Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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FIFTH CIRCUIT REJECTS SOPHISTICATED-INSURED EXCEPTION TO DOCTRINE OF CONTRA PROFERENTUM

Last Wednesday, the Fifth Circuit Court of Appeals affirmed summary judgment in favor of insureds seeking coverage under a directors' and officers' liability policy for attorney fees and costs incurred in successfully defending criminal charges against them as employees of the Stanford Financial Group Company. In *Certain Underwriters at Lloyds London v. Perraud*, 2015 WL 4747318 (5th Cir. Tex. August 12, 2015), the trial court found that the policy exclusion Underwriters sought to apply to this case was ambiguous and interpreted the provision in favor of coverage applying the doctrine of *contra proferentum* ('if a policy is susceptible to more than one reasonable interpretation...Texas law requires an insurance policy to be construed against the insurer and in favor of the insured."). And the trial court refused to apply a "sophisticated-insured exception" to the doctrine that some courts have applied when the insured is a sophisticated entity and actually negotiated or drafted applicable policy provisions.

On appeal, Underwriters did not challenge the ambiguity finding but only sought to overturn the judgment based on the sophisticated-insured exception. The Court observed the variety of approaches other courts have employed when applying the exception. But they also noted that no Texas court has ever recognized the exception and state's highest civil court recently declined the opportunity to do so on a certified question. So applying the well accepted doctrine of *contra proferentum*, and observing Texas's strong policy in favor of finding coverage, the Court affirmed summary judgment finding coverage under the policy.

COURT FINDS NO DEATH BENEFIT COVERAGE FOR INSURED'S FALL AFTER EXITING VEHICLE

Last Monday, the Fifth Circuit Court of Appeals affirmed a trial court's summary judgment in favor of an insurer finding that the insured's fall and subsequent death occurred after he had exited the insured vehicle and, as a result, the death benefit did not apply. In *McWhirter v. AAA Life Insurance Company*, 2015 WL 4720323 (5th Cir. Tex. August 10, 2015), the policy provided coverage for accidents that occurred while "exiting from any private passenger automobile." The insured returned from a party with his wife and daughter, with his daughter driving the car. Shortly after arriving home, the insured fell. He was found lying in the grass near the car and neither his wife nor daughter witnessed the fall. McWhirter later died from a head injury sustained in the fall. AAA moved for summary judgment asserting McWhirter fell after exiting the vehicle. The trial court granted summary judgment in favor of AAA and this appeal followed.

On appeal, the Fifth Circuit reviewed the evidence which supported the claim the insured fell after he exited the vehicle and while approaching the house, along with the conflicting evidence provided by the family in an effort to create a fact issue. The Court found the evidence offered, however, was not sufficient to create a genuine issue of material fact. The Court observed the Texas Supreme Court had considered a very similar case and whether an accident arose out of the use of a truck and noted that "if the insured had finished exiting the truck and then fell, or if he had fallen out of the car without any involvement of the vehicle, there would be no coverage." Accordingly, summary judgment in favor of the insurer was upheld.

NATIONAL FLOOD INSURANCE PROGRAM REQUIRES SECOND SWORN PROOF OF LOSS TO PAY SUPPLEMENTAL CLAIM

In *Ferraro v. Liberty Mutual Fire Insurance Company*, 2015 WL 4666106 (5th Cir August 6, 2015), the Fifth Circuit Court of Appeals upheld the district court's summary judgment in favor of Liberty Mutual based on federal law construing the National Flood Insurance Program (NFIP.) Liberty's adjuster had recommended a payment of $103,826 for flood damages to the Ferraros' home due to Hurricane Issac, and prepared a proof of loss. The Ferraros signed it, and added the handwritten notation "will supplement later." Liberty paid the entire amount. The Ferraros later submitted their public adjuster's report to Liberty for $320,436, but failed to include a second sworn statement in proof of loss. Apparently, according to the Court, "A Liberty Mutual adjuster told them no additional forms were necessary to support their claim." The carrier issued no additional payments.

The Ferraros filed suit under the flood policy for property damage, loss of use, depreciation, mold and damage remediation, debris clean-up and removal cost of compliance, and any other available damages. Liberty moved for summary judgment on the basis that

the Ferraro's were barred from pursuing the instant suit because they did not comply the insurance policy's requirements to provide a complete signed sworn-to proof of loss within 240 days of the loss. The trial court agreed and granted a case dispositive summary judgment against the Ferraros.

