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DICKINSON WRIGHT'S

TENNESSEE INSURANCE **LEGAL**NEWS

TENNESSEE LEGISLATURE PASSES LEGISLATION CHANGING REQUIREMENTS FOR COVERAGE OF SINKHOLE LOSSES

by John E. Anderson, Sr., who is a member in Dickinson Wright's Nashville office, and can be reached at 615.620.1735 or janderson@dickinsonwright.com

The Tennessee Legislature recently reformed the law of sinkhole coverage and sinkhole losses in the State of Tennessee with legislation which became effective July 1, 2014. Under the prior Tennessee law, every insurer offering homeowners' property insurance in the State of Tennessee was required to make available coverage for insurable sinkhole losses on any dwelling, including contents of personal property contained in the dwelling, to the extent provided in the policy to which the sinkhole coverage attached. The interpretation of the term "make available" was subject to differing opinions. Some took the position that the insurers were required to offer sinkhole coverage to their insureds, while others took the position that the law required them to offer coverage if desired. The new legislation was intended to clarify any confusion.

The new legislation provides that every insurer offering homeowner property in the State of Tennessee shall make coverage available for insurable sinkhole losses, including contents of personal property contained in the dwelling. Julie Mix McPeak, Commissioner of the Tennessee Department of Commerce and Insurance, issued a June 12, 2014 Bulletin to clarify any concerns – "The purpose of this Bulletin is to clarify that the Department interprets the 'make available' provision in 56-7-130 to mean that companies may limit the availability of coverage for insurable sinkhole losses to the inception of a policy. . . . The Department interprets the statute to apply that availability to the initial purchase of a policy AND upon the request of a consumer thereafter." (Emphasis added). Clearly, sinkhole coverage is not a mandatory requirement of insurers.

One of the bill's sponsors, Jim Tracy (R-Shelbyville) explained that the new legislation was designed to impose objective standards to verify the cause of the alleged loss due to the existence of fraudulent claims. The new legislation, however, received criticisms from representatives of homeowners, who questioned the extent of fraudulent claims, the impact of this legislation on the ability of homeowners to find affordable insurance coverage, and the need for this new legislation.

The bill sets forth specific investigation requirements upon receipt of a sinkhole claim. The new law requires an inspection of the insured's premises to determine if there has been structural damage to the covered structure. If the insurer concludes that the structural damage

to a covered building is not consistent with sinkhole activity, prior to denying the claim, the insurer must obtain a written certification from a professional engineer, a professional geologist or other qualified individual stating that the sinkhole activity did not cause the alleged structural damage.

Also, the insurer may limit its total claims payout for damages to the covered building. Under the new law, the insurer may limit payment to the actual cash value of the sinkhole loss to the covered building, excluding costs associated with building stabilization or foundation repair, until the policyholder enters into a contract for the performance of building stabilization or foundation repairs in accordance with the recommendations of the engineer retained or approved for the insurer.

Additionally, to be eligible to receive payment for building stabilization or foundation repairs, or any other loss to the covered building in excess of the actual cash value of the sinkhole loss to the covered building, the insured must repair such damage or loss in accordance with the plan of repair approved by the insurer. The new statute provides a detailed procedure for payment of claims.

Finally, the new law provides that an insurer may cancel, decline to renew or decline to issue any homeowner policy insurance on a structure that has been subject to a sinkhole loss claim if the structure:

1. Has not been repaired in accordance with a plan of repair approved by the insurer and within the time constraints set forth therein; or
2. Is subject to the risk of future sinkhole damage because of unstable land.

The new legislation is designed to impose objective standards to assist in the reporting and processing of sinkhole claims. It is a positive step toward accomplishing these goals.

SIXTH CIRCUIT HOLDS THAT PLEADINGS DID NOT ESTABLISH TRUCK DRIVER WAS AN "EMPLOYEE" UNDER INSURANCE POLICY

by Autumn L. Gentry, who is a member in Dickinson Wright's Nashville office, and can be reached at 615.620.1755 or agentry@dickinsonwright.com

In *Gramercy Insurance Co. v. Expeditor's Express, Inc.*, 2104 U.S. App. LEXIS 15262 (6th Cir. Aug. 5, 2014), a truck driver died after the truck he was driving suffered a flat tire, veered off the road, turned over and caught fire. As a result, the driver's estate sued the trucking company, the owner of the truck and others in state court. The trucking company asked its insurance company to defend the lawsuit and indemnify it against any judgment. In response, the insurer filed a declaratory judgment action in federal court to determine whether it had any responsibility for coverage.

The insurance policy did not cover "bodily injury" to any of the trucking company's employees arising out of and in the court of their employment with the trucking company or performing duties related to the conduct of the trucking company's business. The policy defined the term "employee" to include a "leased worker" or a person leased to the trucking company by a labor leasing firm under an agreement between the trucking company and the labor leasing firm, but it did not include a "temporary worker," or a person furnished to the trucking company to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions.

The insurer moved for judgment on the pleadings which consisted of the complaint, the answer, and the insurance policy. The district court granted the insurer's motion, finding that the insurance policy did not apply because the driver was an "employee" of the trucking company.

On appeal, the Sixth Circuit was asked to review the issue of whether the truck driver was actually an "employee" of the trucking company and, therefore, excluded from coverage under the policy issued by the insurer.

