2024 WL 2131515
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United States Court of Appeals, Fifth Circuit.

NATIONWIDE MUTUAL INSURANCE COMPANY, Plaintiff—Appellee,
v.
Hiu Lam Cookie CHOI; Brandon Ng, Defendants—Appellants.

No. 23-20405
|
FILED May 13, 2024

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:22-CV-1231

Attorneys and Law Firms

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Before Dennis, Southwick, and Ho, Circuit Judges.

Opinion

Per Curiam: [*]

***1** Hiu Lam Cookie Choi and Brandon Ng, two individuals insured by Nationwide Mutual Insurance Co., were sued for theft of Bitcoin. Nationwide brought suit against its insureds for a declaratory judgment that it had no obligation to provide coverage under a homeowner policy and a personal-umbrella policy. The district court granted summary judgment, holding Nationwide was not obligated either to defend or indemnify Choi or Ng in the underlying lawsuit.

"An insurer must defend its insured if a plaintiff's factual allegations potentially support a covered claim, while the facts actually established in the underlying suit determine whether the insurer must indemnify its insured." *Zurich Am. Ins. v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex. 2008).

The policy issued by Nationwide required it to defend and indemnify a claim against the insureds for damages based on an "occurrence" arising from negligent personal acts. The policy in turn defines an occurrence as "an accident ... which results, during the policy period, in ... '[p]roperty damage.' " The underlying lawsuit against Choi and Ng alleges only intentional acts. We reject the argument that a particular paragraph in the complaint should be interpreted as claiming negligence. Therefore, Nationwide has no duty to defend.

"[T]he duty to indemnify is justiciable before the insured's liability is determined in the liability lawsuit when the insurer has no duty to defend *and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify.*" *Farmers Tex. Cnty. Mut. Ins. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) (emphasis in original). That court later explained that its decision in *Griffin* "was grounded on the impossibility that the drive-by shooting in that case could be transformed by proof of any conceivable set of facts into an auto accident covered by the insurance policy." *D.R. Horton-Tex., Ltd. v. Markel Intern. Ins.*, 300 S.W.3d 740, 745 (Tex. 2009). There is a similar impossibility that this claim based on theft of property can be transformed into a negligence case.

The district court properly ruled there was no duty to indemnify.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2024 WL 2131515

Footnotes

* This opinion is not designated for publication. See 5th Cir. R. 47.5.4.

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