Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MAY 9, 2013

EASTERN DISTRICT OF TEXAS DENIES INSURED'S MOTION FOR REMAND AND DISMISSES THIRD-PARTY ADJUSTING COMPANY FROM LAWSUIT

This past week, the United States District Court for the Eastern District of Texas denied a plaintiff insured's Motion for Remand. In *Holmes v. Acceptances Casualty Insurance Company*, No. 1:12-CV-584, 2013 WL 1819693 (E.D. Tex. April 23, 2013), Plaintiff sued the insurer and its third-party adjusting company for common law fraud, negligence, breach of contract, and multiple violations of the DTPA and Texas Insurance Code for alleged damages to the Plaintiff's home arising from a fire. The insurer removed the lawsuit to federal court on the basis that diversity exists among the real parties of interest and that the third-party adjusting company was improperly joined for purposes of defeating federal jurisdiction. Plaintiff subsequently filed a Motion to Remand the case back to state court.

In her well written opinion, Judge Crone determined that the allegations against the adjusting company were conclusory, and they failed to allege any specific conduct that could support a claim for relief under the Texas Insurance Code and DTPA. The Court determined that the plaintiff failed to put the defendants on fair notice of the allegations against them, and the facts, as alleged against the defendants merely parroted provisions of the Texas Insurance Code. The Court also noted that the plaintiff failed to allege any facts against the adjusting company individually, and ultimately failed to meet the liberal pleading standards recognized by Texas state courts. As such, the Court denied plaintiff's Motion for Remand and dismissed the adjusting company from the lawsuit.

NORTHERN DISTRICT OF TEXAS REFUSES TO EXTEND INSURER'S DUTY TO DEFEND BEYOND THE POLICYHOLDER'S EMPLOYEES

In *Colony Insurance Company v. Marty D. Price*, No. 3:11-CV-3536-D, 2013 WL 1797786 (N.D. Tex. April 29, 2013). The Northern District of Texas determined that that Colony Insurance Company ("Colony") did not owe a duty to defend to multiple defendants associated with a nightclub. Colony insured Tommy Sinclair d/b/a Mustang Entertainment ("Sinclair") under the policy at issue. Sinclair operated a nightclub were a patron was allegedly falsely imprisoned, assaulted, and kicked out of the night club. The following day the patron died. The estate and beneficiaries sued several defendants, including Marty Price ("Price"), Mustang Town Property LP ("Mustang"), and T.O.M GP, LLC ("T.O.M.") in the underlying suit. In a separate action, these defendants brought suit against Colony for coverage under Sinclair's Policy.

According to the underlying petition, Price was Sinclair's attorney and was either an owner of the night club or acted as the owner on behalf of Sinclair. Mustang and T.O.M. are entities formed by Sinclair and Price more than year after the alleged wrongful death took place.

The only named insured on the Policy was Sinclair, and additional insureds under the Policy were limited to Sinclair's employees. In an interesting turn of events, Price, Mustang, and T.O.M. alleged that they were Sinclair's employees as defined by the policy. The parties seeking coverage maintained that since the underlying petition alleges that "employees" falsely imprisoned the decedent and also alleged that "Defendants" falsely imprisoned him, and it is known that only Sinclair's employees falsely imprisoned the decedent, that all of the Defendants referenced in the underlying petition must be employees.

Applying the eight-corners test, the Court determined that the petition treated the words "defendants" separate from "employees". The Court carefully explained that underlying lawsuit simply alleged that the Defendants were liable for false imprisonment, not that all defendants were employees. As such, the defendants seeking coverage were not additional insureds under the Policy. Further, the Court determined that it is unreasonable to construe the underlying petition as alleging all "defendants" physically committed a tort on decedent because some of the defendants are entities, not people. As such, the Court granted Colony's Motion for Summary Judgment and determined that Price, Mustang, and T.O.M. are not entitled to coverage under Sinclair's policy as additional insureds.

FEDERAL COURT HOLDS THAT A DIRECTOR AND OMISSIONS LIABILITY POLICY MAY NOT BE TRANSFORMED INTO A POLICY THAT PROVIDES COVERAGE FOR THE POLICYHOLDER'S OWN LOSS

Judge Fitzwater from the United State District Court for the Northern District of Texas granted Zurich American Insurance Company's ("Zurich") Motion to Dismiss pursuant Rule 12(b)(6) in *American Construction Benefits Group, LLC v. Zurich American Insurance Company*, No. 3:12-CV-2726-D, 2013 WL 1797942, (N.D. Tex. April 29, 2013).

American Construction Benefits Group ("ACBG") provided reinsurance to its member company, J.D. Abrams, L.P. ("Abrams"). ACBG obtained reinsurance from Presidio Excess Insurance Services, Inc. ("Presido"). During the policy-renewal negotiations with Presidio, ACBG's president, Seven J Heussner, accepted a coverage exclusion for the cost of a heart transplant operation incurred in the treatment of the child of an Abrams employee. As such, Presidio declined to provide reinsurance coverage for the transplant claim, and ACBG was responsible for the cost of the heart transplant.

ACBG alleged that its president's actions relating to the coverage exclusion he negotiated constituted a "wrongful act" under its Director's and Omissions Policy ("D&O Policy") and that Zurich was responsible for the approximately $1.2 million cost for the heart transplant. After several months of negotiations, ACBG sued Zurich for breach of contract based on its failure to pay the claim. ACBG also alleged that Zurich violated the DTPA and Texas Insurance Code.

The court refused to permit ACBG to recover under the D&O Policy. The Court noted that ACBG was attempting to transform its D&O *liability* policy into a first-party policy to provide coverage for its own loss. The Court further explained that ACBG is not alleging that Abrams made a claim against ACBG for injury caused by its president's wrongful acts. Instead, ACBG is alleging that *it* was injured because its president committed a wrongful act that left it without reinsurance from Presidio to cover Abrams' claim for the expenses of the transplant. The Court ultimately determined that ACBG's complaint against Zurich failed to allege that Abrams made a claim against ACBG for a wrongful act of a director, officer, or employee of ACBG, and failed to state a plausible claim for which relief may be granted. As such, the court determined that ACBG's breach of contract and Texas Insurance Code's claims are dismissed.

MDJW First Friday Webinar - Lessons Learned from Hurricane Ike – June 7, 2013

Registration Information will be available approximately two weeks before the webinar.