Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

SEPTEMBER 16, 2014

STATE FARM WINS TWO MSJ'S ON WHETHER SPACE SHEATHING NEEDS TO BE REPLACED DURING A ROOF REPLACEMENT

Judge Reyna in Hidalgo County granted two Motions for Summary Judgment on behalf of State Farm Lloyds regarding the City of Mission's alleged requirements regarding the type of sheathing to be used in roof repairs. In *Victor Vela v. State Farm Lloyds* and *Roy Talbert v. State Farm Lloyds*, both Plaintiffs asserted claims against State Farm for damage to their homes arising out of the 2012 hailstorms that passed through Hidalgo County. In both claims, the dispute focused on whether it was necessary to replace the spaced sheathing under the wood shake roof on the *Talbert* and *Vela* homes with a solid wood sheathing due to a Code requirement in the City of Mission, Texas. Both claims were submitted to the appraisal process and in both claims the appraisal award included the cost of replacing the spaced sheathing with solid wood sheathing as part of the replacement of the roof. State Farm paid all of the appraisal award with the exception of the cost of replacing the spaced sheeting with solid wood sheathing and in doing so issued a letter advising the Plaintiff that they were continuing their investigation as to whether or not there was in fact a Code requirement mandating that the spaced sheathing be replaced with solid wood sheathing.

On October 24, 2012, the City of Mission issued a letter indicating that it was their belief the International Residence Code required that the spaced sheathing had to be replaced with solid sheathing during the repair of a wood shake roof. This letter was issued prior to the date of the *Talbert* and *Vela* appraisal awards. On January 22, 2013, after the appraisal awards were paid with the exception of the cost of replacing the spaced sheathing with solid sheathing, the City of Mission issued a second letter correcting their previous belief and indicating that after conferring with the International Code Council they had been informed that replacement of the spaced sheathing with solid sheathing was not in fact required *if* the roof was being replaced. Based on the second letter State Farm made their final decision that there was no coverage under the building ordinance or law coverage in the policy for the cost of replacing the spaced sheathing.

The Court granted State Farm's summary judgments as to both the *Talbert* and the *Vela* claim and in doing so rejected the arguments by Talbert and Vela that the October 24, 2012, letter constituted "enforcement" of a code causing them to incur additional costs in the repairs to their home. The Court accepted the argument made by State Farm that because in the absence of evidence of *actual enforcement* of a Code provision by some affirmative action involving the execution of building standards and withholding permits for construction then the building and ordinance coverage was *not* invoked. State Farm argued (and the Court appears to have accepted the argument) that there must be some form of positive action undertaken by City officials to actually enforce the Code before this coverage provision is triggered. The phrase "enforcement of a Code" in the building and ordinance coverage is not based on what the Code technically says or is believed to say but upon what municipal enforcement officials actually require in that jurisdiction.

A similar summary judgment was previously granted to State Farm on this exact same issue in Cause No. 7:13-cv-00183, in the United States District Court for the Southern District of Texas, McAllen Division. *Toney v. State Farm Lloyds*.

[Editor's Note: Todd Lonergan and Chris Martin of MDJW had the privilege of representing State Farm in both of these matters and proved that *is* possible to win a summary judgment in state court in Hidalgo County before Judge Reyna. We thank State Farm for the opportunity to protect its interests in these matters.**]**

NORTHERN DISTRICT OF TEXAS DETERMINES THAT THIRD PARTY JUDGMENT CREDITORS CANNOT BRING BAD FAITH CLAIMS AGAINST INSURER

Recently, the United States District Court for the Northern District of Texas granted an insurer's Partial Motion to Dismiss regarding a third party's bad faith and Texas Insurance Code causes of action. In *Companion Prop. & Cas. Ins. Co. v. Opheim*, 3:14-CV-0752-G, 2014 WL 4209586 (N.D. Tex. Aug. 26, 2014) Companion Property & Casualty Insurance Company sued Charles Opheim, Kevin Dillingham, and his businesses to resolve a dispute arising out of a policy issued by Companion. Companion issued a general liability policy to defendants Dillingham and Constructure, Inc. In 2009, Constructure contracted with Charles Opheim to renovate and add a second floor to Opheim's home. However, the roof was removed and water damaged the interior of the home during a rainstorm and damaged the home.

Opheim and Constructure sued each other on their contract and submitted their dispute to arbitration, which resulted in an award for Opheim for damages. After a court entered the final judgment on the arbitrator's award, Opheim submitted a copy of the award and final judgment to Companion.

