Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME COURT NARROWLY CONSTRUES CONTRACTUAL LIABILITY EXCLUSION

In a significant decision addressing certified questions from the Fifth Circuit, last Friday the Texas Supreme Court narrowly construed the contractual liability exclusion in a commercial general liability policy and concluded that:

"…a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not "assume liability" for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion."

In *Ewing Construction Company, Inc. v. Amerisure Ins. Co.*, No. 12-0661, 2014 WL 185035 (Tex. January 17, 2014), Ewing Construction contracted with a school district to serve as a general contractor on some renovations and additions to a school. Shortly after the work was completed, the district complained that the tennis courts started cracking and flaking rendering them unusable. Suit was filed and Ewing tendered the defense to Amerisure. Amerisure denied coverage based in part on the contractual liability exclusion which, in turn prompted Ewing to file a declaratory judgment action in federal court seeking coverage. The district court held that the contractual liability exclusion precluded coverage, the insured appealed and the Fifth Circuit certified questions involving the contractual liability exclusion to the Texas Supreme Court.

The Texas Supreme Court observed that the contractual liability exclusion precludes coverage when the insured contractually assumes liability, except when: (1) the insured's liability for damages would exist absent the contract, and (2) where the contract is an insured contract. In this case, the insurer argued that the contractual liability exclusion "means what it says" and the exclusion applies here because the insured contractually agreed to construct the tennis courts in a good and workmanlike manner, and therefore assumed liability for damages. The insured, on the other hand, argued that this case is distinguishable from the Court's decision in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), and that the insured's agreement to perform in a good and workmanlike matter did not enlarge any duties it has at common law, and therefore, was not an "assumption of liability" within the meaning of the contractual liability exclusion.

In responding to the first certified question:

1. Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, "assume liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion.

The Texas Supreme Court answered "no. And, as a result, the court did not answer the second question of whether an exception to the exclusion applied.

Editor's Note: The opinion makes it clear that the court does not disavow earlier decisions addressing related issues, and that the *Gilbert* decision was not overturned, but simply distinguished on its facts. And, lastly the court observes that other exclusions being asserted were not addressed by the court's opinion.

FEDERAL DISTRICT COURT HOLDS CLAIMANT IS A PROPER PARTY TO DECLARATORY JUDGMENT ACTION FOR DEFENSE & INDEMNITY

Last Monday, the Northern District of Texas, Dallas Division answered "yes" to the question of whether a claimant who is not yet a judgment holder may be involuntarily joined to the insurer's declaratory judgment action. Thus, the court rejected the claimant's stratagem to dodge the binding effect of the declaratory judgment. However, the court did not answer the question of whether the claimant ***must*** be joined.

Vanliner Ins. Co. v. DerMargosian, No. 3:12-CV-5074-D, 2014 WL 113595 (N. D. Texas Jan. 13, 2014), involved an underlying suit in which the DerMargosians sued Arpin American Moving Systems for mishandling a packing and moving job. The DerMargosians retained Arpin to pack and move specific belongings to Dubai, while leaving others unpacked at their home in Texas. Arpin allegedly failed to accurately follow instructions, and mistakenly packed a pistol, which was shipped to Dubai with their other household goods. As a result, Mr. DerMargosian was arrested in Dubai for possession of the pistol, incarcerated, and forced to stand trial.

Upon being sued, Arpin sought defense and indemnity from Vanliner, and Vanliner brought a declaratory judgment suit seeking to determine whether it had a duty to defend and indemnify Arpin. Vanliner also named the DerMargosians as defendants. The DerMargosians moved for dismissal, arguing they were not proper parties to the declaratory judgment action. They argued they were not in contractual privity with Vanliner, that Vanliner was not a party to the underlying suit, and that Vanliner was not asserting any claims directly against them in the declaratory judgment action.

The court observed that an injured claimant is a third-party beneficiary under a liability policy. While the claimant cannot directly enforce the policy until it holds a judgment against the insured, the ***insurer*** can nevertheless obtain a pre-judgment ruling on its duty to defend its insured, and can also obtain a pre-judgment ruling on its duty to indemnify in some circumstances. The court also noted that a declaratory judgment obtained by the insurer is binding on a third-party beneficiary, if that beneficiary is joined as a party to the action. The court refused to dismiss the DerMargosians, concluding they had a material and immediate interest in the question of Vanliner's contractual duties, and there was an actual controversy among all of the parties.

FEDERAL DISTRICT COURT HOLDS JOINING APPRAISER CANNOT DEFEAT DIVERSITY JURISDICTION, DENIES REMAND

The Southern District of Texas, McAllen Division, recently denied remand in a bad faith suit filed in state court against Allstate and its appraiser. In *Reighard v. Allstate Texas Lloyds*, No. 7:13-CV-610, --F. Supp.--, 2014 WL 68707 (S.D. Tex. Jan. 8, 2014), the policyholder sued Allstate and Allstate's appraiser after the appraisal returned a result that was unsatisfactory to the policyholder. Allstate removed the case to federal court, contending the non-diverse appraiser was improperly joined.

Although both parties acknowledged the appraiser could not be directly liable for Insurance Code violations, the policyholder argued the appraiser had conspired with the insurer to underpay the claim. Examining this contention, the court observed that although the petition contained a single sentence to that effect, it did not on its face allege a cause of action for conspiracy. Perhaps more importantly, the court noted,

In particular, appraisers cannot misrepresent insurance policies, material facts, or legal rights, or refuse to pay claims… The utterance of "conspiracy" and a mysterious handwave does not enable an appraiser to deny coverage, and does not state a claim under state law.

Accordingly, the court found that the appraiser for Allstate was improperly joined in the lawsuit and denied plaintiff's motion to remand.

Editor's note: This case reveals an exploratory move and a new twist in policyholder attorneys' (in this case Richard Daly) attempting to defeat diversity jurisdiction by suing appraisers. We will continue to monitor for similar efforts in other cases to see if it gains any momentum.

FEDERAL MAGISTRATE FINES HOMEOWNER $21,000 FOR CREATING STINK OVER TOILET DAMAGE

A federal magistrate judge in the Eastern District of Texas, Sherman Division, recommended awarding a carrier $21,000 in fraud damages after a homeowner submitted claims for a toilet overflow. In *Smith v. Allstate Texas Lloyds*, No. 4:12-CV-486, 2013 WL 6177755 (E. D. Tex. Nov. 25, 2013), the homeowners sued Allstate for breach of contract and bad faith. Allstate counterclaimed for fraud, alleging the loss was not a "sudden and accidental" overflow, but was created when the flapper valve was hung open and the toilet simultaneously plugged. Allstate also contended in its counterclaim that it had paid over $20,000 on six previous toilet overflow claims which its investigation had revealed were all fraudulent.

The policyholders failed to submit any controverting evidence, and the magistrate recommended grating summary judgment in favor of Allstate both on the homeowners' claims, and on Allstate's fraud counterclaim, awarding the amount Allstate had overpaid on all the fraudulent overflow claims.