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It's a Matter of Coverage…or Is It?

By Amanda B. Fopma **April 30, 2024**

Those who are fortunate enough to practice in the area of property insurance are well acquainted with the recurring issue of what aspects of a claim are appropriate for consideration in appraisal. More than three decades ago, a panel of the Michigan Court of Appeals recognized "where the parties cannot agree on coverage, a court is to determine coverage in a declaratory action before appraisal of the damage to the property." *Auto-Owners Inc Co v Kwaiser*, 190 Mich App 582 (1991). Later, the courts recognized "if liability is not admitted by an insurer, the trial court must first determine the issue of 'coverage' before ordering appraisal." *The D Boys, LLC v Mid-Century Ins Co*, 644 Fed Appx 574 (CA 6, 2016). However, once an insurer determines there is coverage for the loss under the policy and the only disagreement which remains is over the amount of the loss, the courts are statutorily compelled to order the parties to submit their disputes to appraisal pursuant to MCL 500.2833(1)(m). *Id.* What constitutes an issue of coverage versus a mere issue of the amount of the loss and scope of the covered damage has remained vehemently contested.

SECREST WARDLE NOTES

This is the first *published* opinion by a panel of the Michigan Court of Appeals since *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482 (1991), which directly addresses whether a matter of coverage remains reserved for the Court or should be resolved by appraisal. In following the federal circuits, insurers must be mindful that the courts are increasingly reluctant to find any genuine coverage issue unless the insurer clearly identifies the coverage issues early on and makes clear there is no coverage. If evidence of coverage is lacking as to certain aspects of the claim, insurers should consider filing a declaratory judgment action demanding a decision on coverage before an appraisal demand is made.

In its published decision in *Cantina Enterprises II Inc, v Property-Owners Ins Co*, ___ Mich App ___; ___NW2d ___ (2024) (Docket No. 363105), the question of whether an item of property could be considered "business personal property" constituted a genuine question of coverage was addressed. In July 2021, a fire started in the kitchen area of the restaurant resulting in damage.

The policy issued to Cantina Enterprises covered its interest in any "business personal property" which included "[the Cantina's] use interest as a tenant in improvements and betterments."[1] Following the fire, Property-Owners requested a signed statement in proof of loss detailing the information necessary to investigate the claim and a contents inventory due within 60 days. There was no dispute that the fire was a covered cause of loss under the

[1] The policy defined improvements and betterments as "fixtures, alterations, installations or additions: 9a) [m]ade part of the building or structure you occupy but do not own; and (b) [y]ou acquired or made at your expense but cannot legally remove[.]" *Cantina Enterprises*, ___ Mich App at ___; slip op at 1.

policy. Cantina Enterprises submitted estimates for the items needing repair, which included improvements and betterments to the leased restaurant space. During the adjustment, a dispute arose as to whether certain claimed items were improvements and betterments versus part of the building which would not be covered. Property-Owners advised that these portions of the claim may be considered improvements and betterments if Cantina could show they installed the items to the restaurant and not the building owner. The Cantina thereafter provided proof of renovations it had undertaken over its tenancy. In the interim, in August 2021, Property-Owners began issuing payments on the claim including over $30,000 for improvements and betterments.

On September 17, 2021, Property-Owners advised Cantina Enterprises which items did not constitute improvements and betterments on the basis they were part of the building. Property-Owners also rejected the proof of loss because it did not adequately support the claims. On October 1, 2021, Cantina Enterprises demanded appraisal in accordance with MCL 500.2833(1)(m) and the policy. Property-Owners took the position that appraisal was premature as the proof of loss had not been submitted along with supporting documentation, so it could not properly evaluate whether there was an appraisable dispute. Property-Owners extended the deadline to submit the proof of loss until November 12, 2021. On October 27, 2021, Cantina Enterprises submitted a proof of loss claiming $44,254.17 in "business personal property." Property-Owners rejected the proof of loss because the supporting documentation did not support the amount claimed. Property-Owners requested paid invoices for the improvements and betterments, and reiterated which items were not covered under the policy.

Cantina Enterprises filed a Petition to Compel Appraisal and thereafter competing motions for summary disposition were filed. Property-Owners took the position appraisal was inappropriate as the documents they submitted precluded their ability to determine whether there was coverage for the claim. Cantina Enterprises asserted the only issue was the extent of coverage for the loss. The trial court granted Cantina Enterprises' Motion for Summary Disposition, ordered the parties to proceed to appraisal and appointed an umpire. The Court also noted that Property-Owners had failed to show the proof of loss was inadequate, and, therefore, there was no dispute over true coverage but merely the amount of the loss.

On appeal, the first issue the Panel addressed was whether Cantina Enterprises' failure to submit a proof of loss within 60 days barred the claim. The Panel correctly recognized, as a general matter, a policyholder is precluded from filing a claim if it does not comply with its obligations under the policy including timely submission of a proof of loss. *Auto-Owners Ins Co v Gallup*, 191 Mich App 181 (1991). The exception is where an insurer waives that requirement. The Panel held that although Cantina Enterprises did not formally submit the proof of loss until more than a month and a half after it was due, Property-Owners' issuance of partial payments served as an implicit waiver of the 60-day requirement. Further, Property-Owners had extended the deadline on two separate occasions and, therefore, by communicating it would continue to accept the proof of loss past the 60-day requirement in the policy, it had *expressly* waived the 60-day requirement.

As to whether there was a true coverage issue, the Panel held that when Property-Owners had acknowledged that the damages were generally covered by the Policy and consistent with *Smith v State Farm Fire & Cas Co*, 737 F Supp 2d 702 (ED Mich, 2010) and *The D Boys, LLC*, the dispute concerned the scope of the loss - whether Cantina Enterprises was entitled to payment for each item it claimed. Simply put, the Panel determined the only factual dispute was whether Cantina Enterprises had proven their loss and the appraisal panel would be the final arbiter of what was "business personal property."

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