Companion sued Opheim and sought a declaration that of its rights and duties pursuant to the insurance policy issued to Dillingham and Constructure. Opheim brought counterclaims for breach of contract, common law bad faith, and various causes of action under the Texas Insurance Code. The Court analyzed Companion's Motion to Dismiss Opheim's counter-claims pursuant Federal Rule 12(b)(6). The Court noted that a third-party claimant becomes a third-party judgment creditor when he obtains a judgment against an insured; however, third parties lack standing to sue insurers for unfair claim settlement practices under the Texas Insurance Code due to the Texas Supreme Court's concern about creating conflicting duties for insurance companies between insureds and third parties. Further, the Court noted that the Texas Insurance Code defines "claim" as a "first-party claim".

The Court further noted that Texas has never recognized a common law cause of action for breach of good faith and fair dealing where the insurer fails to settle third party claims against an insured. As such, the Court dismissed all of Opheim's bad faith claims.

FAILURE TO TIMELY NOTIFY INSURER OF WORK PLACE STABBING RESULTED IN NO DUTY TO PROVIDE COVERAGE

Last Thursday, in *C.L. Thomas Inc. et al. v. Lexington Insurance Co.* et al., 13-13-00566-CV, Sept. 11, 2014, the Thirteenth Court of Appeals held that Lexington Insurance did not have a duty to cover a $5 million arbitration award of a truck driver who was fired after getting stabbed in the neck during a workplace fight. The altercation arose when another driver employed by the same company became upset that he had been assigned to drive the same truck. After the altercation, the drivers' employer, Thomas, fired both of the employees. The injured employee filed suit against Thomas alleging wrongful termination and defamation. The parties attended arbitration, and the injured employee was awarded $5,091,777. Seeking to recoup the amount it had to pay the injured employee, Thomas made claims under its insurance policy that it had with Lexington as well as under a policy it had with another insurer. Lexington denied coverage because Thomas's insurance claims were denied because Thomas had failed to timely provide notice of a potential claim. Thomas then sued Lexington alleging Lexington breached the insurance contract and violated the Texas Insurance Code. The parties filed cross-motions for summary judgment, and the trial court ultimately determined Lexington did not owe a duty to cover Thomas's judgment because Thomas had failed to timely provide notice of the claim to the carrier. Under the Policy, Thomas was required to "immediately" notified Lexington of any claim that could exhaust more than 25% of the insurance beneath Lexington's umbrella policy. As such, according to the Court, Thomas should have notified Lexington as soon as he received the arbitration demand.

The Court of Appeals noted: "Notice that comes after judgment defeats all of the recognized purposes of the notice requirements because it renders the insurer unable to investigate the claim, defend the claim or negotiate in an attempt to settle the claim." As such, the Corpus Christi Court of Appeals *affirmed* the trial court's grant of Lexington's Motion for Summary Judgment.

2014 MDJW North Texas Insurance Seminar

September 25, 2014

Join MDJW Attorneys Chris Martin, Mark Dyer, Kevin Sewell, Barrie Beer, Michael Watson, Jamie Cooper, Matthew Paradowski, Kenni Lucas, Alan Moore, Jason Spivey, Ben Britt, and Ryan Geddie along with special guest speakers Shannon Rusnak, CPA, CFE, MAFF and George Uhl, CPA, CFE, CFF from MDD Forensic Accountants for a FREE one day seminar to examine many of the cutting edge claims handling, coverage, and trial strategy issues confronting Texas insurers today.

Seminar Topics

ObamaCare – The End of Future Medical Claims?	Forensic Accounting: Using Internet Resources to Investigate Behind the Numbers
The Peculiar Problem of Additional Insureds	Dealing with Multiple Insurers and "Other Insurance"
Reservation of Rights and Denial Letters	Advertising Injury Coverage
Insurance "Game Changers" in the Texas Supreme Court	Stowers Doctrine Update
How to Submit a Plaintiff's Failure to Wear a Seat Belt on a Jury Charge	Rule 167 – Offers of Settlement
Texas Expedited Trials, Dismissal of Baseless Claims, and New Pleading	Recent Developments in the Designation of Responsible Third-Parties under Ch. 33.004 of

Rules - a Sea Change or Business as Usual?

the Texas Civil Practice & Remedies Code

Irving Convention Center
500 W Las Colinas Blvd
Irving, TX 75039

Registration: 7:30 a.m. – 9:00 a.m.

Seminar: 9:00 a.m. – 5:00 p.m.

6 Hours of CE or CLE Credit
Continental Breakfast and Lunch Provided

Free Parking

As of 9/23/2014, this event is full
You may send an email to ce@mdjwlaw.com before 3PM on 9/24/2014 to be added to the waiting list. If space becomes available, you will be notified at 5PM on 9/24/2014.