The Fifth Circuit recognized that whether an insured must submit an additional proof of loss to recover additional amounts on a preexisting claim under the NFIP was a matter of first impression in that Circuit. The summary judgment was upheld because the NFIP puts at stake the government's liability on the claim, and thereby implicates sovereign immunity even though it is an insurance carrier that administers the claim. The Court noted: "Payments made pursuant to such policies are 'a direct charge on the public treasury.'" Therefore, the provisions in the policy must be "strictly construed and enforced." The Court followed the precedents of the First and Eighth Circuits and held that an additional signed and sworn proof of loss is required. Additionally, the public adjuster's report was insufficient to satisfy this requirement because it is not signed and sworn to by the Insured.

PARTIAL SUMMARY JUDGMENT GRANTED IN RESIDENTIAL HAIL STORM CLAIM

In *Cantu v. State Farm Lloyds*, Civ. Action No. 7:13-cv-00105 (So. Dist. Tex - McAllen Div. August 7, 2015), a homeowner filed suit on his first party property insurance claim for hail damage to his residence in the Valley. The trial court denied the carrier's motion for summary judgment on claims of breach of contract and granted in part and denied in part its motion for summary judgment on claims for extra-contractual damages. State Farm had determined the covered damages fell below the policy deductible. The insured invoked the appraisal clause, but filed suit in state court before the appraisal process was completed alleging claims of breach of contract, violations of the Texas Insurance Code and DTPA, and breach of the common-law duty of good faith and fair dealing. The case was removed to federal court and Plaintiff's motion to remand was denied. The Plaintiff attempted to invoke the appraisal clause again in federal court, but the Court ruled that right was waived when he abandoned the previous appraisal.

State Farm moved for summary judgment on the breach of contract claim contending it arose solely on Plaintiff adjuster's contention that the entire roof needed to be replaced because the damaged tiles allegedly could not be replaced with similar tiles. State Farm contended there was no breach because the Insured admitted only 8 to 14 tiles were damaged and the policy only required the insurer to replace damaged parts of the roof with similar materials and construction. The Court focused on Plaintiff's adjuster's contention that "all slopes of the roof require complete replacement" and denied the motion for summary judgment on the basis of a question of fact as to whether 8 to 14 tiles needed replacing or the entire roof.

The Court granted summary judgment on Plaintiff's DTPA, Texas Insurance Code and common law duty of good faith and fair dealing claims that fall under the analysis of a "bad faith" claim. The Court recognized that "a claim crosses the boundary from breach of contract to bad faith when the former 'is accompanied by an independent tort.'" An insurer does not act in bad faith, as a matter of law, where a reasonable investigation merely shows "a bona fide dispute about the insurer's liability on the contract." The Court noted that the insured testified he had no complaints about the handling of his claim other than disagreements on the amount. Plaintiff's public adjuster claimed State Farm's adjuster failed to reasonably investigate the claim as evidenced by the "incomplete and inadequate assessment of the damage." The Court quickly saw through this advocacy and stated, "a discrepancy between the estimates and disagreement as to the amount of damage is not tantamount to bad faith."

The Court denied a summary judgment "at this time" as to Plaintiff's remaining prompt payment of claim contention because of a fact question created by the denial of the summary judgment motion on the breach of contract claim. The Court concluded: "An insurer is required to pay statutory damages 'only after having first been found liable for the claim.' Thus, if State Farm is ultimately adjudged liable under the policy, it may still be liable under Section 542.058 despite its potential good faith in denying payment." Thus, the Court held it was premature to rule on the prompt payment of claim contentions.

FIFTH CIRCUIT PROVIDES GUIDANCE ON POLICY NOTICE PROVISIONS AND CALCULATING PENALTY INTEREST UNDER THE TEXAS PROMPT PAYMENT OF CLAIMS ACT

