Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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TORT PLAINTIFF'S JUDGMENT AGAINST DEFENDANT'S INSURER DISMISSED BY COURT OF APPEALS AS NOT YET RIPE FOR ADJUDICATION

The Fourteenth Court of Appeals in Houston last Tuesday reversed a trial court's judgment against a liability carrier on ripeness grounds, concluding that absent a judgment against or settlement with the insured, the Plaintiff had no claim against the insurer. In United Fire Lloyds v. Tippin, No. 14-12-00313- CV, 2013 WL 936303 (Tex. App.—Houston [14th Dist.] March 12, 2013), the plaintiff not only sued the Golden Corral restaurant where her daughter was allegedly injured, but eventually joined United Fire, the restaurant's insurer, into the lawsuit.

United Fire answered and asserted a number of defenses, moved to sever the contract claim against it from the negligence claim against Golden Corral, and moved to dismiss for lack of subject matter jurisdiction. The trial court denied both motions. United Fire later filed another motion to dismiss and a motion for summary judgment contending that United Fire had been improperly joined. These motions were also denied. The parties then filed cross-motions for summary judgment. The plaintiff contended that the numerous notices to Golden Corral and the filing of the lawsuit constituted notice to United Fire under the requirement under the medical payments portion of the United Fire policy that the claimant report the claim within a year of the accident. The trial court agreed, granted summary judgment in favor of the plaintiff, and awarded damages and attorneys' fees.

The appellate court panel unanimously concluded that the trial court lacked jurisdiction over the plaintiff's claim against United Fire, and therefore that the judgment must be vacated and the case be dismissed. In Texas, the court wrote, an injured party cannot sue the allegedly negligent party's insurance carrier "until … liability has been finally determined by agreement or judgment." In this case, there was no judgment against Golden Corral, and the plaintiff admitted that there might never be a judgment. Thus, the claim against United Fire was not ripe, and must be dismissed. In a footnote, the Court also rejected the plaintiff's argument that it could sue United Fire directly for failure to pay under the "medical payments" provision based on the express language of the policy stating that United Fire could not in any situation be brought into a suit for damages against an insured.

EXPIRATION OF LIMITATIONS PERIOD FOR NEGLIGENCE CLAIM DOES NOT RENDER OTHER DRIVER "UNINSURED" FOR UM/UIM PURPOSES

A driver involved in an auto accident whose suit against the other driver was unsuccessful due to the expiration of the statute of limitations was not entitled to treat the other driver as "uninsured" for purposes of a claim under his own policy, the Eastland Court of Appeals held Thursday. In State Farm Mutual Auto. Ins. Co. v. Bowen, No. 11-11-00082-CV, 2013 WL 1087796 (Tex. App.—Eastland March 14, 2013), the plaintiff had sued the other driver in Texas, but that case was dismissed for want of jurisdiction over the defendant driver and the estate of the late owner of the defendant driver's vehicle. The plaintiff sued again in New Mexico, but the second case was dismissed because the statute of limitations had run. In a separate

suit against his own insurance company, the driver and his insurer agreed as to the negligence of the other driver and the amount of the total coverage available in a suit against the other driver, and tried the matter on damages alone.

After trial, the jury answered the single question on damages with a number far beneath than the aggregate insurance covering the other driver. Thus, if the statute of limitations had not run in the New Mexico lawsuit, the plaintiff's recovery plainly would not have exceeded the amount of coverage available, and the plaintiff would have been fully compensated. Nevertheless, the trial court entered judgment on the UIM claim for the total amount of damages, without accounting for the other driver's available coverage.

The central issue on appeal was the meaning of "denies coverage" in the UIM portion of the operative policy. The court concluded that the failure of the plaintiff to recover because of the statute of limitations did not constitute a denial of coverage by the other driver's insurer. The court therefore reversed the judgment of the trial court and rendered judgment in favor of State Farm.

TEXAS SUPREME COURT DENIES REVIEW OF CASE AFFIRMING U.S. ARMY SUBROGATION RIGHTS

An opinion issued last year by the El Paso Court of Appeals that affirmed a trial court's ruling that the U.S. Army had subrogation rights against underinsured motorist coverage will stand, with the Texas Supreme Court formally declining to review the case last Friday. As we reported last April, in Warmbrod v. USAA County Mutual Insurance Company, 367 S.W.3d 778 (Tex. App.—El Paso 2012), the insured was severely injured in a car accident and was treated free of charge in a U.S. Army Hospital by virtue of her husband's military status. The Army then sought to recover its costs from the insured's UIM benefits, in accordance with 10 U.S.C. § 1095 and the Federal Medical Care Recovery Act (FMCRA). The insurer paid its policy limits but protected the Army's subrogation rights by issuing a check co-payable to the plaintiff, her attorney and the Army for the amount of the Army's lien.

On appeal, the El Paso Court agreed with the insured that the FMCRA only provides the Army with a right of recovery against responsible third-parties, but not against first party insurance proceeds. Considering 10 U.S.C. § 1095, however, the court recognized that the United States government has a right to collect reasonable expenses for care it provided from third-party payers, which is defined to include "an automobile liability insurance or no fault insurance carrier." Accordingly, the court concluded that because the United States Army has a right to recover against the UIM coverage, summary judgment in favor of the insurer was proper.