Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME COURT MAY PROVIDE GUIDANCE ON INSURER'S LIABILITY SETTLEMENT CHECK TO TWO PAYEES

On October 22, 2014, Allied Insurance petitioned the Supreme Court of Texas to review the Dallas Court of Appeals' holding that Allied's liability was not discharged when it issued a check co-payable to ViewPoint Bank and the insured, and the insured alone was able to cash the check. In *ViewPoint Bank v. Allied Property and Cas. Ins. Co.*, No. 05-12-01370, 2014 WL 3867810, (Tex. App.—Dallas Aug. 7, 2014), Allied Property and Casualty Insurance Company issued checks jointly payable to its insured, Optimum Deerbrook, LLC and Optimum's mortgagee, ViewPoint Bank. Optimum endorsed and cashed the checks without ViewPoint's consent; ViewPoint sued to recover these checks. After the trial court granted summary judgment in favor of Allied, the Court of Appeals reversed, holding that Allied was not discharged of its liability for paying the claim under Article 3 of the Uniform Commercial Code.

The Dallas Court of Appeals cited to *McAllen Hospitals, LP v. State Farm Mutual Ins. Co. of Texas*, No. 12-0983, 2014 WL 1998245 (Tex. May 16, 2014), a recent Texas Supreme Court case that addressed whether a hospital's statutory lien was discharged upon an insurer's payments to the patients and the hospital when only the patient endorsed the check. Following the reasoning in the *McAllen* decision, the Dallas Court of Appeals similarly found that in this case because the check was made payable to non-alternative payees, the policyholder alone was not entitled to endorse the check and that the insurer's obligations were therefore not discharged.

Although this portion of the Dallas court's holding was consistent with *McAllen*, it is unclear whether the court was correct that Allied's obligations were not discharged under these circumstances. Allied's pending brief to the Texas Supreme Court cites several portions of Texas UCC that the Dallas Court of Appeals may have ignored in holding that an insurer remains strictly liable if a policyholder that was not authorized to endorse an instrument does so without a mortgagee's consent.

Editor's Note: Martin Disiere hopes that the Texas Supreme Court will accept the petition to clarify these issues for future guidance and is evaluating options to assist the high court in reaching the correct decision to protect reasonable insurers that have fully paid their claims. Insurers interested in filing and *amicus* brief with the Texas Supreme Court may contact Christopher Martin or the head of our appellate section, Levon Hovnatanian for more information.

TRIAL COURT GRANTS SUMMARY JUDGMENT TO INSURER IN TRAIN COLLISION CASE

Recently, the trial court in Ector County analyzed coverage issues in a truck / train collision case and held that there was no coverage available for the accident under a policy issued by Unitrin County Mutual Insurance Company. Although the court's order granting summary judgment was brief without stating specific reasoning, Unitrin's motion was based on various policy exclusions discussed below.

In *Union Pacific Railroad Co. v. Jaime Flores Farra et al.*, No. D-130-001, in the 358th District Court, Ector County, Texas, Union Pacific Railroad Company filed a lawsuit against various defendants after a tractor-trailer owned or operated by the defendants collided with a train operated by Union Pacific. The lawsuit alleged that one of the defendants, A.S. Manriquez Trucking, Inc., negligently hired another defendant to drive the tractor-trailer involved in the collision. Manriquez's insurer, Unitrin County Mutual Insurance Company, filed a motion for summary judgment seeking a declaration that it had no duty to defend or indemnify Manriquez.

Unitrin's motion was based on various exclusions in the policy. Unitrin first argued that the automobile in question was not a "covered auto" under the policy because the vehicle was not expressly mentioned in the schedule of covered vehicles. The vehicle also did not fall under the definition of a "hired" vehicle because it was operated by an independent contractor and not exclusively controlled by a named insured under the policy.

Unitrin also argued that the driver of the vehicle was not a covered insured under the policy because he was not driving a covered automobile, even though Union Pacific alleged that Manriquez negligently entrusted the driver with the automobile. Unitrin cited to

the Fifth Circuit's decision in *Lincoln General Ins. v. De la Luz Garcia*, 501 F.3d 436 (5th Cir. 2007),involving similar negligent-entrustment allegations. In *Lincoln*, the Court rejected the plaintiffs' claim that even though an accident occurred outside of covered territory, the claim was covered because the negligent hiring occurred within covered territory. Similarly, Unitrin argued that because the underlying claim that formed the basis of the negligent entrustment was not covered, i.e. no covered vehicle, there was no coverage for the negligent hiring and entrustment. Without stating the specific exclusion(s) that the trial court relied on, it granted summary judgment in favor of Unitrin on October 14, 2014.

Editor's Note: Christopher W. Martin and Todd M. Lonergan of Martin, Disiere, Jefferson & Wisdom, L.L.P. Martin Disiere represented Unitrin in this case and congratulates Unitrin on this significant victory.

