Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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Farm. Congratulations to Mr. South and State Farm for this great win.] FEDERAL COURT LIMITS STATE FARM'S LIABILITY IN FOUNDATION DAMAGE LAWSUIT

A federal court in Houston recently granted summary judgment in favor of State Farm in a lawsuit by two homeowners for property damage. *Salazar v. State Farm Lloyds*, No. H-13-1094, 2014 WL 2862760 (June 24, 2014) (Rosenthal, J.). The Salazars sued under their homeowners' policy, alleging State Farm had wrongfully denied their claim for foundation movement and related damage allegedly caused by water leaks and plumbing leaks.

Judge Lee Rosenthal addressed the relationship between two policy endorsements, the Dwelling Foundation Endorsement ("DFE") and the Water Damage Endorsement ("WDE"). The DFE limited coverage for foundation and related damage to 15% of the $229,100 Dwelling limit. Although the parties agreed to this limit for foundation damages, the Salazars argued the WDE obligated State Farm to cover additional damage from foundation movement due to plumbing leaks. The court correctly concluded, however, that the DFE expressly limited foundation movement caused by plumbing problems and the WDE excluded coverage for loss caused by foundation movement. The type of loss covered by the WDE was loss from deterioration, wet rot, or dry rot caused by continuous water leaks, factors not present in this case. In a significant win for State Farm, the court ruled that the Salazars' coverage was limited to $34,365 (15% of the DFE limit), less their deductible, rather than the $229,100 which they argued applied.

Editor's Note: State Farm was represented by Chris Martin and Leslie Tan of our firm and we greatly appreciate the opportunity to help State Farm defend this case.

FIFTH CIRCUIT FINDS THIRD-PARTY HAS STANDING AGAINST INSURER WHEN FORCED TO COUNTERCLAIM BY FEDERAL RULES

The Fifth Circuit recently addressed an exception to the general principal under Texas law that when an insured damages the property of a third party, the insurer is not obligated to pay damages on behalf of its insured until there is a final judgment entered against the insured or a settlement agreement. Texas courts have construed this to be a rule of standing and will consider whether a final judgment existed at the time a third-party claim was filed.[1]

In *Nat. Liability & Fire Ins. Co. v. R & R Marine, Inc.*, No. 10-20767, 2014 WL 2932671 (5th Cir. June 30, 2014), National initiated a lawsuit to disclaim liability on a policy covering its insured, R & R Marine, which operated a shipyard and allegedly damaged Hornbeck Offshore Service's vessel during repairs. Hornbeck counterclaimed against National, arguing the policy obligated National to cover all sums for which R & R Marine became obligated to pay.

National acknowledged that if R & R was negligent, it would have to pay up to policy limits once a final judgment was entered, but it argued Hornbeck did not have standing to sue it because no final judgment had been entered. Hornbeck argued it was forced to file its compulsory counterclaim under the federal rules of civil procedure. The court found under these circumstances Hornbeck's counterclaim was compulsory and it therefore had standing to bring its claim against National. The court then upheld the district court's finding of negligence and damages against R & R for which National was liable under the policy.

With regard to damages, however, the Fifth Circuit found the district court's application of the 18% statutory interest rate was improper because it resulted in a judgment in excess of National's $1,000,000 policy limit.

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[1] *See e.g. Owens v. Allstate Ins. Co.*, 996 S.W.2d 207, 208-09 (Tex. App.—Dallas 1998, pet. denied) (holding that insurance company lacked standing to bring interpleader action "because [the insured-tortfeasor] was not legally responsible to pay for any of the defendants at the time of the interpleader petition").

TWO RECENT FEDERAL CASES REFLECT DIFFERENT SUMMARY JUDGMENT APPROACHES TO PROPERTY DAMAGE CLAIMS

A federal court in Dallas granted summary judgment in favor of American Insurance Company ("AIC") in a hail storm case. In *Hamilton Properties v. Am. Ins. Co.*, No. 3:12-CV-5046-B, 2014 WL 3055801 (N.D. Tex. July 7, 2014) (Boyle, J.), a commercial property owner sued AIC for denial of a claim related to damages from a July 8, 2009 hailstorm in Dallas.

