Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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FIFTH CIRCUIT REVERSES SUMMARY JUDGMENT IN FAVOR OF INSURER, INVALIDATES ASSIGNMENT UNDER GANDY

Last Friday, the Fifth Circuit reversed a summary judgment granted in favor of Nautilus Insurance Company in *Nautilus Ins. Co. v. Villalta*, 13-20298, --- Fed. Appx. ---, 2014 WL 890431 (5th Cir. Mar. 7, 2014) and invalidated the assignment of rights held by the claimant, holding it violated public policy as articulated in *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996).

In its extremely brief summary opinion, the Fifth Circuit noted the underlying suit arose from the shooting of Plaintiff by an employee of the insured security company. After Nautilus declined to defend the security company, citing the assault and battery exclusion in its policy, the security company entered into a settlement with Plaintiff whereby it allowed a $2 million judgment to be taken against it, agreed not to appeal the judgment, and Plaintiff agreed not to execute on the judgment. The security company then assigned its rights in the insurance policy to Plaintiff, who sued Nautilus to recover the agreed judgment.

The district court granted *sua sponte* summary judgment in favor of Nautilus on the ground that the assault and battery exclusion barred coverage for the claim. On appeal, the Fifth Circuit reversed the summary judgment. However, the Fifth Circuit simultaneously invalidated the assignment of rights to Plaintiff, noting it violated *Gandy*, and observed that Plaintiff had no legitimate justiciable interest in any coverage dispute between Nautilus and its insured.

COURT GRANTS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ENTERS TAKE NOTHING JUDGMENT

Setting aside a November 2013, 10-2 jury verdict in a Hurricane Ike case that awarded over $250,000 in contractual and extra-contractual damages and $75,000 in attorney's fees, last Tuesday, Judge Sylvia Mathews of Harris County's 281st District court granted National Lloyds' Motion for Judgment Notwithstanding the Verdict (JNOV) and entered a take nothing judgment. In *John David d/b/a/ House of Style v. National Lloyds Insurance Co.*, No. 2010-58199 (281st Dist. Ct. Harris County, Tex. March 4, 2014), after a trial on the merits wherein the insured sought damages to their property as a result of Hurricane Ike, the jury found that National Lloyds Insurance Company had breached the contract, breached the duty of good faith and fair dealing and violated the insurance code. They awarded $117,200 in contractual damages, $150,000 for knowing violations of the insurance code and $75,000 in attorney fees.

National Lloyds moved for JNOV arguing in part that the Plaintiff failed to segregate the covered and non-covered causes of loss thereby violating the doctrine of concurrent causation. National Lloyds also argued that Plaintiff offered no evidence of the covered damages, or testimony that would support the jury findings of insurance code violations or a breach of the common law duty of good faith and fair dealing. And on March 4, 2014, Judge Sylvia Mathews evidently agreed and entered a take nothing judgment against the National Lloyds. Humberto Garcia and Jason Speights with Speights & Worrich represented the plaintiff.

DALLAS FEDERAL COURT REJECTS CLAIM OF INDEPENDENT INJURY, DENIES EXTRA-CONTRACTUAL DAMAGES

The Federal District Court for the Northern District of Texas recently granted summary judgment for a CGL carrier on claims brought by its insureds under Texas Insurance Code Chapter 541, modifying an opinion previously issued last October. In *Admiral Ins. Co. v. Petron Energy, Inc.*, 3:11-CV-2524-M, 2014 WL 798374 (N.D. Tex. Feb. 28, 2014) (slip opinion), the Northern District of Texas reprised its previous opinion issued on October 31, 2013, and modified its original holdings. The court granted summary judgment in favor of Admiral on the insureds' Texas Insurance Code Chapter 541 (unfair claim handling) claims, but also granted summary judgment in favor of the insureds on their Chapter 542 (prompt payment) claims.

The underlying litigation arose out of a multi-car accident. Plaintiffs sued the named insured, Petron Energy, and its joint venture partner WPO, alleging the driver and passenger of the offending vehicle were acting in the course and scope of employment for Petron and WPO, and were intoxicated. The vehicle was owned by a principal of Petron, and was part of his personal collection of classic

cars. Plaintiffs alleged the car collection, car shows, and related entertainment were used in the promotion of Petron's and WPO's business.

Admiral refused to defend or indemnify Petron or WPO, raising a variety of defenses, and brought this federal coverage suit to determine its duties. Petron and WPO asserted counterclaims for breach of contract, and violations of Texas Insurance Code Chapters 541 and 542. In its October 2013 opinion, the court found that Admiral owed a duty to defend and had breached its contract, and thus granted summary judgment for the insureds on those issues. However, the court denied the insureds' summary judgment on their Insurance Code Chapter 541 and 542 claims, finding Admiral's conduct was reasonable, and they had not demonstrated an independent injury resulting from the improper denial of a defense.