Recently, the Fifth Circuit examined reporting requirements and the accrual of penalties and interest under Texas Prompt Payment of Claims Act. In *Cox Operating, L.L.C. v. St. Paul Surplus Lines Ins. Co.*, No. 13-20529, 2015 WL 4590252, (5th Cir. July 30, 2015), the insured incurred substantial costs cleaning up pollution and debris after Hurricane Katrina caused damage to its oil-and-gas facilities. After reimbursing Cox for over $1.4 million of its costs, Cox's insurer filed suit in the district court, seeking a declaration that the remainder of Cox's costs were not "pollution clean-up costs" covered by the policy. After a five-week jury trial, the district court entered judgment awarding the insured damages for breach of the policy and penalty interest under the Prompt Pay Act. On appeal, St. Paul argued the damages award must be reduced (1) because it includes costs that Cox did not report to St. Paul within one year of the clean-up work and thus are not covered by the policy; and (2) the award constituted a double recovery because it includes costs that were already reimbursed by other insurers. St. Paul also argued the Prompt Pay penalty-interest award should be reduced, or eliminated entirely, because the district court calculated the amount of penalty interest based on an incorrect date when penalty interest began to accrue.

On October 17, 2005, Cox notified St. Paul that it had a pollution clean-up claim. On October 27, St. Paul hired an adjusting firm to adjust the claim, and a representative made contacts with Cox's representative to discuss it. Cox alleged that between November 8, 2005, and March 13, 2006, no adjuster or St. Paul representative communicated with any Cox representative On July 24, 2006, a request for documents and invoices was made.

In the year following St. Paul's request for documents, Cox submitted various invoices and statements of the amount of its claim. St. Paul paid the limits of the primary policy and some additional under the excess. On August 30, 2007, St. Paul delivered a letter to Cox stating that St. Paul believed it had "paid all amounts that ... are owed under the 'Pollution Clean Up Costs' section of the Policy." The letter also included a copy of a complaint that St. Paul had filed in this case against Cox seeking a declaration that St. Paul was not liable for the rest of Cox's claim.

Cox counterclaimed alleging St. Paul had breached the policy; St. Paul had done so in bad faith; and, because St. Paul had failed to commence an investigation or request documents within 30 days of receiving notice of its claim, St. Paul owed penalty interest under the Texas Prompt Payment of Claims Act. At trial, the jury found St. Paul had breached the excess policy resulting in damages to Cox. The jury also found St. Paul had violated the Prompt Payment of Claims Act by not timely commencing an investigation or requesting documents. The district court entered judgment on the jury's findings awarding Cox damages for breach of the policy and penalty interest under the Act.

On appeal, St. Paul argued under the Fifth Circuit's decision in *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653 (5th Cir.1999), a notice provision appearing in a policy's "insuring language" defines the scope of coverage and is therefore nonwaivable. Thus, the one-year reporting requirement could not be waived. The Court disagreed finding that the holding in *Matador* stressed it was the parties "objective intent" that determined whether a policy's provision could be waived. In this case, because of the nature of the provision and St. Paul's actions, the court could not conclude that the parties intended the provision to be nonwaivable.

As to the "double recovery" argument, the Court found that viewing the trial evidence in the light most favorable to the verdict, a reasonable jury could have reached the result and affirmed the district court's rejection of the double recovery argument.

Finally, St. Paul challenged the district court's award of penalty interest under the Texas Prompt Payment of Claims Act, asserting that the district court incorrectly determined the date on which penalty begins to accrue. The jury found St. Paul failed to commence an investigation or request information within 30 days of that date. Consequently, the jury found St. Paul violated § 542.055 of the Act. The district court concluded that interest began accruing 60 days after Cox provided St. Paul with notice of its claim. The Court began its analysis by noting that the Texas Supreme Court has not yet explained whether, and when, an insurer's violation of § 542.055 triggers the accrual of penalty interest under § 542.060 and concluded they would have to make an *Erie* guess as to the answer. They concluded that the plain language of the Act provides that a violation of any of the Act's deadlines begins the accrual of statutory interest under § 542.060. Thus, the Court could find no reversible error in the district court's calculation of penalty interest. The district court's judgment was affirmed.

INSURED'S "FORUM MANIPULATION" AND "DECEPTIVE MISCONDUCT" RESULTS IN IRONIC EXPIRATION OF THE STATUTE OF LIMITATIONS AND COMPLETE DISMISSAL OF HIS CLAIMS

Recently, in *Van Tassel v. State Farm Lloyds*, Civil Action No. 4:14-CV-02864 (S.D. Tex. July 31, 2015), a Federal District Court Judge in the Southern District of Texas denied Plaintiff's motion to remand and granted summary judgment to State Farm as to all of the Insured's contractual and extra-contractual causes of action against it.