The court found AIC had satisfied its summary judgment burden on the breach of contract claim. AIC had introduced evidence that other hailstorms that occurred outside the policy period had affected the property and the damage was possibly attributable to normal wear and tear, also excluded by the policy. The plaintiff countered with affidavits showing that the July 8 hailstorm caused damage to roofs of neighboring buildings and was stronger than prior hailstorms. The court found the affidavits insufficient to defeat summary judgment because they were silent as to the condition of the plaintiff's property before or after the July storm and did little more than show that the July storm *could have* damaged the property. Although the court acknowledged that the plaintiff's affidavits were some evidence that the July storm contributed to the damages, it concluded the plaintiff's evidence would not allow a jury to allocate damages between the July hailstorm and non-covered factors. Because of this deficient evidence and the plaintiff's lack of evidence on its other claims, the court also granted summary judgment in favor of AIC on the plaintiff's claims for bad faith, violations of the Texas Insurance Code and the DTPA, breach of fiduciary duty, and misrepresentation.

In contrast, the federal court in *First Christian Academy, Inc. v. New Hampshire Ins. Co.*, No. H-13-1452, 2014 WL 294949 (S.D. Tex. July 1, 2014) (Miller, J.) granted summary judgment against an insurer in a claim brought by a commercial property owner for vandalism damages.

New Hampshire Insurance ("NHIC") cancelled the insured's commercial property and general liability insurance policies on December 10, 2011 after the insured failed to pay premiums. The insured filed suit against NHIC on April 19, 2013 for wrongful denial of a property damage claim from vandalism that occurred in late December 28, 2011, after the policy had been cancelled. Later, in response to a motion for summary judgment by NHIC, the plaintiff argued it first reported the loss in February 2012 and the vandalism occurred as far back as September 2011, within the policy period.

NHIC objected to the property owner's affidavit stating that the loss occurred during the coverage period. NHIC argued this evidence was conclusory, unsubstantiated, and self-serving. Judge Gray Miller rejected this argument and found the affidavit sufficient because all the plaintiff had to show was more than a scintilla of evidence to defeat summary judgment. The court denied NHIC's summary judgment argument that there was no breach of contract as a matter of law.

In addressing the plaintiff's claims for bad faith and violations of the Texas Insurance Code and Deceptive Trade Practices Act, the court found that in light of plaintiff's evidence that the damage was sustained before the policy's cancellation, there existed a genuine issue of material fact that the insurer should have at least conducted an investigation into this aspect of the claim. It therefore denied NHIC's motion for summary judgment on these extra-contractual claims.

INSURERS MAY HAVE NEW REMEDY TO CHALLENGE AMOUNT OF HOSPITAL MEDICAL CHARGES

The Fourteenth Court of Appeals in Houston recently found an insurer had standing to challenge medical charges subject to a hospital lien in a personal injury lawsuit. In *Allstate Indem. Co. v. Memorial Hermann Health System*, No. 14-13-00307-CV, 2014 WL 2895187 (Tex. App.—Houston [14th Dist.] June 26, 2014), a person received emergency care at Memorial Hermann Hospital for injuries sustained in an automobile accident caused by Allstate's insured. Allstate paid the injured party $2,118 on behalf of its insured to settle the claim but did not discharge the hospital lien. Memorial Hermann sent a letter to Allstate alleging that it had violated the lien which secured $4,956 in medical charges. Allstate then filed a declaratory judgment action seeking a declaration that it had the right to challenge the reasonableness of the hospital's billed services. The trial court granted Memorial Hermann's plea to the jurisdiction and its motion for summary judgment on its counterclaim for the medical expenses.

On appeal, Memorial Hermann argued Allstate was not a party to its contract with the injured party and therefore had no standing to challenge the reasonableness of medical bills. The court first noted that under the Uniform Declaratory Judgment Act, Allstate was affected by the Hospital Lien Statute because Memorial Hermann's lien attached to the proceeds of Allstate's policy. The court then discussed a dispute among Texas appellate courts on whether the Hospital Lien Statute established a separate cause of action against an insurer independent of the patient's obligation to pay the hospital bill. It cited a recent Texas Supreme Court case that questioned whether the statute created this cause of action.[1] In that case, the high court noted that a valid hospital lien that is not paid out of settlement proceeds revives the patient's cause of action and the hospital retains its lien on that cause of action. Because of this remedy already available to a hospital and an injured party, the court questioned the "propriety of reading into the statute such an additional remedy [against an insurer]." However, the court did not resolve the issue because it was not raised by the parties.

The Houston court nevertheless concluded that Allstate had standing to challenge the reasonableness of the medical bills and remanded the case to the trial court. Because the Texas Supreme Court has called into question this basis of Allstate's argument, however, it is unclear whether the Houston court's ruling would be upheld on appeal. Until the high court resolves this issue, insurers may have a new remedy to challenge the amount of a hospital's medical expenses.

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[1] *McAllen Hospitals, L.P. v. State Farm Cnty. Mut. Ins. Co. of Tex.*, --S.W.3d--, 2014 WL 1998245, at *5-6 (Tex. May 16, 2014).