Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

SEP 18, 2017

EVERYTHING INSURANCE PROFESSIONALS NEED TO KNOW ABOUT THE NEW WIND/HAIL STATUTE IN TEXAS: HB 1774 AND WHAT IT MEANS TO YOU NOW.

Effective September 1, 2017, Texas new law governing wind and hail claims submitted by Texas insureds (and their PAs, lawyers and other representatives) put new significant new requirements on those submitting property claims in Texas arising out of wind or hail events. On **Friday, September 29th at 12 noon Central** (1 p.m. Eastern, 10 a.m. Pacific), *MDJW University* will present a one hour webinar on this new legislation impacting every P&C carrier doing business in Texas. Certified for one hour of CE credit by the Texas Department of Insurance, this class will be taught by Chris Martin, founding Partner and the head of our Firm's Insurance Practice Group. Chris will cover the new legislation and how it impacts claims submitted now, and also the expected impact on future litigation arising out of Texas claims submitted after September 1st. The class is free and can be accessed from any computer with an internet connection or any phone line. To resister, please email Cynthia Glenney at: cynthiag@mdjwlaw.com or call her at 713-632-1737.

TDI ISSUES HURRICANE HARVEY BULLETINS

Since Harvey made landfall in Texas three weeks ago, the Texas Department of Insurance has issued 13 bulletins governing different aspects of insurance company operations as they related to this record-setting weather event. Each of the Bulletins are summarized here. HURRICANE HARVEY RESOURCES

FORT WORTH FEDERAL COURT DISMISSES COOKIE-CUTTER WIND/HAIL SUIT

Recently, Federal District Court Judge McBryde from Ft. Worth summarily dismissed all claims pled against an insurer in a typically vague and formulaic lawsuit alleging severe but unspecified damage to a Fort Worth home as a result of a recent hailstorm. In *Cruz v. Allstate Ins. Co.*, No. 4:17-CV-491-A, 2017 WL 3887923 (Sep. 5. 2017), Allstate filed a motion to dismiss all causes of action as inadequately pleaded under Federal Rule 8. The court agreed with Allstate, pointing out that the plaintiffs' complaint "pleaded very few facts," and "contain[ed] only conclusory allegations." The court went on to observe: "Here, at most, plaintiffs' complaint seems to be that they did not get paid as much as they think they should have been paid, but they have not alleged any facts to show that Allstate breached a contract between them." The court then concluded that having failed to allege any factual basis for a breach of contract claim, there could be no recovery for extra-contractual damages unless facts were alleged supporting an independent injury. In this regard, the court noted the recent Supreme Court of Texas opinion in *USAA Texas Lloyds v. Menchaca*, but concluded the extra-contractual claims asserted here were of the type predicated on coverage under the policy, regardless of *Menchaca*.
This outcome is a reminder to carriers not to overlook early opportunities for success in federal courts. Early motions for dismissal under Rules 8, 9, and 12 can be powerful tools. Although not all federal judges are as decisive as Judge McBryde, you can't get what you don't ask for.

SAN ANTONIO FEDERAL COURT STANDS ON DISMISSAL OF ALL CLAIMS IN FIRE CASE

A Federal District Court in San Antonio recently refused to reconsider its prior grant of summary judgment in an insurer's favor on a residential fire case. In *McClelland v. Chubb Lloyds Ins. Co.*, No. 5:16-CV-00108, 2017 WL 3909614 (Sep. 6, 2017), a fire destroyed the McClellands' garage. After being paid approximately $213,000 to rebuild the garage from the slab up, the McClellands opted to build a significantly larger garage and sued Chubb for not paying the full cost of rebuilding the larger garage. The court granted summary judgment for Chubb because the policy only covered reconstruction costs for a structure of like design and quality, and the McClellands had not presented evidence on what that would cost – they only presented evidence of the cost to build a ***larger*** garage. After the summary judgment was granted in Chubb's favor, the McClellands moved to alter or amend it under the Federal rules.
In an opinion highlighting the stringent threshold for reconsideration of rulings in federal court, the court concluded the McClellands had not established there was either significant new evidence that was not previously available to them in the exercise of due diligence or an intervening change in the law, and declined to revisit the summary judgment merely because counsel thought of a different way to argue the case.

HOUSTON COURT OF APPEALS ENFORCES NOTICE CONDITION AND RULES ACTUAL KNOWLEDGE OF SUIT IRRELEVANT

The Houston Court of Appeals recently affirmed an insurer's summary judgment win on violation of a CGL policy's notice provision. In *Hoel v. Old American County Mut. Fire Ins. Co.*, No. 1-16-00610-CV, 2017 WL 3911020 (Tex. App. – Houston [1st Dist.] Sep. 7, 2017), Old American's insured was sued as a result of an auto accident. The insured did not tender the suit to Old

American, and Hoel took a default judgment. Hoel then sued Old American to recover the judgment.

Old American sought and won summary judgment on the ground that the insured's failure to comply with the policy's notice condition and the resulting default judgment constituted prejudice as a matter of law and barred coverage for the claim. Hoel relied on correspondence showing Old American had actual knowledge of the lawsuit and argued actual knowledge prevented a finding that Old American had been prejudiced.

The court of appeals relied on and followed the seminal 2008 case of *National Union v. Crocker*, which expressly held that actual knowledge of the suit does not preclude a showing of prejudice as a matter of law. *Crocker* made clear that knowing suit has been filed and knowing the insured expects and wants a defense are two different things. Thus, the trial court properly granted summary judgment and the court of appeals quickly affirmed it in a short, blunt opinion.

While Texas jurisprudence has steadily eroded the enforcement of policy conditions over the years by adding prejudice requirements, and it is often difficult to obtain summary judgment on more nuanced coverage defenses in Texas state courts, this case shows that failure to provide notice of the suit which results in a default judgment can still be a "sure thing."