Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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WESTERN DISTRICT OF TEXAS ADMITS EXTRINSIC EVIDENCE IN DUTY-TO-DEFEND CASE

Last Wednesday, the Western District of Texas, Austin Division relied on extrinsic evidence to negate an insurer's duty to defend, adding to the small handful of federal cases that have openly applied the putative exception to the eight-corners rule. In Star-Tex Resources, LLC v. Granite State Ins. Co., No. A-12-CV-326 ML (W.D. Tex. April 24, 2013), the insured and its employee faced a petition which alleged an automobile accident occurred in an auto auction lot, but did not identify the employee's precise role in causing the automobile accident. The insured sought a defense from its CGL carrier, whose policy contained an automobile exclusion barring coverage for injuries "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any Insured."

Although the petition clearly identified an automobile accident and alleged that the employee caused the accident, it did not state whether the employee was operating the auto at the time of the accident. The insurer argued that the only reasonable inference that could be reached was that the employee was operating the auto. The court disagreed, concluding that any number of reasonable inferences could be reached, such as (a) the employee was directing traffic in the lot and caused the accident, (b) the employee was walking in the lot and caused the accident, or (c) the employee was a passenger in the auto and distracted the driver. Therefore the court considered extrinsic evidence showing what the employee was doing at the time of the accident to determine whether the automobile exclusion applied. Because the undisputed evidence clearly showed the employee was driving the auto, the court found no duty to defend.

This case adds to the small but growing list of federal cases which consider Northfield Ins. Co. v. Loving Home Care, Inc., 363 F.3d 523, 528 (5th Cir. 2004) and GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church, 197 S.W.3d 305, 308 (Tex. 2006) together to create a presently viable exception to the otherwise strict eight-corners rule forbidding consideration of anything other than the policy and the petition to determine the duty to defend. It remains to be seen whether Texas state courts will join this growing trend.

POLICY CONSTRUCTION 101: NORTHERN DISTRICT OF TEXAS HOLDS ENDORSEMENTS MEAN WHAT THEY SAY

Last Monday, Chief Judge Sydney Fitzwater of the Northern District of Texas granted summary judgment in a carrier-on-carrier dispute over the meaning of an endorsement deleting a vehicle from a Business Auto Policy. The court held the express deletion of liability coverage for the described vehicle in a change endorsement trumped any alleged ambiguity created by coverage symbols used elsewhere in the policy. In *Bituminous Cas. Co. v. The Travelers Indemnity Co.*, 2013 WL 1722447 (N. D. Tex. April 22, 2013), Travelers' insured, Big D, leased five tractor-trailers to Bituminous' insured, Frontier. After the lease was executed, Big D requested the five tractor-trailers be deleted from the Travelers policy, and Travelers issued an endorsement identifying the five vehicles and expressly stating, "LIABILITY COVERAGE IS DELETED." Two weeks after the endorsement was issued, a Frontier employee was involved in an accident while driving one of the vehicles.

After Travelers repeatedly refused Bituminous' demands that it defend the employee and settle the suit, Bituminous settled the suit and brought this action against Travelers. Bituminous argued that because the Business Auto Policy used the coverage symbol "1," which was defined as "Any Auto," to designate the scope of coverage, the only way to remove a vehicle from coverage was to either change the definition of the symbol "1" or replace the broad symbol "1" with a more limited coverage symbol as defined in the policy form. The court rejected this overly technical reading, holding that the endorsement on its face unambiguously showed clear intent to remove the identified vehicles from liability coverage, and under Texas law, when an endorsement conflicts with the main coverage form, the endorsement controls. Therefore, Travelers' rejection of Bituminous' demands was vindicated.

SOUTHERN DISTRICT OF TEXAS RECOMMENDS PROMPT PAYMENT CLAIMS BE CONSIDERED "EXTRA-CONTRACTUAL"

A magistrate judge for the Southern District of Texas recently recommended dismissal of "Prompt Payment" claims under Texas Insurance Code Chapter 542 as part of the bundle of claims considered to be "extra-contractual" in nature. In *Pointewest Center, LLC v. National Sur. Co.*, No G-10-598 (S.D. Tex April 10, 2013), the plaintiff's extra-contractual claims had previously been dismissed by the court. The parties disagreed whether that order included the plaintiff's claim for 18% interest under Chapter 542's Prompt Payment statute, and the defendant filed a motion to dismiss it as well. The magistrate stated, "this Court is of the opinion that [the Chapter 542] claim has already been dismissed."

For good measure, the magistrate went on to recommend dismissal of the Prompt Payment claim, to the extent it remained at issue, on the ground that the evidence unequivocally showed the defendant had acted reasonably, and dismissal of all claims other than breach of contract was justified. The court analogized the Prompt Payment claim to a tort claim which has no legal predicate if there is any reasonable basis for the insurer's claim decision.

MDJW First Friday Webinar - Multiple Claims and Inadequate Limits - Part 2

On Friday, May 3, 2013 at noon, Central Time, MDJW Founding Partner Chris Martin will present Part 2 of "Multiple Claims and Inadequate Limits." Claims involving multiple claims with inadequate policy limits under a liability policy can easily create a dangerous minefield for any claim professional. Suits over the same issue frequently stretch the limits of bad faith case law.

This program will address recent cases in Texas which insurance professionals must understand and appreciate. The program will continue a discussion started in April covering 3 major topics:

- Strategies for resolving claims with one insured, multiple claimants and inadequate limits;

- Strategies for resolving claims involving multiple insureds, multiple claimants and inadequate limits.

- Strategies to avoid bad faith claims arising out of these dangerous liability claims including a review of recent Texas case law.

Mr. Martin is one of the most recognized insurance attorneys in Texas. He is the author of three legal Treatises on Texas Insurance Law, he is a frequent speaker at state and national insurance programs and conferences, and he served as the professor of Insurance Law at the University of Houston Law School for 10 years. He has won numerous insurance coverage and bad faith jury trials in Texas and 14 other states and he has received national recognition for his skills in trying insurance lawsuits.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit. We have also applied to the State Bar of Texas for one hour of Texas CLE credit. Insurance professionals accredited by the Texas Department of Insurance should have their adjuster number available during the training in order to request credit for the course.

Register for this webinar at:

https://student.gototraining.com/r/3253279334595465984

After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar.

Note: If you have never participated in one of the MDJW webinars, or, if you have had trouble in the past connecting to a webinar, please use the following link to check your computer's connectivity:

http://support.citrixonline.com/en_US/gotomeeting/all_files/GTM140010