'Looney' Copyright Claim Covered: Fifth Circuit Holds Breach of Contract Exclusion Doesn't Bar Liability Insurance Coverage

Media Law Bulletin

May 2012 by Katherine Mast

When Looney Ricks Kiss Architects, Inc. (Looney) created an architectural design known as the Island Park Apartments in 1996, it probably wasn't thinking of insurance coverage law. But, it appears likely that Looney's attorneys brushed up on the topic in 2007 before filing suit against Steve Bryan and his affiliated building companies (Bryan) for infringement of Looney's copyrighted architectural work. And, in 2012, it appears to have paid off.

In *Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Casualty Co.,* __F.3d__, 2012 WL 1109058 (5th Cir Apr. 4, 2012), the Fifth Circuit Court of Appeals concluded that the Louisiana Supreme Court would apply a "but for" test and adopt Looney's position that an exclusion for "personal and advertising injury . . . arising out of a breach of contract" in Bryan's liability insurance policies would not bar coverage for Looney's copyright infringement claim, despite contractual language barring the same infringing use.

Looney, an architecture firm, created an architectural design known as the Island Park Apartments, which was constructed by Bryan pursuant to a 1996 Standard Form of Agreement Between Owner and Architect (Agreement). The Agreement included provisions that Looney was the author of all documents prepared for the project and that they shall not be used by Bryan or others without a written agreement and compensation to Looney. Looney also registered the Island Park Apartments with the U.S. Copyright Office as an architectural work and technical drawings.

Looney subsequently sued Bryan in March 2007 for copyright infringement in relation to Bryan's involvement in the construction of the Cypress Lake Apartments (starting in or around 2001), which Looney alleges infringes on its copyrighted architectural work. Bryan's liability insurers (one through intervention, and one in a separate action in which it named Looney as a defendant) sought declaratory judgment that the breach of contract exclusions in their policies precluded any obligation

they may have had to defend or indemnify Bryan under the personal and advertising injury coverage for copyright infringement.

On summary judgment, the district court held that the insurance companies owed a duty to defend, but that they had no duty to indemnify pursuant to the "breach of contract" exclusions. The carriers and Looney (the third-party plaintiff) appealed.

On appeal, the Fifth Circuit attempted to predict how the Louisiana Supreme Court might rule, acknowledging that other states have applied two different tests when deciding whether the "breach of contract" exclusion applies—a "but for" test and an "incidental relationship" test. Under the "but for" test, the injury is only considered to have arisen out of the contractual breach if it would not have occurred but for the breach. Under the "incidental relationship" test, the exclusion applies as long as the contract bears some relationship to the dispute.

The Fifth Circuit held that a Louisiana court would apply the "but for" test, based on Louisiana case law establishing that the "breach of contract" exclusion does not to preclude an insurer's liability for a tort action, even though the same factual basis could support a breach of contract claim. Accordingly, because Looney's copyright claim would exist even in the absence of its agreement with Bryan, the court held the "breach of contract exclusion" does not apply to bar coverage for Looney's claim. In adopting Looney's arguments, the court reversed the district court's summary judgment finding the policies did not provide coverage and affirmed the prior ruling that the insurers had a duty to defend.

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