Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JULY 3, 2013

SOUTHERN DISTRICT OF TEXAS DENIES INSURED'S MOTION TO REMAND AND DISMISSES LAWSUIT AGAINST THE ADJUSTER AND STATE FARM LLOYDS

Recently, Judge Harmon from the Southern District of Texas issued a 29 page opinion setting forth the appropriate pleading standard for the recent influx of poorly pleaded Texas hail claim cases. In *Sara Dalton v. State Farm Lloyds and Stewart Brown*, 4:12-cv-03004 (S.D. Tex., June 20, 2013), the Court denied an insured's Motion to Remand and granted State Farm's Motion to Dismiss for Failure to State a Claim. The insured sued State Farm for alleged damages caused by a January 2012 hail storm. State Farm removed the lawsuit on the basis of improper joinder of its adjuster, Stewart Brown and filed a 12(b)(6) Motion to Dismiss alleging that Plaintiff's factual allegations against both State Farm and Stewart Brown were insufficient to satisfy the required pleadings standards.

Agreeing with State Farm, the Court noted that Plaintiff's "bare-bones regurgitation of sections of the Texas Insurance Code have become all too common in first-party bad-faith litigation" and the insured's petition offered no reasonable basis to predict that state law would allow recovery against the adjuster. As such, the Court noted that the allegations against the adjuster were minimal, and provided no facts and therefore failed to establish a plausible claim. More importantly, the Court affirmed its earlier decisions that concluded that when claims against an adjuster are identical to those against the insurer, the adjuster's actions "are indistinguishable from [the insurer's] actions' and are insufficient to support a claim against the adjuster."

After dismissing the adjuster, the Court addressed State Farm's Motion to Dismiss. The Court noted that Plaintiff's bare-bones, conclusory, state court petition failed to meet the federal pleading standards under the Federal Rules of Civil Procedure 8 and 9(b). As such, the Court permitted the insured 20 days to cure her pleading deficiencies before the lawsuit is completely dismissed with prejudice.

[**Editor's Note**: Martin, Disiere, Jefferson & Wisdom attorneys Chris Martin, Marilyn Cayce, and Raymond Kutch assisted in the preparation of State Farm's briefing in this case. We congratulate State Farm on their successful motions.]

FIFTH CIRCUIT CONFIRMS THAT AN EXCESS LIABILITY INSURER IS NOT REQUIRED TO SHOW PREJUDICE BEFORE DENYING COVERAGE BASED ON LATE NOTICE OF THE TRIGGERING EVENT

Last week, the Fifth Circuit affirmed a District Court's decision granting an insurer's Motion for Summary Judgment on the Pleadings and held that the excess insurer was not required to show prejudice before denying coverage based on late notice on an occurrence based policy. The original Policy contained an absolute pollution exclusion clause; however, the parties specifically negotiated a "pollution buy-back" exclusion whereby the insurer agreed to provide coverage for the direct or indirect consequence of released or escaped pollutants so long as the triggering event is reported within 30 days after having become known.

In *Star Indem. & Liability Co. v. SGS Petroleum Service Corp*., 12-20545, 2013 WL 3013873 (5th Cir. June 18, 2013), the insurer sought a declaratory judgment that it was not required to show prejudice before denying coverage to the insured for liability arising out of a pollution occurrence which the insured did not report within thirty days, as required by the policy. Plaintiff argued that the insurer did not suffer any prejudice from its failure to provide notice to the insurer within the required 30 days. The insured did not report the triggering incident until 59 days after it learned of the pollution discharge. Drawing parallels from an earlier decision, the Court explained that to extend the 30 day notice period would have exposed the insurer "to a risk broader than the risk expressly insured against the policy." The Court noted that both the insured and insurer are sophisticated commercial parties with comparable bargaining power, that the language in the policy was plain, and that timely reporting of the claim was one of the events necessary to trigger coverage.

As such, the Court concluded that the notice provision of the policy was an essential part of the bargained-for exchange under the occurrence-based policy and was specifically negotiated.

DRIVER EXCLUSION PRECLUDES COVERAGE FOR LOSS PAYEE

Last Wednesday, the El Paso Court of Appeals held that a driver exclusion endorsement also precluded coverage for the loss payee for damage to the vehicle when the excluded driver was involved in an auto accident. In *Stadium Auto, Inc. v. Loya Insurance Company*, 2013 WL 3214618 (Tex. App. – El Paso, June 26, 2013), the named insured, Olga Salazar, purchased a vehicle from Stadium Auto and also financed the vehicle with Stadium. The insured purchased an auto policy from Loya Insurance covering damage to the vehicle and added Stadium as a loss payee. But the policy was also was endorsed with a named driver exclusion, precluding any coverage for the vehicle while a Junior Sanchez was driving. Mr. Sanchez took the vehicle without permission and was involved in an auto accident; Loya denied coverage and the trial court granted summary judgment in Loya's favor. This appeal followed.

Stadium asserted that the loss payable clause provided coverage to the loss payee, despite the named driver exclusion. They also argued that they should be afforded coverage based on the alleged "theft" of the vehicle, but the court determined that this argument was not asserted at the trial court level and was therefore waived. Addressing whether the driver exclusion also precluded coverage for the loss payee, the court found that under the unambiguous language of the driver exclusion endorsement, when an excluded driver drives there is no coverage under the policy for the driver or the loss payee. Accordingly, summary judgment in favor or Loya Insurance was affirmed.

INSURED'S FAILURE TO ALLOW INSURER A REASONABLE OPPORTUNITY TO INSPECT THE LOSS BEFORE REPAIRS, PRECLUDES COVERAGE

Last Tuesday, the U.S. District Court for the Northern District of Texas granted summary judgment in favor of a homeowners' insurer after finding that the insured failed to provide reasonable access to the damaged property before replacing the roof. In *Santacruz v. Allstate Texas Lloyds, Inc.*, 2013 WL 3196535 (N.D. Tex., June 25, 2013), the insured reportedly lost shingles due to a wind storm and had a tarp placed on the roof. The insured then reported a claim for wind and water damage. When the adjuster called to begin the investigation, the insured reported that she had a roofing contractor on site ready to replace the roof that day. The adjuster stated that they could not make it out that day but could in a couple of days. Two days later at the time of the inspection, the roof had already been replaced. Allstate denied coverage and this lawsuit followed.

Allstate filed a motion for summary judgment asserting in part that the insured failed to comply with their duties after loss and that by replacing the roof before the inspection, the insured violated the policy and deprived Allstate of the opportunity to investigate the loss. The court agreed and also found insufficient evidence that wind blew shingles off the roof, that plaintiff's actions in replacing the roof made it impossible to investigate their claim and as a result, Allstate had a reasonable basis to deny the claim. And because the insured also failed to prove their right to recover and the amount of their covered damages, summary judgment was granted in favor of Allstate.