

TEXAS INSURANCE LAW NEWSBRIEF

AUG 23, 2016

TYLER APPEALS COURT GRANTS MANDAMUS ON INSURER'S MOTION TO SEVER EXTRA-CONTRACTUAL CLAIMS

Last week a Texas appellate court conditionally granted a writ of mandamus and directed the trial court to vacate its previous order denying a motion to sever extra-contractual claims.

The dispute in *In Re: AAA Texas County Mutual Insurance Company v. Hon. David Scott Brabham*, No. 12-15-00277-CV, 2016 WL 4395817 (Tex. App. Aug. 18, 2016), arose when the trial court denied a motion to sever and abate extra-contractual claims and compelled AAA to respond to discovery on extra-contractual claims. The underlying case was cause number 2014-1365-A, styled *Thomas Jackson vs. AAA Texas County Mutual Insurance Company* in the 188th District Court of Gregg County, Texas. On June 12, 2013, vehicles driven by Thomas Jackson and Patricia Tompkins were involved in a collision. Jackson filed a claim for underinsured motorist (UIM) benefits with his insurer AAA. Jackson later filed a lawsuit against AAA for breach of contract under the UIM portion of his policy, alleging violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code, and breach of the duty of good faith and fair dealing. AAA filed a motion to sever and abate the extra-contractual claims. Following a hearing, the trial court denied the motion but ordered that the contractual and extra-contractual claims be heard separately in a bifurcated trial and granted a motion to compel discovery regarding the extra-contractual claims. AAA then sought mandamus.

The court began its analysis by reciting Texas law that mandamus is an extraordinary remedy, but appropriate when a motion to sever and abate extra-contractual claims is denied. AAA argued that the trial court abused its discretion when it denied the motion to sever and abate and compelled discovery and that a bifurcated trial is not sufficient to protect AAA's interests. The appellate court found that although a trial court has considerable discretion, that discretion is not unlimited. Abatement is required when a determination on the breach of contract claim in favor of the insurer will negate the insured's extra-contractual claims. Without the abatement, the parties would be put to the effort and expense of conducting discovery and preparing for trial of claims that may be disposed of in a previous trial.

The court concluded that a bifurcation does not sufficiently protect the interests of an insurer in this context because the order rendered at the end of a bifurcated trial may not be final and appealable. In the context of insurance cases, a breach of an insurance contract claim is separate and distinct from bad faith, Insurance Code, or DTPA causes of action and each might constitute a complete lawsuit within itself. An insured may not prevail on a bad faith claim without first showing that the insurer breached the contract. Further, the Texas Supreme Court has recognized that severance may be necessary if the "insurer has made a settlement offer on the disputed contract claim" or if there are "other compelling circumstances." In the context of UIM coverage, an insurer is under no contractual duty to pay UIM benefits until the insured proves that the insured has UIM coverage, that the other driver negligently caused the accident that resulted in covered damages, the amount of the insured's damages, and that the other driver's insurance coverage is deficient. Thus, an insured generally must first establish that the insurer is liable on the contract before the insured can recover on extra-contractual causes of action against an insurer for failing to promptly pay, failing to settle, or failing to investigate an underinsured motorist insurance claim.

The court conditionally granted the writ because the extra-contractual claims ultimately could be rendered moot and AAA should not be required to put forth the effort and expense of conducting discovery and preparing for a trial on those claims. The court concluded that the trial court abused its discretion when it denied the motion to sever and abate and compelled discovery on the extra-contractual claims.

FEDERAL DISTRICT COURT EXAMINES "BUSINESS ACTIVITIES" EXCLUSION IN HOMEOWNERS POLICY RELATED TO PHONY YELP REVIEW

A federal district judge in Houston recently examined a homeowner's policy's "business activities" and "malicious act" exclusions and held it excluded all claims against a dentist that wrote phony negative reviews of a competitor. In *Anton v. Nat'l Sur. Corp.*, No. CV H-16-267, 2016 WL 4363406, at *1 (S.D. Tex. Aug. 16, 2016), the insureds, a married couple Michael J. Anton ("Anton") and Magi

Crofcheck (“Crofcheck”) were seeking coverage under their homeowners policy for fake reviews Crofcheck posted on a competing dentist’s Yelp review page and this coverage dispute arose.

Robert Devoll and his dental practice, Clear Lake Periodontics, sued the insureds in state court. Anton and Crofcheck are both dentists in the same locale as Dr. Devoll. The allegations set forth in the Devoll lawsuit stem from a phony review of Dr. Devoll's dental practice that Dr. Crofcheck admitted to posting on Dr. Anton's Yelp account. In the Yelp review, Dr. Crofcheck represented to be a patient of Dr. Devoll and accused him of unprofessional and reprehensible dental care. Dr. Devoll's petition asserted multiple causes of action including violations of Texas Civil Practice and Remedies Code § 143.001; negligence per se; fraud; negligence and gross negligence business disparagement; and intentional infliction of emotional distress. The insureds timely notified National Surety of the lawsuit on more than one occasion and requested defense and indemnity coverage under their Homeowners' Policy. NSC formally denied the insureds requests. The insureds then filed this lawsuit and NSC moved for judgment on the pleadings.

The case turned on whether the claims in the underlying lawsuit fell within two exclusions under the homeowner’s policy. Exclusion 1 excludes coverage for damages arising out of “[a]ny criminal, willful, malicious or other act or omission that is reasonably expected or intended by any insured to cause damage. Exclusion 7 excludes coverage for damages arising out of “[b]usiness activities or business property of any insured.”

The court reasoned that because the phony reviews were intentional and meant to cause harm and because both Plaintiffs are competing dentists, the court found that all causes of action were unambiguously excluded by exclusions 1 or 7. Accordingly, the court granted the motion for judgment on the pleadings dismissing all claims.