In this modified opinion, the Court reviewed its prior holding on the lack of independent injury, and granted summary judgment in favor of Admiral on the Insurance Code Chapter 541 claims. The court noted that merely incurring fees in the underlying litigation was not an independent injury sufficient to support extra-contractual damages. Nor was incurring fees in the coverage action, since filing a coverage action, by itself, is not a violation of the Insurance Code.

However, the Court reversed its prior holding and granted summary judgment in favor of the insureds on their Chapter 542 claims, holding that 542 penalty interest is automatic when the carrier breaches its contract. Because Admiral had not timely paid the defense costs it owed, Admiral was held liable for the 18% interest mandated by Chapter 542, as well as attorney fees.

EL PASO FEDERAL COURT REJECTS EFFORTS TO FORCE INSURER'S COVERAGE ACTION INTO STATE COURT

Last Tuesday, a Federal District Court in El Paso held that a coverage suit filed by an insurer could proceed immediately, while the underlying state court liability suit was still pending. In *Canal Ins. Co. v. XMEX Transp., LLC*, EP-13-CV-156-KC, 2014 WL 841554 (W.D. Tex. Mar. 4, 2014), the court denied the defendants' motion to dismiss or abate the federal suit.

The underlying suit involved a single-vehicle accident in which two people were killed. Numerous parties brought suit in state court. Canal Insurance Company, a liability insurer who received demands for defense and indemnity from numerous defendants, brought this separate coverage action in federal court to determine its duty to defend and indemnify the alleged insureds, including its named insured XMEX.

The underlying plaintiffs argued the federal coverage suit should be dismissed in favor of the pre-existing state liability suit, essentially arguing that Canal should intervene in the liability suit and have its coverage issues determined alongside the liability issues. The federal court conducted a textbook analysis of the legal question of whether it should retain jurisdiction or dismiss the case in favor of the earlier-filed state court suit, considering the factors laid out by the Fifth Circuit in *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585 (5th Cir. 1994), and *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 386 (5th Cir. 2003). The court rejected arguments of forum-shopping, noting that filing a suit always involves a degree of forum selection, and the real questions is whether the selection is abusive. The court also rejected arguments that the two suits were parallel, noting that Canal was not a party to the underlying suit, and the question of Canal's coverage was distinct from the question of XMEX's liability.

Ultimately, the court elected to retain jurisdiction and allowed the question of Canal's duty to defend to proceed unabated. The court acknowledged that under Texas law, it could not address the indemnity question until the underlying suit was tried or settled, thus fixing the liability of the alleged insureds. Curiously, the court did not overtly address the fact that under Texas law, insurance coverage questions may ***not*** be injected into a liability suit, and thus it was not legally possible for Canal to resolve its coverage question within the underlying suit, as the underlying plaintiffs urged. The court obliquely hinted at it, suggesting it may have been omitted from the parties' briefing.

OKLAHOMA COURT ENTERS SIGNIFICANT BAD FAITH VERDICTS AGAINST FARMERS INSURANCE

On March 4, a state district court in Woodward, Oklahoma, entered $5 million judgments in three separate bad faith cases against Farmers Insurance Company and a subsidiary in connection with the handling of residential property damage claims arising from the April 2012 tornados that struck the Woodward area.

Judgments in the three cases, CJ-2012-00081, *Kim Louthan v. Farmers Insurance Co.*; CJ-2012-00079, *Jeffrey Paul Sharpe v. Farmers Insurance Co.*; and CJ-2012-00078, *Sterling Parks v. Foremost Insurance Company* (a subsidiary of Farmers), were entered following a trial to the bench solely on the issue of damages. The damages issued were tried to the bench as a result of a somewhat unusual pre-trial sanction entered against the insurers for the purported failure to comply with the court's prior discovery orders. As a

sanction, the state district judge, Hon. Ray Dean Linder, entered a default judgment against the insurers on liability (akin to a "death-penalty" sanction in Texas where a defendant's pleadings are stricken), to be followed by presentation of evidence to the bench on the issue of damages.

In the subsequent trial to the bench, Judge Linder found that the Louthans suffered $224,202.82 in actual damages for breach of the insurance contract, that the Sharps had suffered $245,967.58 in actual damages for breach of contract, and that Parks had suffered $49,278.26 in actual damages for breach of contract. The court further found that the insurer in each case had breached its duty of good faith and fair dealing, and awarded the plaintiffs in each case $2,000,000 in damages for that breach. In addition, the court awarded the plaintiffs in each case the sum of $3,000,000 in punitive damages. Thus, the judgment entered in each of the cases exceeded $5,000,000 million.

The Plaintiffs were represented by the Marr Law Firm in Oklahoma City and Mitchel, Gaston, Riffel & Riffel in Woodward. The Defendants were represented by Chubbuck, Duncan & Robey, PC of Oklahoma City.

Editor's note: While we strive to report weekly on the latest developments in Texas insurance law from the trial and appellate courts of Texas, we do track developments nationally and report on anything significant from other jurisdictions. We thought the recent decision from Oklahoma warranted some review given the high interest many of our readers have in such legal developments north of the Red River.