

Court Denies Equitable Subrogation Recovery Against Another Insurer

November 2004

The U.S. District Court for the Western District of Texas, applying Texas law, has held that an insurance company, and not just its insured, has standing to bring a suit against another insurer for unfair insurance business practices under Texas Insurance Code Article 21.21. *Serv. Cas. Ins. Co. v. The Travelers Ins. Co.*, 2004 WL 2218381 (W.D. Tex. Oct. 4, 2004). The court also held that the plaintiff-insurer was barred from recovering a portion of a settlement payment from the defendant-insurer under an equitable subrogation theory because of the fortuity doctrine.

The plaintiff-insurer and the defendant-insurer issued consecutive liability policies to a motor company. The plaintiff-insurer's policy was an occurrence-based general liability policy while the defendant insurer issued a claims-made employment practices liability policy. The motor company was sued for illegally discharging an employee. The defendant-insurer retained counsel for the motor company under a reservation of rights. Two years later, after the insured demanded that the lawsuit be settled, the plaintiff-insurer settled the action for \$125,000. It then brought suit against the defendant-insurer for misrepresenting its intentions to provide coverage and equitable recovery of the settlement payment.

The district court first denied the defendant-insurer's motion to dismiss the plaintiff-insurer's Article 21.21 claims for a lack of standing. According to the court, the plaintiff-insurer was a "person" under the Article who had alleged that it suffered actual damage from the defendant's purported misrepresentations about defending and indemnifying the policyholder. In reaching this decision, the district court cited prior Texas decisions in which courts had found that third-party claimants could bring actions under Article 21.21.

The court then held that the plaintiff-insurer could not equitably recover a portion of the settlement payment because of the fortuity doctrine. The defendant-insurer's policy excluded coverage for events that "'reasonably would be regarded as Wrongful Employment Practices'" that were known to the company prior to the inception of the policy. According to the court, because the former employee's underlying complaint included allegations that the company's sales manager had knowledge of such events prior to the policy's inception, coverage was barred under the defendant-insurer's policy.

For more information, please contact us at 202.719.7130.