Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JANUARY 15, 2014

FIFTH CIRCUIT APPLIES LIMITED EXCEPTION TO EIGHT-CORNERS ANALYSIS OF INSURER'S DUTY TO DEFEND – FINDS NO DUTY TO DEFEND OR INDEMNIFY

Last Wednesday, the Fifth Circuit examined an insurer's duty to defend injuries arising from and auto accident under a commercial general liability policy and applied its own limited exception to the eight-corners rule in finding that the insurer had no duty to defend or indemnify. In *Star-Tex Resources, L.L.C. v. Granite State Insurance Co.*, 2014 WL 60192 (5th Cir. (Tex.) January 8, 2014), an intoxicated employee was driving a car on an auto auction lot when they struck another employee who was walking on the lot and pinned them between two vehicles causing serious injury. Suit was filed against the insured, Star-Tex and the responsible employee. They then sought coverage under the employer's commercial general liability policy. The insurer denied coverage based on the policy's auto-exclusion and the insureds then filed a declaratory judgment action seeking coverage. The trial court granted summary judgment in favor of the insurer and this appeal followed.

The Fifth Circuit discussed Texas' relatively strict version of the eight-corners analysis applied to the duty to defend, wherein the factual allegations in the petition are compared to the coverage provided in the insurance policy to determine if the duty to defend exists. In this case, the injured party's petition only alleged in part that he was "seriously injured in an automobile collision caused by the negligence of…" the employee who was "under the influence of alcohol or drugs at the time of the collision." The court observed that the petition did not say whether the employee was operating the vehicle, or directing traffic or, working in some other capacity when the accident occurred. So the Fifth Circuit applied its own very limited exception to the eight-corners rule (that has not officially been adopted, nor rejected by the Texas Supreme Court) which permits the use of extrinsic evidence "only when relevant to the independent and discrete coverage issue, not touching on the merits of the underlying third-party claim" and, determined that the auto-exclusion did in fact apply. Accordingly, summary judgment in favor of the insurer was upheld finding no duty to defend and also, no duty to indemnify.

FEDERAL COURT FINDS INSURER'S INSISTENCE UPON ACCORD AND SATISFACTION DEFENSE COMBINED WITH LENGTHY DELAY IN DEMANDING APPRAISAL RESULTED IN WAIVER OF RIGHT TO APPRAISAL

The U.S. District Court for the Southern District of Texas, Galveston Division recently held that an insurer that mediated a case twice, unsuccessfully due in part to its reliance on an accord and satisfaction defense, combined with a three year delay in seeking to compel appraisal and ongoing expenses incurred by plaintiff's during the process, resulted in waiver of the insurer's right to demand appraisal. In *JAI Bhole, Inc. v. Employers Fire Insurance Co.*, 2014 WL 50165 (S.D. Tex., January 7, 2014), the insured motel was damaged by Ike and the insured, dissatisfied with the payment on the claim, filed suit on October 12, 2010. The parties attempted to mediate the case on two occasions, June 2, 2011 and September 17, 2013, but both efforts failed due in part to the insurer's continued reliance on its accord and satisfaction defense as barring recovery. On November 15, 2013, briefing was completed on the insurer's motion to compel appraisal and on December 19, 2013, the court heard the motion.

In response to the insured's argument that appraisal had been waived, the court noted that it only need consider one Texas case, *In re Universal Underwriters of Texas Ins. Co.*, 345 S.W.3d 404 (Tex. 2011), wherein the Supreme Court of Texas stated that the insured must prove; 1) the length of the insurer's delay in demanding appraisal showed an intent to waive is contractual right to demand it and, 2) that the insured was prejudiced as a result of the delay. The court noted that the insurer's insistence on its accord and satisfaction defense which contributed to the two failed mediations and the amount of time that passed before it sought to enforce the appraisal provision, combined with the estimated $40,000 in costs and fees incurred by the insureds over that time, resulted in prejudice. Accordingly, the court denied the insurer's motion to compel appraisal and abate the lawsuit. The case is set for trial in March 2014.

FEDERAL COURT GRANTS SEVERAL MOTIONS TO REMAND FINDING ALLEGATIONS OF IMPROPER CLAIM HANDLING AGAINST ADJUSTERS SUFFICIENT TO STATE A CLAIM

In a series of decisions issued on January 8, 2014, the U.S. District Court for the Southern District of Texas, McAllen Division, granted motions to remand in three separate cases that were removed to the court on the basis that the adjusters were improperly joined to defeat diversity. *Rocha v. Geovera Specialty Ins. Co.*, 2014 WL 68648 (S.D.Tex., January 8, 2014), *Garza v. Geovera Specialty Ins. Co.*, 2014 WL 66830 (S.D.Tex., January 8, 2014), and *Palma v. Allstate Texas Lloyds*, 2014 WL 66867 (S.D.Tex., January 8, 2014), all involved hail damage claims arising from the March and April 2012, hail storms in the Rio Grande Valley. The insurer's removed the cases based on improper joinder of the adjusters and the insured moved to have the cases remanded to state court.

In granting the emotions to remand, the court discussed the factual allegations in each and observed that the insurer has a "heavy burden" of persuasion in establishing improper joinder as a basis for removal. And, after reviewing the allegations against the adjuster in each claim it found that the insureds' petitions adequately stated claims against the adjusters for which recovery could be made. Accordingly, the insurer's failed to meet their heavy burden and the cases were remanded.