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APPELLATE COURT AFFIRMS SUMMARY JUDGMENT FOR CARRIER AGAINST HOMEOWNER BASED UPON STATUTE OF LIMITATIONS EVEN THOUGH CLAIM WAS REOPENED TO INVESTIGATE DAMAGE ALLEGEDLY ARISING FROM ORIGINAL CLAIM

Last Thursday an appellate court affirmed summary judgment premised upon a statute of limitations defense in favor of a homeowner's carrier. In *Sheppard v. Travelers Lloyds of Tex. Ins. Co.*, 2009 WL 3294997 (Tex. App.—Houston [14th Dist.] October 15, 2009), Sheppard sought coverage for damage to his home and contents allegedly caused by Tropical Storm Allison. The policy covered physical loss to the dwelling caused by wind-driven rain, but not physical loss caused by flooding. The home was inspected and the independent adjuster indicated Sheppard's contents were not covered. Travelers sent a check for $4,890.60 and closed its claim file. Sheppard did not communicate with Travelers over the next 20 months. In spring 2004, Travelers received correspondence from Sheppard's attorney indicating the home "has severe water damage and serious toxic mold infestation that was caused by a covered loss and recently discovered." Travelers responded it would investigate the claim subject to a full reservation of rights.

After investigating Sheppard's claim, Travelers denied the claim for three reasons: 1) its determination that flooding from surface water, and excluded peril, caused the damage in question; 2) Sheppard's failure to repair the premises within 365 days of the loss event; and 3) Sheppard's failure to bring an action within two years and one day from the date the alleged underpayment. Travelers received no further correspondence from Sheppard until he filed suit alleging Travelers breached the policy and violated the Texas Insurance Code. In response, Travelers filed a summary judgment asserting it was entitled to judgment as a matter of law because Sheppard failed to file suit within two years and one day from the date on which his causes of action accrued and Sheppard's claim for mold damage was excluded under the policy. The trial court granted summary judgment for Travelers without stating upon which ground it relied.

The primary question addressed by the appellate court was when did Sheppard's causes of action accrue? Travelers argued Sheppard's causes of action accrued in 2001 when the independent adjuster indicated no coverage for his contents and Travelers paid the loss and closed its file. On the other hand, Sheppard contended his causes of action accrued when Travelers sent a denial letter after it re-opened its file in response to an investigation triggered by correspondence from Sheppard's attorney. It is undisputed Travelers did not send written notification to Sheppard in July 2001 explaining its determination regarding the claim and the reasons for its decision. After reviewing Texas law on the issue of accrual, the court concluded the date Travelers closed its claim file established "an objectively verifiable event that unambiguously demonstrated [the insurer's] intent not to pay the claim." Under the specific facts in

this case the court decided Sheppard's legal injury occurred in 2001 and, therefore, his causes of action were untimely filed. Next the court addressed Sheppard's argument that Travelers' later correspondence affected the accrual date. The court held because Travelers did not change its position and did not pay additional sums for Sheppard's claim, the correspondence did not affect Sheppard's already accrued causes of action in 2001.

Editor's Note: This decision, while not reported, could potentially impact thousands of claims filed due to damage caused by Hurricane Ike and other catastrophic storms. In our practice, it is common to experience lawsuits arising from allegations of "underpayment" by an insurance carrier. This decision highlights the proper way to handle new questions or allegations surrounding an old claim. Travelers "got it right" by acknowledging the new claim and undertaking an investigation after receiving correspondence from the insured's counsel. After a thorough and reasonable investigation was completed and with a reservation of rights letter in place, Travelers denied the claim and did not pay additional sums. One of the lessons from this case is even if the carrier desires to pay a nominal amount to avoid suit, it may be starting the limitations clock anew and providing an extension for suits involving allegations of bad faith and violations of the Texas Insurance Code. If you have any questions about how to handle these claims and others like it, please contact any of our capable lawyers on the MDJW Insurance litigation team.