LAW FIRM DEFEATS MALPRACTICE LAWSUIT RELATED TO BP EXPLOSION

Last Tuesday, the Houston Fourteenth Court of Appeals upheld a trial court's granting of several summary judgment motions in a legal malpractice lawsuit by claimants who had second thoughts about settlements secured on their behalf. In *Linda Hernandez et al. v. Abraham, Watkins, Nichols, Sorrels & Friend, et al.*, No. 14-13-00567-cv (Tex. App.—Houston [14th Dist.] Oct. 21, 2014), Abraham Watkins had represented a group of former BP employees who were working at a Texas City refinery that experienced an explosion on March 23, 2005. Although the plaintiffs did not require immediate medical attention after the explosion and resumed work shortly thereafter, Abraham Watkins secured a $135,000 settlement on their behalf. Dissatisfied with this recovery, the plaintiffs retained the Kassab Law Firm, and asserted various malpractice claims against Abraham Watkins, claimed that actual damages were at least $6 million, and demanded Abraham Watkins' complete file on the BP Explosion litigation.

In response to the demand, Abraham Watkins filed suit in the 212th District Court in Galveston seeking a declaration that it adequately handled and settled the underlying lawsuit and that demands for its file were vague and overbroad. After the plaintiffs' subsequent malpractice lawsuit was transferred and consolidated with the Galveston suit, the trial court granted various rulings in favor of Abraham Watkins.

On the discovery issue, the Fourteenth Court of Appeals cited to *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013), a recent Texas Supreme Court case related to the same BP Explosion. The Court in *Elizondo* stated that in assessing whether a law firm failed to secure an adequate settlement, courts could compare the settlements that similarly situated plaintiffs obtained from the same defendant. The Fourteenth Court of Appeals held that the trial court properly refused to compel this same information from Abraham Watkins because the plaintiffs had not specified what injuries they had suffered from the BP Explosion and that claims of "soft-tissue injuries" were impermissibly vague.

The Court of Appeals also affirmed various motions for summary judgment in favor of Abraham Watkins, finding that the plaintiffs had failed to present evidence on their various claims and that there was no evidence that Abraham Watkins committed malpractice.

Editor's Note: Abraham Watkins was represented by Dale Jefferson and appellate counsel Levon Hovantanian, and Bruce E. Ramage of Martin, Disiere, Jefferson & Wisdom, L.L.P. through its E&O carrier, St. Paul Fire & Marine Insurance Company, and we congratulate everyone on this significant victory.

INSURER HIT WITH $34 MILLION JUDGMENT FOR FAILURE TO PAY MALPRACTICE CLAIM

Recently, a jury in Houston, Texas awarded $34 million in damages against OneBeacon Insurance Company after rejecting the insurer's efforts to rescind the policy and finding "knowing" violations of the Texas Insurance Code. In *OneBeacon Ins. Co. v. T. Wade Welch & Associates, et al.*, No. H-11-3061, 2014 WL 5335362, (S.D. Tex. Oct. 17, 2014), DISH obtained a judgment of approximately $13 million against T. Wade Welch & Associates for malpractice related to the firm's handling of a DISH lawsuit in Connecticut. In the underlying lawsuit filed by a Russian media company against DISH, T. Wade Welch attorney Ross Wooten was sanctioned for failing to respond to discovery requests. The law firm then sued its malpractice insurer, OneBeacon, for its refusal to pay the claim and for unfair settlement practices under the Texas Insurance Code.

OneBeacon sought to rescind the policy on the basis that the firm failed to disclose the potential claim against it in its insurance application. The jury rejected this argument and entered a verdict of $8,000,000 in past and future lost profits, $5,000,000 in exemplary damages, and $7,500,000 in additional damages under the Texas Insurance Code for a finding that OneBeacon acted "knowingly." DISH, which had intervened in the lawsuit, will also recover from OneBeacon the $13.5 million judgment that it secured against the law firm. OneBeacon Insurance Company was represented by Gordon Rees, LLP and Strasburger Price LLP.

MDJW First Friday Webinar - Expedited Discovery and Level I Discovery Deadlines

Robert Owen and Vicki Kurhajec - presenters

November 7, 2014

Our next First Friday will be held on November 7, 2014 at noon **Central** Time. Robert Owen, an associate in the Houston Office, and Vicki Kurhajec, a paralegal in the Austin office, will present Expedited Discovery and Level I Discovery Deadlines, exploring the new expedited discovery rules issued by the Texas Supreme Court and how they affect claims handling.

Mr. Owen is an associate in Martin, Disiere, Jefferson & Wisdom's appellate section where he represents clients in the Texas Courts of Appeals and the United States Fifth Circuit Court of Appeals. Mr. Owen also assists clients and trial counsel with complex issues in litigation, including jurisdiction contests, summary judgments, preservation of error at trial, the jury charge, and posttrial motions. Before entering private practice, Mr. Owen served as a briefing attorney for the Honorable Charles W. Seymore of the Fourteenth Court of Appeals of Texas.

Ms. Kurhajec earned her Bachelors of Business Administration from Texas State University. She became a licensed property and casualty insurance adjuster in 1992 working as a claims litigation adjuster for Farmers Insurance handling personal and commercial lines claims. During her eleven year tenure with Farmers, she also served on the American Arbitration Association panel for three years and participated in numerous in-house insurance seminars giving presentations on first party claims handling and coverage issues. Ms. Kurhajec joined Martin, Disiere, Jefferson and Wisdom as a litigation paralegal in 2011. Ms. Kurhajec has continued to maintain an active insurance license.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit. Insurance professionals accredited by the Texas Department of Insurance should have their license number available during the training in order to request credit for the course.

Register for this webinar at: https://student.gototraining.com/r/8395412655354142976. After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar.

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