Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MARCH 25, 2013

FEDERAL COURT IN THE VALLEY REJECTS REMAND, APPRAISAL STRATAGEMS BY POLICYHOLDER

A federal judge of the Southern District of Texas, McAllen Division, recently rebuffed a policyholder plaintiff's attempt to manipulate the appraisal process and to force a remand to state court. *See Friedrichs v. GeoVera Specialty Ins. Co.*, No. 7.12-CV-392, 2013 WL 674021 (S.D. Tex. Feb. 22, 2013).

After the policyholder made a pre-suit demand for hail damage under her homeowners' policy which exceeded $100,000, the insurer invoked appraisal. The insured responded by selecting an appraiser, and, just eight days later, simultaneously filed a lawsuit and an *ex parte* motion for appointment of an umpire. The motion was filed before the 15-day period specified in the policy's appraisal clause for the two appraisers to agree on an umpire. Three days later, the state court judge granted the motion and appointed an umpire. (Although the court's opinion does not reflect it, this almost certainly occurred before the insurer was served with the lawsuit.) The insurer then answered the lawsuit, and a few days later, removed it to federal court and filed a motion to vacate the appointment of the umpire and to set aside the umpire's award.

Just before the removal, the insured amended her petition to delete the breach of contract claim, leaving only a declaratory judgment claim at issue, and argued that the only amount in controversy at the time of removal was the attorney fees for the declaratory judgment. The court rejected this argument noting the amount in controversy for a declaratory judgment action is the value of the right to be declared, and observing that the insured's pre-suit demand made unmistakably clear that over $100,000 in potential coverage was actually at issue. The insured also agreed to stipulate to damages less than $75,000, but the court also rejected this strategy, stating that its discretion to consider a post-removal stipulation is only triggered if the amount in controversy is ambiguous.

The court also summarily overturned the state court's order appointing the umpire and the umpire's award on the grounds that they were made without authority because the insured failed to allow the appraisers the contractually required 15 days to agree on an umpire before filing her motion for appointment.

FEDERAL COURT REJECTS MORE APPRAISAL GAMESMANSHIP; COMPLIANCE WITH AWARD DEFEATS ALL CLAIMS

In a Bastrop County wildfire case, Judge Sam Sparks of the Western District of Texas, Austin Division, also recently addressed the validity of an umpire appointment and appraisal award. *See Michels v. Safeco Ins. Co. of Indiana*, No. 1:12-CV-00511-SS (W.D. Tex. March 13, 2013) (slip copy).

The policyholders initially invoked appraisal on a smoke damage claim to their home, and selected Mark West as their appraiser. Safeco appointed Jason Womack as its appraiser, and the two appraisers agreed on an umpire, but the policyholders then rescinded their appraisal demand. Safeco re-invoked appraisal and again selected Jason Womack. This time the insureds selected Stephen Hadhazi as their appraiser. Unsurprisingly, the appraisers failed to agree on an umpire in 15 days, and Safeco filed suit to have an umpire appointed. The insureds responded by filing suit in state court alleging a variety of claims against Safeco and Womack, and their state court case was removed and consolidated with Safeco's first-filed suit.

Judge Sparks appointed an umpire and ordered the parties to go forward with appraisal. The umpire issued an award of $17,500. Safeco's appraiser agreed to the award, and Safeco tendered a check to the insured in the amount of the award less the deductible and prior payments. Although both parties had previously represented to the court that the appraisal result would resolve all issues, the insureds refused to dismiss their claims, instead seeking to set aside the award and vacate the appointment of the umpire. Among other things, the insureds argued that the umpire impermissibly issued a lump-sum award. The court rejected this argument, noting the insureds' own appraiser, Hadhazi, was the one who requested a lump-sum award, and that their own appraiser's actions would not be the basis for setting aside the award.

After upholding the validity of the appointment and award, the court held timely compliance with the appraisal award defeated all of the insureds' causes of action. The insureds tried to argue they had not accepted the award and therefore were entitled to continue pursuing their claims, but the court summarily rejected that argument stating: "If an insured could simply avoid the outcome of the appraisal process by refusing to accept payment of the award, appraisals would be meaningless exercises in futility."

The two above cases exemplify the power that courts have, should they choose to exercise it, to prevent appraisal gamesmanship and to correct it when it does happen.

THE $50 MILLION NAMING ERROR: FEDERAL COURT HOLDS OUT HOPE FOR POLICY REFORMATION

The Western District of Texas, San Antonio Division, recently opined on a case involving the misnaming of the insured on a pollution liability policy with a $50 million self-insured retention. *See Chartis Specialty Ins. Co. v. Tesoro Corporation*, No. SA-11-CV-00927-DAE. 2013 WL 944254 (W.D. Tex. March 11, 2013). Tesoro Refining purchased a refinery, and as part of the purchase transaction, became the named insured on a pollution liability policy previously issued by Chartis. However, the entity named on the policy amendment was not Tesoro Refining, but its parent company, Tesoro Corporation. The policy had a $50 million self-insured retention for scheduled and known pollution conditions.

In conjunction with environmental cleanup costs alleged to exceed $69 million, Tesoro Corporation demanded coverage from Chartis. Chartis denied the claim, relying in part on the fact that Tesoro Corporation, the named insured on the policy, had not incurred any legal liability or costs, and the legal liability for the cleanup costs was borne by its subsidiary, Tesoro Refining, who was not a named insured on the policy. Because Tesoro Corporation had not paid any part of the alleged cleanup costs and had no legal liability for them, Chartis maintained Tesoro Corporation had not satisfied the $50 million SIR.