Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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FIFTH CIRCUIT REAFFIRMS LACK OF BAD FAITH IN 3RD PARTY LIABILITY CLAIMS

The Fifth Circuit recently reaffirmed that Texas law does not recognize a cause of action for breach of the duty of good faith and fair dealing by an insurance company for the handling of third-party tort claims against its insured. In *Mid-Continent Casualty Company v. Eland Energy, Inc. and Sundown Energy LP*, No. 11-10649 (5th Cir., February 22, 2013), Sundown's oil and gas production facility in Port Sulphur, Louisiana was severely damaged by Hurricane Katrina, causing storage tanks with crude oil to spill into the surrounding area. Sundown filed a claim under it CGL policy with Mid-Continent for reimbursement of government-mandated clean-up costs. At the same time, surrounding property owners and commercial fisherman filed multiple lawsuits against Sundown and Eland, which Sundown tendered to Mid-Continent for defense. One property owner not in a lawsuit contacted Mid-Continent directly to make a third-party claim and tried to negotiate a settlement, which Mid-Continent unsuccessfully attempted to do without Sundown's knowledge.

Mid-Continent agreed to defend the lawsuits and eventually paid to Sundown the $1 million dollar primary policy limit and the $5 million umbrella policy limit for clean-up costs. With policy limits exhausted, Mid- Continent withdrew from defending the lawsuits. Sundown, however, refused to accept the $6 million, advised Mid-Continent it wished to hold the clean-up claim "in abeyance," and asked Mid-Continent to continue defending the lawsuits. Mid-Continent filed a declaratory judgment in the U.S. District Court in the Dallas Division of the Northern District of Texas seeking to clarify its duties and responsibilities under the policies, and Sundown filed counterclaims for bad faith, Insurance Code violations and other counter- claims.

In three opinions, Judge Sid Fitzwater granted summary judgment to Mid-Continent for some of the relief it sought, and the case went to trial on Sundown's remaining counter-claims, including a claim Mid-Continent breached a duty of good faith and fair dealing by attempting to settle the claim of one property owner without Sundown's knowledge or consent. The jury returned a verdict in favor of Sundown, but the district court granted Mid-Continent's motion for judgment as a matter of law overturning the jury verdict. See *Mid-Continent Casualty Company v. Eland Energy*, 795 F.Supp.2d 493 (N.D. Tex. 2011).

Sundown complained on appeal that Mid-Continent's offer of settlement to a third-party claimant was bad faith, relying on *State Farm v. Traver* and *Republic Ins. Co. v. Stoker*. Sundown argued both *Traver* and *Stoker* expanded an insurer's liability in the third-party context if it "consciously undermined" the insured's defense, or committed some act, so extreme, that it would cause injury independent of the policy claim. The 5th Circuit said neither of the passages taken from *Traver* and *Stoker* established Texas law, and, in the seventeen years since *Stoker*, the 5th Circuit noted no Texas court had ever held that recovery was available under Texas law for an insurer's allegedly "extreme act" causing injury independent of the policy claim in the first-party context, let alone in the third-party context. The 5th Circuit refused to do so here and affirmed the district court's final judgment.

[**Editor's Note**: Martin, Disiere, Jefferson & Wisdom was proud to represent Mid-Continent in this case with a trial team led by Chris Martin, Robert Dees and Ethan Carlyle, and the appellate team led by Levon Hovnatanian and Bruce Ramage, along with many other MDJW lawyers and staff over the 7-year legal battle through trial court and the Fifth Circuit. We congratulate Mid-Continent for having the courage to try the case and fight the appeal.]

DALLAS FEDERAL DISTRICT COURT DENIES MOTION TO REMAND BECAUSE OF IMPROPERLY JOINED NON-DIVERSE DEFENDANTS

Last week, Judge Barbara Lynn of the Dallas Division of the Northern District of Texas denied a motion to remand a case to State court on the basis that non-diverse defendants were improperly joined by Plaintiff in an attempt to defeat federal diversity jurisdiction. *Waldrop v. Guarantee Trust Life Ins. Co*., 2013 WL664705, Civil Action No. 3:12–cv–02579–M. (N.D. Tex. – Dallas, Feb. 25, 2013).

The suit arose from a life insurance contract between the decedent, Chad Ryan and Guarantee Life Insurance Company ("GTL"). Ryan purchased a renewable term life insurance policy from GTL in August 2008, naming his mother, Laverne Waldrop, as the beneficiary. Ryan's coverage was cancelled in February 2010 due to an "interruption" in payment. The interruption resulted when the bank account associated with the policy no longer contained sufficient funds to pay premiums due. Ryan applied to reinstate the policy in March of 2010. In so doing, GTL required Ryan to make certain representations about his medical history. GTL accepted Ryan's application and reinstated his policy on April 6, 2010. Ryan was murdered on February 16, 2011. After his death, Waldrop submitted a claim for the policy proceeds. GTL denied the claim due to alleged misrepresentations that Ryan made on the reinstatement application.

Waldrop filed suit in state court against Defendants GTL, Adrienne Buckingham, Drew Richards, and Trinity Health and Life for claims of breach of contract, bad faith, violations of the Texas Deceptive Trade Practices Act, common law fraud, and negligent misrepresentations. Buckingham and GTL were citizens of Illinois, while Richards, Trinity, and the Plaintiff were citizens of Texas.

Defendants Buckingham and GTL removed the case to federal court based on diversity jurisdiction, claiming the non-diverse Defendants, Richards and Trinity, were improperly joined and should be disregarded when considering diversity of citizenship. Plaintiff then moved to remand arguing Defendants failed to show that the non-diverse defendants were improperly joined. Plaintiff also sought leave to file an amended complaint, subject to the motion to remand. The Court noted the post-removal filings are relevant to the court's analysis only to the extent they contain factual allegations that "clarify or amplify the claims actually alleged" in the petition that controlled at the time of removal and that the court must not consider new causes of action or theories not raised in the state court petition.

After reviewing Plaintiff's petition on file at the time of removal, the Court determined the petition did not establish a cause of action against the non-diverse Defendants Trinity and Richards under any of the theories alleged. Thus, the Court held the citizenship of Defendants Trinity and Richards should be disregarded for the purposes of determining jurisdiction. Because the only legitimate Defendants were diverse from Plaintiff, and because the amount in controversy exceeded the jurisdictional threshold, the Court denied Waldrop's Motion to Remand.

STATE FARM WINS BAD FAITH TRIAL IN HOUSTON FEDERAL COURT

Last week, State Farm won a bad faith trial in Houston Federal Court in *Vada De Jongh vs. State Farm Lloyds*, CA No. 4:12-cv-03703. De Jongh sued State Farm for property damage arising out of an April 2012 hail storm in Alvin, Texas. State Farm determined the storm damage was less than the insured's deductible and the insured subsequently sued her homeowner's insurer and an adjuster for breach of contract, bad faith, Insurance Code violations and fraud in Brazoria County. State Farm removed the case to Federal District Court. Judge Lynn Hughes conducted a bench trial last week on all issues and, at the conclusion of trial, found no evidence to support Plaintiffs claims. In the alternative, the Court found the costs to repair the existing conditions to be less than the deductible in the insured's policy with State Farm.

[Editor's Note: Chris Martin and Marilyn Cayce of MDJW had the privilege of trying this case for State Farm and they wish to thank the client team for the opportunity to do so.]