Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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FIFTH CIRCUIT REAFFIRMS *SORIANIO* PROTECTION OF LIABILITY CARRIERS FROM MULTIPLE EXPOSURES IN EXCESS OF POLICY LIMITS

Last Wednesday, the Fifth Circuit refused to hold a liability and excess carrier liable for accepting a reasonable policy limits settlement demand on behalf of one insured, leaving another insured exposed to liability and defense costs. In doing so, the court declined to extend the *Stowers* rule and re-affirmed *Soriano*'s protection of insurers faced with large claims against multiple insureds. In *Pride Transportation v. Continental Cas. Co.*, No. 11-10892 (5th Cir. Feb. 6, 2013), a trucking company and its employee driver were sued after a major auto accident. The damages potentially exceeded the limits of both the primary and excess policies. The claimants made an offer to settle with the driver, but not the company, for the total limits of both policies. After attempting to obtain a release of the company as well, the carriers accepted the settlement on behalf of the driver only. The carriers then withdrew their defense of the company on the ground that both policies had been exhausted and there was no further duty to defend or indemnify the company.

The trucking company sued both carriers alleging that accepting the settlement only on behalf of the driver was unreasonable and the carriers should not be released from their duty to defend the company. The company argued that reasonableness of a settlement demand is a fact question which should be determined in light of the total liability to all insureds. The court disagreed and concluded that in light of the undisputed facts creating a high risk of personal exposure for the driver, the carriers' actions were reasonable as a matter of law. The court rejected this creative use of *Stowers*, stating, "…we decline to use this case, as [company] wishes, to extend the *Stowers* duty to impose liability on insurers for accepting demands." The court fell back on the *Soriano* principle applicable in Texas, which protects a carrier from liability when it accepts a reasonable demand on behalf of one insured, even though that settlement may exhaust the policy limits and leave another insured exposed.

The court also summarily rejected the company's attempts to assert common-law bad faith claims re- affirming that the common-law tort of bad faith does not apply to third-party liability claims and that its statutory equivalent under Texas Insurance Code §541 is governed by the *Stowers* standard.

FEDERAL JUDGE IN EASTERN DISTRICT DISMISSES NUMEROUS EXTRA-CONTRACTUAL CLAIMS BY INSURED

Last week, the Eastern District of Texas demonstrated that taking a "shotgun" approach to pleadings will not necessarily gain an insured any advantage in federal court. In *Button v. Chubb Lloyds Ins. Co. of Texas*, 4:11CV536, 2013 WL 440976 (E.D. Tex. Feb. 4, 2013), District Judge Richard Schell of the Sherman Division approved a magistrate's report and recommendation, granting the insurer's motion to dismiss and dismissing a wide variety of extra-contractual causes of action asserted by the insured.

The court rejected the insured's claims for breach of implied warranty, stating that insurance policies are not subject to implied warranties. The court also dismissed the insured's claim for negligence and negligent misrepresentation stating: "If a defendant's conduct is actionable only because it breaches the parties' agreement, as is the case here, the claim is solely contractual in nature." The court went on to dismiss the insured's claims for misrepresentation and fraud, noting: "The Court agrees with the Defendant that Plaintiffs have wholly failed to set forth sufficient facts to demonstrate even to the most 'casual reader' an element of fraud or misrepresentation." This result highlights the usefulness of Federal Rule of Civil Procedure 12(b)(6), which provides for early dismissal of claims that have no basis in fact or law.

HOUSTON APPELATE COURT EXONERATES INSURANCE AGENT IN BROKER LIABILITY SUIT

In what may be the final denouement of a ten-year litigation saga, Houston's 14th Court of Appeals recently denied rehearing of its September 2012 opinion holding that an insurance agent was not liable to its client for procuring "bad insurance" after the client's insurance carrier refused to pay a claim. *Guidry v. Environmental Procedures, Inc.*, No. 14-11-00090-CV, 2012 WL 4017984 (Tex. App.—Houston [14th Dist.] Sep. 13, 2012, *supplemental opinion denying rehearing* Jan. 31, 2013).

After the insured was forced to settle a $15 million patent infringement suit out of its own funds, the insured previously sued its carriers, including one liability carrier who had issued coverage with limits of $5 million. In this subsequent suit against the agent, the insured contended the agent had sold the insured "bad insurance" from this carrier and obtained a judgment against the agent in the trial court for the full $5 million policy limit which the insured contended the carrier should have paid. The insured alleged, and the jury agreed, that the agent sold the insured a surplus lines policy without being properly licensed either in Texas or as a surplus lines agent, failed to disclose to the insured that the policy was a surplus lines policy, and sold the insured a policy written by a financially unstable insurer.

The Court of Appeals reversed the trial court's judgment on the jury verdict and rendered judgment that the insured take nothing. The court concluded that although the agent did commit all the acts alleged, there was no evidence that any of them caused the insured's damages. There was no evidence that the insured could have obtained coverage from an admitted carrier, no evidence that its claim would have had a different outcome had its insurer been an admitted carrier, and no evidence that the decline in the insurer's financial rating from A- to D resulted in any actual inability to pay a covered claim.

In response to the insured's request for rehearing on an alternative theory that it should at least recover the premium it paid to the agent, the court continued to rebuff the insured's claims. The court again held there was no evidence the insurer's failure to pay the claim was the causal result of any of the proven acts or omissions of the agent. The court noted that in its prior bad faith suit against the insurer, the insured was able to secure a settlement of $500,000, which on its face showed that the policy was not "worthless," as the insured contended.

SOUTH TEXAS INSURANCE LAW SEMINAR – FEBRUARY 21 & 22nd IN HOUSTON

The South Texas College of Law will host its annual insurance CLE and CE program on Thursday and Friday, February 21 and 22nd in Houston. Chris Martin is the Chair of this year's program and the Planning Committee has put together an incredible program with dynamic speakers covering all of the latest issues in Texas Insurance Law. The program will cover the latest case law changes and strategy updates dealing with Stowers, auto and homeowners insurance, commercial liability coverages, bad faith and Insurance Code allegations, agency problems, insurance mediations and trial strategy considerations. The program will feature some of the best insurance lawyers in the state and each will focus on the latest updates and practical considerations of interest to insurance lawyers and insurance professionals.

For more information on the program, please go to:

http://www.stcl.edu/cle/17th annual tx insurance law.html

We hope to see you in Houston next Thursday and Friday for the 2013 South Texas Insurance Law Symposium.