Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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SOUTHERN DISTRICT OF TEXAS DISMISSES PLAINTIFF'S BAD FAITH AND PROMPT PAYMENT OF CLAIMS CAUSES OF ACTION IN WIND AND HAIL LAWSUIT

This past week the District Court for the Southern District of Texas, Houston Division, partially granted State Farm Lloyds' Motion for Summary Judgment, and dismissed an insured's bad faith claims pursuant the *bona fide* dispute doctrine. In *Nasti v. State Farm Lloyds*, 2015 WL 150468 (S.D. Tex)(January 9, 2015)(J. Harmon), Plaintiff Gary Nasti sued State Farm Lloyds for alleged storm damage to his Woodlands home. After receiving a free roof estimate from a local roofer, Mr. Nasti reported a claim to State Farm Lloyds and requested an inspection. State Farm inspected the claim and determined that the amount of damage did not exceed Plaintiff's $6,584.00 policy deductible. Plaintiff requested a second inspection and State Farm determined that there was no storm damage; however, State Farm did not alter the original estimate establishing that Plaintiff's alleged damage was below his deductible. Plaintiff's expert, Shannon Kimmel, opined that the roof needed to be entirely replaced for $49,808.47 and that State Farm's adjusters ignored and underestimated covered damage. Plaintiff sued State Farm for breach of contract, and multiple violations of under the Texas Insurance Code and Deceptive Trade Practice Act.

Judge Melinda Harmon found that a fact issue existed regarding the conflicting estimates between State Farm and Plaintiff with regard to his breach of contract claim; however the Court dismissed Plaintiff's bad faith and prompt payment claims because Plaintiff's expert provided a declaration clearly establishing that a genuine dispute as to the extent of covered versus non-covered damage exists between the covered damages. Since a *bona fide* dispute regarding what damage, if any, should have been covered, the Court partially granted State Farm's summary judgment and dismissed all of Plaintiff's claims except breach of contract.

[Editor's note: Christopher Martin, Marilyn Cayce, and Raymond Kutch of Martin, Disiere, Jefferson and Wisdom were privileged to represent State Farm Lloyds in this matter].

DALLAS COURT OF APPEALS AFFIRMS TRIAL COURT'S DECISION THAT INSURER DID NOT OWE THE DUTY TO DEFEND TO AN INSURED IN A CONVERSION AND LOCKOUT CASE

In *Drew v. Texas Farm Bureau Mutual Insurance Company*, 2014 WL 7476481 (December 31, 2014), the Dallas Court of Appeals affirmed a trial court's grant of summary judgment on behalf of Texas Farm Bureau Mutual Insurance Company ("Farm Bureau") for the alleged breach of the policy contract for refusing to defend and indemnify the Plaintiffs' in an underlying lawsuit. The underlying lawsuit involved the lock out of a tenant in sufferance. Charles Sneed sued Becky Drew alleging that he owned a home in Coppell, Texas subject to a deed of trust that he held. On August 3, 2010, Sneed alleged that Drew purchased the home at a trustee's sale and Sneed continued to live in the house. Drew never attempted to remove Sneed, nor did Drew make any demand for him to vacate the premises. In September 2010, while he was out, Drew removed his personal property, changed the locks, and threaten Sneed's wife with arrest when she tried to stop the garage sale of their possessions. Drew then allegedly used the proceeds from the sale of Sneed's personal property on improvements on the property in question. The Sneeds subsequently filed suit against the Drews.

Farm Bureau issued a homeowner's insurance Policy to the Drews, and the Drews tendered Sneed's Original Petition to Farm Bureau. On October 19, 2010, Farm Bureau declined to defend the suit on Drew's behalf. In June 2010, Drew tendered Sneed's Fourth Amended Petition and Farm Bureau, once again, refused to defend the lawsuit. On October 26, 2012, the Drews brought suit against Farm Bureau, and the trial court subsequently granted Farm Bureau's Motion for Summary Judgment.

The Court reiterated the long standing rule that duty to defend is analyzed under the eight corners rule. The Court only considers the terms of the Drews' insurance policy and the allegations of the Sneed's petitions. In Texas, if a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against the insured.

The Court first looked at the Policy's definition of "occurrence" which was defined as "an accident, including exposure to conditions, which results in bodily injury or property damage during the policy period." The Court next analyzed Plaintiffs' First and Fourth

Petitions—the petitions Plaintiffs tendered to Farm Bureau. The Original Petition alleged conversion, violation of the Texas Theft Liability Act, and unjust enrichment. The Fourth Amended Petition alleged causes of action for conversion, unjust enrichment, and sought exemplary damages.

The Court stated that the duty to defend does not depend on what the facts are; it depends only on what the facts are alleged to be. A liability policy obligates the insurer to defend the insured against any claim that could potentially be covered, regardless of the claim's merits. If the pleadings do not allege facts within the scope of the policy's coverage, the insurer does not have a duty to defend.

Farm Bureau argued that the conduct alleged in both of the petitions was not an "accident" and therefore was not an occurrence Drews' Policy. The Drews argued that the Sneed's conversion claim was not an intentional tort; rather, the Sneeds' allegations are of negligent acts by the Drews thereby justifying coverage under the Policy. After considering the arguments of the parties, the Court held that the sale of the Sneeds' possessions was "intentional and deliberate, even if the Drews had no intent to injure the Sneeds." The Drews actions of changing the locks and selling the Sneeds possessions were not accidental, but rather voluntary and intentional action. As such, the Court affirmed the trial court's grant of summary judgment.