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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

FEBRUARY 4, 2013

FIFTH CIRCUIT HOLDS INSURED'S LATE NOTICE TO INSURER OF APPEALABLE FINAL JUDGMENT IS PREJUDICIAL AS A MATTER OF LAW

The Fifth Circuit recently concluded that an insured's delay in notifying its insurer of a claim until after a final judgment was entered, but while it was still appealable, prejudiced the insurer as a matter of law. In *Jamestown Insurance Company, RRG v. Reeder*, No. 12-204437 (5th Cir., Jan. 17, 2013), the insured filed suit in 2004 and numerous counterclaims were filed against him. In the trial that followed, the insured took nothing on his own claims but was found liable to several defendants in a March 2008 final judgment. Notice was finally given to the insurer in November 2010 while the case was in the appellate stages. The Texas Court of Appeals affirmed the judgment against the insured. But in August 2012, the Texas Supreme Court reversed and rendered a take nothing judgment against the insured. After notice and during the appeal, the insurer filed this separate declaratory judgment action in federal court. The federal district court granted summary judgment in favor of the insurer and this appeal followed.

The Fifth Circuit reviewed Texas law finding that an insured's failure to notify an insurer of a judgment against them until after it became final and nonappealable, prejudiced the insurer as a matter of law. They also noted that the Texas Supreme Court had not yet addressed the prejudice issue involving notice of an appealable final judgment. In this case, the insured did not tender notice to the insurer until fifty-six months after the first counterclaim was filed, and more than thirty-one months after the trial court entered final judgment. After reviewing Texas law involving late notice and prejudice, the court took an *Erie* guess and held that an insured's failure to notify its insurer of a final judgment that was still appealable nevertheless prejudiced the insurer as a matter of law.

COURT ORDERS SEVERANCE AND ABATEMENT OF EXTRA-CONTRACTUAL CLAIMS IN UNINSURED MOTORIST LAWSUIT WHERE NO OFFER OF SETTLEMENT WAS MADE

Last Wednesday, the Corpus Christi Court of Appeals conditionally granted writ of mandamus, ordering the trial court to vacate its order denying the insurer's motion to sever and abate extra-contractual claims in an uninsured motorist case, even when no settlement offers had been made. In *In re Old American County Mutual Fire Insurance Company*, No. 13-12-00700-CV (Tex.App. – Corpus Christi January 30, 2013), the insured vehicle was struck from the rear by an uninsured driver and the insured and her passengers claimed injuries and damages under their uninsured motorist coverage. The insurer had made no settlement offers and after suit was filed alleging breach of contract and other extra-contractual claims, the insurer filed a motion to sever and abate the extra-contractual claims. The trial court denied the insurer's motion and the insurer filed a petition for writ of mandamus seeking to reverse the order.

The Corpus Christi Court of Appeals reviewed Texas law applicable to severance and abatement and bifurcation of trials and then agreed with the insurer that "severance and abatement of extra-contractual claims is required in many instances in which an insured asserts a claim to uninsured or underinsured motorist benefits." The court noted that the insured must first prove that they have the coverage, that the other driver negligently caused the accident, was uninsured and, also establish the amount of their damages. And because the insurer should not be required to conduct discovery or prepare for trial on claims that could be rendered moot based on the outcome of the contract claim, the court concluded that "the facts and circumstances of the case require severance to prevent manifest injustice," and ordered the trial court to vacate its order denying the motion to sever and abate the extra-contractual claims.

BREACH OF INSURED WARRANTY TO FENCE IN PROPERTY PROTECTED BY THEFT POLICY DEEMED IMMATERIAL TO THE LOSS, INSURER LIABLE

A federal District Court Judge in the Houston Division of the Southern District of Texas recently concluded that a breach of a policy warranty by a trucking company that its terminals are "100% fenced" was found to be immaterial based on the facts of the loss, and coverage was afforded. In *W.W. Rowland Trucking Co., Inc. v. CRC Services, Inc.*, No. 4:12-cv-00091 (S.D. Tex. January 13, 2013), Judge Hughes granted summary judgment in favor of the insured after finding that the thieves created their own opening in a fence through which a truckload of good was stolen. And, despite a warranty that the terminal was 100% fenced, the alleged breach of warranty by the insured was immaterial to the loss. Accordingly, summary judgment was granted in favor of the insured.