

Texas District Court Holds that Fortuity Doctrine Applies Regardless of Actual Knowledge of Underlying Loss and Potential Liability

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In a case involving commercial liability policies, a federal district court in Texas, applying Texas law, has held that the fortuity doctrine bars coverage where the insureds knew they were engaged in activities for which they could possibly be found liable, regardless of whether they had actual knowledge of the underlying loss and potential liability. *RLI Insurance Co. v. Maxxon Southwest, Inc.*, 2003 WL 21283878 (N.D. Tex. April 22, 2003).

The case arose after an insurer brought a declaratory judgment action seeking a declaration that it did not owe a duty of defense or indemnity under two commercial liability policies in connection with a civil suit alleging that the policyholder engaged in a conspiracy to violate federal antitrust laws. The insurer argued that the activities at issue constitute a "loss-in-progress" because the underlying complaint alleged that the conduct at issue predated the inception of the policy by at least four years.

The district court ruled in favor of the insurer, explaining that the fortuity doctrine precludes insurance coverage "where the insured is, or should be, aware of an ongoing progressive loss or known loss at the time the policy is purchased." The court also noted that "Texas courts have long recognized the doctrine as an inherent requirement of all risk insurance policies and as a standard component of Texas insurance law." In so ruling, the district court rejected the policyholder's argument that the doctrine should not apply because the underlying complaint did not allege knowledge of loss by the underlying plaintiff or that a lawsuit would be brought. The court explained: "The key factor in determining coverage under the fortuity doctrine is not, as defendants contend, whether the insureds had actual knowledge of the underlying loss, but rather if they knew at the inception that they were engaging in activities for which they could possibly be found liable." Since there was no dispute that the policyholder knew it was engaged in the potentially actionable conduct at issue in the underlying complaint, the court held that the fortuity doctrine barred coverage.

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