Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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$3 MILLION DEFAULT JUDGMENT TAKEN ON ANSWER DATE AT 10:15 A.M. EVENTUALLY SET ASIDE

G & C Land v. Farmland Management Services started out as an ordinary state court case headed for removal to federal district court in Lubbock Texas. It is now a warning on how things can quickly go wrong. The state court citation had the standard language that an Answer must be filed by 10AM on the Monday after the expiration of 20 days from the date the citation was served. The defense counsel intended to remove the case before the Answer was due, but was delayed by two hours because he was at his son's school a little longer than expected that morning. Additionally, defense counsel indicated he needed to finish investigating the amount in controversy and the Plaintiff's citizenship for diversity purposes, but his investigation had been delayed because his grandfather unexpectedly ended up in the hospital that weekend. While defense counsel was finishing up his removal due diligence, Plaintiff's counsel took at $3 million default judgment at 10:15a.m. the morning the answer was due. *See G & C Land v. Farmland Management Services*, Cause No. 2012-502,932 in the 99th Judicial District Court, Lubbock County, Texas (August 6, 2012.)

Defense counsel sought to have the default judgment set aside in federal court, and finally succeeded on the second amended motion to set aside the default judgment. The federal district court eventually found that the Defendant did not willfully miss the deadline by 15 minutes, there was a lack of prejudice to the Plaintiff, Defendant had demonstrated there were meritorious defenses, and the fault for missing the deadline lay solely at the feet of the defense counsel who did not intend to miss the deadline. The court found defense counsel was negligent in missing the deadline, but it was "excusable neglect" because it was not willful. *See* Order, *G & C Land v. Farmland Management Services*, Civil Action No. 5:12-cv-00134-C (N.D. Tex. October 12, 2012.) As a condition for setting aside the default judgment, the Defendant was ordered to pay the Plaintiff's attorneys' fees incurred in taking the default judgment and in responding to the Defendant's efforts to set aside the default.

The Defendant eventually prevailed on the merits by summary judgment. On appeal, the 5th Circuit Court of Appeals upheld both the summary judgment and the court's exercise of discretion in setting aside the default judgment. On appeal, the Court held: "The entry of default judgments are 'generally disfavored in the law' and therefore, 'should not be granted on the claim, without more, [than] the defendant had failed to meet a procedural time requirement.' When determining whether or not to set aside a default judgment, district courts are directed to consider 'whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented.'" *G & C Land v. Farmland Management Services*, 2014 WL 4699515 (5th Cir. Sept. 23, 2014)(citations omitted.)

Lessons learned: 1) timely filing a state court general denial avoids any last minute removal problems resulting in a default judgment; 2) fax a copy of the answer to be filed in advance to Plaintiff's counsel to avoid an issue about paying for his attorney fees as a condition to set aside a default judgment; 3) mailing an answer to the Court constitutes filing an answer, but the Court may not know it is in the mail when entering a default judgment; and 4) plan on answering a suit before the day the answer is due. And most importantly, 10 a.m. means 10 a.m.!

"OWN, RENT, OR OCCUPY" EXCLUSION IS UNAMBIGUOUS AND DOES NOT REQUIRE EXCLUSIVE CONTROL

In *Liberty Mutual Fire Ins. Co. v. Lexington Ins. Co.*, 2014 WL 4823614 (Tex.App.-San Antonio Sept. 30, 2014), Total Warehousing, Inc's employee struck a warehouse structural support column with his forklift, causing the building's roof to collapse. The owner of the property, DCT Rittman suffered $2.9 million in damages. Lexington Insurance Company insured DCT's property, and indemnified DCT for the damages. Liberty Mutual insured Total for its operations on the premises under a CGL policy. Liberty denied the claim on the basis that the CGL policy's "own, rent, or occupy" exclusion was triggered because Total occupied the premises. Lexington filed this declaratory judgment, and the parties presented the issue to the court on cross motions for summary judgment.

The parties agreed on the core facts: Liberty issued a CGL policy to Total, the policy was in effect, and Total's employee was responsible for the damages. Thus, Liberty was obligated to reimburse Lexington unless the exclusion applied. Additionally, the

parties agreed: Total did not own or rent the premises, Total was authorized to be on the premises, and Total was conducting authorized operations on the premises. The issue was whether Total's operations constituted "occupying" the damaged premises.

The Court of Appeals ultimately held that "occupy" was not an ambiguous term. "[W]e hold that occupy comprises (1) a continued physical presence on the premises, and (2) control of the premises for the insured's own benefit." Because DCT had a contractual right to operate the premises as a third party logistics facility under a 2002 lease and under a 2006 lease assignment, the Court of Appeals held DCT met the definition of occupy under the exclusion. The fact that the lessor and another party retained some right to enter the premises under certain conditions (*i.e.* tenant default, etc.) did not change this result. While Total had assigned the lease to a third party, Total continued to operate the premises as the agent of the third party. The court found: "Total generally controlled access to the premises." Therefore, Liberty was not obligated to reimburse Lexington.

TEXAS SUPREME COURT AGREES TO HEAR HURRICANE IKE CONCURRENT CAUSATION CASE

Last Friday, the Texas Supreme Court agreed to hear oral arguments in *JAW The Pointe, LLC v. Lexington Insurance Co.*, Dkt 13-0711 on January 13, 2015. The case concerns an apartment complex in Galveston that was severely damaged by Hurricane Ike. Lexington Insurance Company had issued a $25 million property policy on it and other properties. The City of Galveston condemned the property, but Lexington refused to provide coverage for the demolition and rebuilding costs. The policy was subsequently exhausted by payments on other claims. JAW filed suit and recovered a jury verdict against Lexington for $1.2 million in compensatory damages and $2.5 million for knowing conduct. The Court of Appeals reversed the judgment on the concurrent causation doctrine because the City's condemnation order resulted from a covered peril (wind damage) and a non-covered peril (flood damage.)

"This case presents an issue of significance to Texas insurance law," JAW said in its petition for review. "When there are covered and non-covered perils that may have combined to cause a loss, what burden should fairly be placed upon the insured to prove the amount of the covered loss?" JAW contends the ruling of the Court of Appeals requires the City to differentiate between covered and uncovered perils, rather than allowing the Plaintiff to present evidence on concurrent causation.

[**Editor's Note**: We will continue to monitor this important case and will report on any further developments.]