The "convoluted" procedural history of this case began when suit was originally brought in November in 2012 in state court in Brazoria County, Texas by Van Tassel against State Farm's Lloyds, Inc. ("Inc."), a different entity than State Farm Lloyds, and against an individual insurance adjuster from Texas. Although the suit was against Inc., which is State Farm Lloyds' registered agent for service of process (as required by state statute), State Farm Lloyds was Van Tassel's actual insurer, so State Farm Lloyds answered the petition. In December of 2012, State Farm Lloyds also directly informed Van Tassel that State Farm Lloyds was the proper defendant and Inc. was not. As the Court noted, Van Tassel's insurance policy's declaration page and State Farm's coverage letters also stated clearly that Van Tassel's policy was issued by State Farm Lloyds, not Inc., and those documents should have been reviewed by Van Tassel's attorney before filing suit, as required by both Texas Rule of Civil Procedure 13 and Federal Rule of Civil Procedure 11.

At his deposition, Van Tassel admitted he had read his insurance policy. Van Tassel, however, did not modify his pleadings or join State Farm Lloyds as a party defendant. His lawyer insisted that his petition asserted causes of action which he could not bring against State Farm Lloyds and that Inc. *was* the proper defendant. State Farm Lloyds removed the suit to federal court arguing the individual adjuster was improperly joined solely to defeat diversity jurisdiction. In January of 2013, Van Tassel filed his first motion to remand, finally acknowledging that State Farm Lloyds had issued his policy and had assigned the adjuster to investigate the claim. The Court

denied the motion to remand and dismissed the adjuster as an improperly joined party because the claims were identical to those against the insurer.

Shortly before the trial setting, Van Tassel filed his second motion to remand based on "new information" stating that State Farm Lloyds misrepresented that it was incorrectly named in this suit, claiming when he filed his first motion he thought Inc. was not a citizen of Texas, and asserting that he now realized that all the named parties were citizens of Texas at the time of the improper removal by nonparty State Farm Lloyds. As such, he argued the case should be remanded for lack of subject matter jurisdiction. Van Tassel, through his lawyers, represented that he actually intended to sue Inc. Because State Farm Lloyds had never properly become a party in the suit, Plaintiff served Inc., Inc. was never dismissed from the suit, and Van Tassel maintained that he intended to sue Inc., the federal court granted the second motion and remanded the case to state court.

After the case was remanded to state court, Inc. moved for summary judgment on the grounds that it was not Van Tassel's insurer and thus not liable for breach of the insurance contract or the other claims. In September of 2014, Van Tassel filed an Amended Petition and, contrary to his earlier representations to the court, reversed course and for the first time dropped Inc. as a party and named State Farm Lloyds as the defendant in the case. In his response to State Farm's motion for summary judgment, Van Tassel made factual statements totally contrary to his previous representations to the Court. The insured, through counsel, amended his pleadings to correct his earlier misnomer of State Farm Lloyds as "State Farm Lloyds, Inc." after previously telling the federal court that the doctrine of misnomer did not apply.

After Plaintiff amended his petition in state court, State Farm Lloyds again removed the case to federal court and Plaintiff filed another motion to remand. In response, the Court found the amended petition filed in September of 2014 commenced a new lawsuit after his voluntary dismissal of Inc. In ruling on the motion to remand, the Court found Van Tassel attempted to "manipulate the forum by significant misrepresentations and deceptive misconduct." The Court dismissed the allegations against the individual adjuster and denied the third motion to remand.

State Farm Lloyds also filed a motion for summary judgment asserting statute of limitations defenses to all of the claims. At issue was whether Van Tassel's initial petition suing State Farm Lloyd's, Inc. was a misnomer or misidentification of the proper Defendant which was critical to determine whether or not the statute of limitations were subject to tolling. The Court noted that Van Tassel insisted "until recently" that it was not a misnomer. The Court agreed with State Farm that Van Tassel was now judicially estopped from asserting his suit against Inc. was a misnomer and State Farm Lloyds, Inc. was the wrong party defendant. Furthermore, the Court found State Farm had met its burden to show Van Tassel was in court with unclean hands which defeated his request for equitable tolling. Based on the statutory and contractual limitations periods in Texas, the Court granted summary judgment as to <u>all</u> of Plaintiff's claims.

[**Editor's Note**: State Farm was represented in this case by Chris Martin, Marilyn Cayce and Raymond Kutch of our firm and we are grateful for the opportunity to defend State Farm in this procedurally fascinating case and we congratulate the company on this significant win.]