According to the pleadings, at the time of the accident, the truck driver was transporting magazines from the Tennessee to Georgia for the trucking company in a truck owned by a third party and leased to the trucking company. However, the pleadings did not answer the central question of whether the truck driver was an "employee" of the trucking company.

To overcome this issue, the insurer pointed to an endorsement which amended the policy to require the insured to comply with Sections 29 and 30 of the Motor Carrier Act of 1980 and its relevant rules and regulations. The insurer argued that by way of this endorsement, the truck driver was an "employee" because the Motor Carrier Act of 1980 includes a broader definition of "employee" that includes any "operator of a commercial motor vehicle" who "directly affects commercial motor vehicle safety in the court of employment" and who is not a government employee.

The Sixth Circuit disagreed, holding that the relevant language of the endorsement did not incorporate the Motor Carrier Act's definition of "employee" into the policy. Rather, the endorsement, instead, acted as a form of extra insurance for the policy. Therefore, if the policy covered less that the Act required, the endorsement amended the policy to comply with the Act. However, here, the policy covered more than the Act required. This is because the policy used a narrower definition of employee than the Act permits. Therefore, the policy covered more people, or in other words, excluded fewer people from coverage. Accordingly, the Sixth Circuit reversed the judgment of the district court and remanded it for further proceedings.

DECLARATORY JUDGMENT ACTION INTERPRETING THE "LAND MOTORIZED VEHICLE" EXCLUSION

by Kelly M. Telfeyan, who is an associate in Dickinson Wright's Nashville office, and can be reached at 615.620.1721 or ktelfeyan@dickinsonwright.com

In *Tennessee Farmers Mutual Insurance Co. v. Simmons*, No. E2013-01419-COA-R30-CV (Tenn. Ct. App. July 15, 2014), the Tennessee Court of Appeals was called upon to interpret a policy of insurance

to determine whether coverage existed for a fatal accident involving a four-wheeler.

In *Simmons,* Tennessee Farmers Mutual Insurance Company ("Tennessee Farmers") filed a declaratory judgment action against Judy Pauline Simmons and her daughter, Lori Beth Simmons Casey, regarding an accident that occurred on April 18, 2010. On that date, Ms. Casey was supervising as her daughter was driving Ryan Casey[1] around her mother's backyard on a four-wheeler. When Ms. Casey went inside the house to get a jacket, Ryan began operating the four-wheeler. Ryan apparently drove the four-wheeler into the road, where it collided with a vehicle driven by Roger Tipton. Ryan was killed in the accident.

Following the accident, Ryan's father, Charles Casey, filed a lawsuit against Ms. Simmons, Ms. Casey, and Mr. Tipton. At the time of the accident, Ms. Simmons' property was insured under a policy issued by Tennessee Farmers. After entering a defense on behalf of Ms. Simmons and Ms. Casey, both of whom were considered "insureds" under the subject policy, Tennessee Farmers filed a declaratory judgment action, seeking a declaration as to the rights and legal relationships of the parties pursuant to the policy and, more specifically, whether the accident and the lawsuit were covered by the policy. Charles Casey was allowed to intervene in the declaratory judgment action.

Following a hearing, the trial court entered a declaratory judgment, declaring that the policy provided no coverage with respect to the subject accident or the subsequent lawsuit. Charles Casey appealed the trial court's ruling, asserting that the trial court erred in granting a declaratory judgment in favor of Tennessee Farmers. Specifically, Mr. Casey argued that when the accident occurred the four-wheeler was partly in the road and partly on the insured premises and that the policy was ambiguous because the definition of "land motorized vehicle" did not address that factual scenario.

As relevant to the issue on appeal, the subject policy of insurance expressly provided that coverage was excluded for bodily injury arising out of the ownership, maintenance, operation, use, loading, or unloading of any "land motorized vehicle." The policy defined a "land motorized vehicle," in pertinent part, as "a motorized transportation device designed solely or in part for recreational activities *while off the insured premises*, including golf carts, snowmobiles, dune buggies, and all-terrain or utility vehicles . . ." or, alternatively, as "a motorcycle, motorized bicycle, tricycle, three-wheeler, four-wheeler, or similar type of equipment owned by an insured *while off the insured premises* . . . ." (Emphasis added).

On appeal, the Tennessee Court of Appeals concluded that the trial court properly interpreted the policy language as requiring the four-wheeler to be off the insured premises in order to be considered a "land motorized vehicle." In so holding, the Court of Appeals held that the policy's definition of "land motorized vehicle" clearly required that the vehicle be "off the insured premises," thereby supporting the interpretation that the vehicle must be completely off the insured premises at the time of the accident in order to be considered a "land motorized vehicle."

Finding that there was no proof in the record that the four-wheeler was partially in the road and partially on the insured property when the accident occurred but rather that the four-wheeler was in the road when the accident occurred, the Court of Appeals concluded that the four-wheeler fit within the definition of a "land motorized vehicle" pursuant to the clear policy language. Because the policy excluded from coverage accidents occurring during the use of a "land motorized vehicle," the Court of Appeals concluded that the trial court properly interpreted the policy language and did not err in determining that no insurance coverage existed.

[1] The record did not disclose any familial relationship between Lori Beth Simmons Casey and Ryan or Charles Casey.

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