. 5, 2021), a Texas federal court applied the Texas “default rule” holding that in order to establish an insurer’s duty to defend, an insured need not prove specific date(s) of injury so long as the date(s): (1) could be determined in future proceedings; and (2) could fall within the policy period.

Insured Chemicals, Inc. (Chemicals), was named as a defendant in several hundred lawsuits alleging injuries from exposure to toxic substances in aqueous film-forming foams designed, manufactured, and marketed by several defendants, including Chemicals. The complaints alleged that the exposures occurred during the plaintiffs’ employment as military or civilian firefighters. Chemicals sought coverage and defense for the underlying lawsuits from its commercial general liability insurer, Crum & Forster Specialty Insurance (Crum). Crum insured Chemicals between 2011 and 2019. Crum denied coverage, however, asserting that since the complaints did not allege specific dates of manufacture, sale, exposure, or first manifestations of illness, its duty to defend was not triggered because Plaintiffs could not show that injuries occurred during the effective dates of any Crum policy.

On Crum’s motion for summary judgment, the court sided with Chemicals when it found that Crum owed a duty to defend Chemicals under Texas law. The court applied the Texas “default rule,” which recognizes that “the duty to defend is triggered when the dates of loss are not alleged but could be determined in future proceedings and could fall within the policy period.” This rule creates a presumption in favor of the insured that a “carrier is obligated to defend when the underlying petitions are silent about the time of the damages.” Thus, even though the underlying complaints did not allege the dates on which the plaintiffs sustained injury or damage, the pleadings alleged exposure and injury from work performed sometime during the effective dates of the Crum policies, triggering a duty to defend.

The court also rejected Crum’s argument that the “default rule” did not apply in the face of the following language contained in one or more policies: “If the date cannot be determined upon which such ‘bodily injury’ ... first occurred[,] ... then, ... such ‘bodily injury’... will be deemed to have occurred or existed, ... before the ‘policy period.’” Crum argued that this provision was determinative and prevented the application of the default rule. The court, however, considered the Crum provision to be ambiguous and construed it in favor of the insured. The provision did not, in the court’s view, “unambiguously reserve the right [for Crum] to unilaterally determine whether a date of loss can be determined.” The provision stated only that the date can “be determined,” not who makes the determination, “or that it must be made with no evidence or opportunity to present it.” Thus, the provision could not supplant the “default rule” and Crum owed a duty to defend.