APPELLATE COURT REVERSES SUMMARY JUDGMENT AND REMANDS CASE BASED ON INSUFFICIENT EVIDENCE FOR APPLICATION OF COVERED AUTO EXCLUSION

Recently an appellate court reversed summary judgment in a suit involving allegations of breach of contract, Stowers and violations of the Texas Insurance Code because insufficient evidence precluded application of the covered auto exclusion. In *National Fire Ins. Co. of Hartford v. State and County Mut. Fire Ins. Co.*, 2009 WL 3248224 (Tex. App.—Houston [1st Dist.] October 8, 2009), suit was filed after an auto accident involving Kelvin Ray Gatlin (insured by State and County Mutual Fire Insurance Company) and a vehicle owned by Rainbow Play Systems (insured by National Fire Insurance Company of Hartford). State and County denied coverage to Gatlin and National Fire filed a subrogation suit against Gatlin to recover insurance proceeds paid to Rainbow.

National Fire obtained a post-answer default judgment and received an assignment of Gatlin's causes of action against State and County. National Fire then filed suit against State and County. In response, State and County filed a traditional and no-evidence summary judgment and attached six exhibits. State and County argued summary judgment was proper as coverage was excluded since Gatlin failed to list his vehicle on the declarations page and did not notify the company he had acquired the vehicle within 30 days as required under the policy. State and County did, however, recognize Gatlin's ownership of the vehicle involved in the accident. To support its position, State and County relied upon the insurance claim file as well as the adjuster's notes to prove Gatlin's ownership at the time of the accident.

National Fire responded to the summary judgment and included objections to the claim file and business-records affidavit. Even though the claim file indicated Gatlin purchased the vehicle in 1999, the court concluded this was insufficient evidence to prove Gatlin owned the vehicle at the time of the accident. And, without proof of ownership, it follows that State and County could not rely upon the covered auto exclusion to preclude coverage. Because the exclusion was not established by traditional summary judgment methods, noncoverage cannot be presumed for State and County's no-evidence motion.

APPELLATE COURT AFFIRMS SUMMARY JUDGMENT IN LAWSUIT INVOLVING EMPLOYEE AND NONSUBSCRIBER EMPLOYER BASED UPON WORKERS' COMPENSATION AND EMPLOYEE EXCLUSIONS

Recently, an appellate court concluded an employer's trucker liability insurance policy provided no coverage for an employee who was injured in the course and scope of his employment. In *Robertson v. Home State Co. Mut. Ins. Co*., 2009 WL 3246787 (Tex. App.—Ft. Worth (October 8, 2009), a trucker employed by Ray Redi-Mix, Inc. was injured on the job. Redi-Mix did not provide workers' compensation insurance coverage, but it did have a liability policy. It provided coverage for "all sums an insured legally must pay as damages because of bodily injury or property damage to which [the] insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto." The Policy contained the following relevant exclusions to which coverage did not apply:

3. WORKERS COMPENSATION

Any obligation for which the insured or the insured's insurer may be held liable under any workers compensation, disability benefits or unemployment compensation law or any similar law.

4. EMPLOYEE INDEMNIFICATION AND EMPLOYER'S LIABILITY

Bodily injury to:

a. An employee of the insured arising out of and in the course of employment by the insured; or

b. The spouse, child, parent, brother or sister of that employee as a consequence of paragraph a. above.

This exclusion applies

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

But this exclusion does not apply to bodily injury to domestic employees not entitled to workers compensation benefits or to liability assumed by the insured under an insured contract.

Here, the employee driver sued his nonsubscriber employer and sought a declaratory judgment that Home State had a duty to defend, to indemnify or to both defend and indemnify Redi-Mix for his claims against Redi-Mix. Home State filed a counter claim arguing the workers' compensation and employee exclusions applied to exclude coverage. The employee obtained a final judgment against Redi-Mix for $967,631.52 and the trial court severed the remaining claims involving Home State. Next, Home State moved for summary judgment, which the trial court granted on the grounds that both the workers' compensation and employee exclusions applied to preclude coverage.

On appeal, the employee argued his negligence cause of action was not barred against a nonsubscriber because it arises under common law instead of the Texas Workers' Compensation Act. After reviewing the history of the TWCA and its application through Texas case law, the court observed when the employee sued Redi-Mix for the negligence, the plain and unambiguous language of the TWCA imposed

upon the employee a "statutory burden" to prove negligence of Redi-Mix, prohibited Redi-Mix from utilizing three common law defenses in defending itself, and dictated the defenses on which Redi-Mix could rely. In doing so, the court affirmed summary judgment in favor of Home State.