Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

NOVEMBER 18, 2014

TEXAS PLAINTIFFS LAWYERS CALLED OUT FOR FILING QUESTIONABLE STORM CLAIMS IN NEW JERSEY

On Thursday, November 13th, a New Jersey federal court issued a show-cause order as to the evidentiary basis for a bad faith insurance suit based on the insured's Hurricane Sandy claim brought by attorneys Bill Voss and Scott Hunziker from Houston. Lighthouse Point Marina & Yacht Club v. International Marine Underwriters, Civ. No. 14-2974, U.S. District Court, District of New Jersey (slip opinion). Specifically, the court ordered Plaintiff's counsel to provide the evidentiary basis for the allegation that the Defendant "fail[ed] to pay Plaintiff's benefits relating [to] the cost to properly repair the Property, as well as, for all alternate living expenses and content-related losses." The court also dismissed with prejudice the insured's suit seeking bad faith and other damages arising from the Sandy claim stating that it had concerns that the suit was brought in "bad faith." U.S. District Court Judge William Walls gave Plaintiff's counsel until December 15th to respond and instructed Defense counsel for the carrier to submit evidence of its attorney fees incurred in defending the case prior to December 22nd.

AUTOMOBILE LIABILITY INSURER DID NOT ERR BY LEAVING CHIROPRACTOR OFF SETTLEMENT DRAFT

In *Pain Control Institute, Inc. v. GEICO General Insurance Company*, 2014 WL 5474777 (Tex.App. - Dallas October 29, 2014,) the Court examined the partial assignment of the Plaintiff's causes of action and assignment of proceeds to their chiropractor (Pain Control Institute or PCI) for treatments after a motor vehicle accident. GEICO, the automobile liability insurance carrier settled with the Plaintiff for $7,000, after PCI had previously advised GEICO it was treating GEICO's insured and sent GEICO a copy of the assignment and the financing statement filed to "perfect our medical lien." GEICO also forwarded copies of its treatment bills to GEICO on three separate occasions before the settlement "for final settlement." GEICO then issued a settlement draft for $7,000 paid directly to the Plaintiffs attorney without PCI's name being added to the draft. PCI filed suit against GEICO asserting GEICO violated the UCC by making payment to the Plaintiff without paying PCI.

The Court of Appeals affirmed the granting of GEICO's motion for summary judgment and the denial of PCI's cross motion for summary judgment because Texas is not a direct action state, "in other words, a tort claimant has no direct cause of action against the tortfeasor's liability insurer until the insured-tortfeasor is adjudged liable to the tortfeasor." Consequently, PCI's patient (i.e. GEICO's insured) had no rights against GEICO to assign to PCI. The Court of Appeals further reasoned that the UCC does not create any causes of action and the UCC does not apply to an assignment of rights concerning a tort claim for personal injuries. Therefore, the trial court did not err in granting GEICO's motion for summary judgment.

SUMMARY JUDGMENT ON CLAIM INVESTIGATION NOT APPROPRIATE WHEN HOMEOWNER REPLACES ROOF BEFORE ADJUSTER CAN INSPECT, BUT ADJUSTER SUBSEQUENTLY DOES LITTLE MORE THAN TAKE PICTURES

In *Santacruz v. Allstate Texas Lloyd's, Inc.*, 2014 WL 5870429 (5th Cir. November 13, 2014,) the 5th Circuit reversed a summary judgment in favor of Santacruz's homeowner's insurance carrier on the basis that Santacruz had raised fact questions on the reasonableness of the adjuster's claim investigation and the damages arising from the alleged breach of the duty of good faith and fair dealing. The matter was remanded for further proceedings in the Northern District of Texas trial court. Plaintiff alleged a June 28, 2010, rainstorm in Dallas blew several shingles off his roof, thereby causing the roof to leak and part of the roof to collapse. He promptly reported the claim to his carrier who advised him it would be a couple of days before an adjuster could inspect the roof. He advised the carrier that more storms were forecast for the rest of the week and that his contractor advised the roof needed to be replaced rather than patched or tarped. The carrier reportedly advised that they needed to inspect the roof before any repairs. The Plaintiff promptly replaced the roof, anyway. The adjuster subsequently inspected the roof, took pictures of the roof and interior, but did no further investigation. The claim was then denied.

When considering the carrier's motion for summary judgment, the trial court focused its attention on whether Allstate had a reasonable basis for denying the claim. The trial court believed Allstate has such a basis because they were denied "access to the

damaged property" by the Plaintiff's replacing the roof before it could be inspected. The Plaintiff contended he was prompted to do the quick repairs because of the impending storms and his contractual duty to "make reasonable and necessary repairs to protect the property." The Court of Appeals disagreed with the trial court and held there was a question of fact about the reasonableness of the claim denial and investigation because Allstate did not attempt to talk to the contractor nor obtain any weather reports. These additional efforts would have revealed the condition of the roof when the contractor observed it and why he felt the condition was due to covered wind damage. The Court of Appeals further held that the Plaintiff's testimony about the lost value of his personal and household items, and production of the invoice and estimates from two contractors about repair costs, were sufficient to raise fact questions about damages. Summary judgment was not appropriate on that record.

UIM CARRIER'S AGREEMENT TO A THIRD PARTY SETTLEMENT BUT FAILURE TO OFFER UIM SETTLEMENT MAY OR MAY NOT STATE A CLAIM UNDER RULE 12B6

In *Fowler v. General Insurance Company of America*, 2014 WL 5879490 (N.D. Tex. November 13, 2014,) the federal district court dismissed part of Plaintiff's claims for failure to state a claim but refused to dismiss other claims. In this UIM case, Plaintiff was injured in a motor vehicle accident. She settled for the policy limits under the third party tortfeasor's policy and General Insurance Company of America, her UIM carrier, consented to the settlement. The Plaintiff then tendered the claim to the UIM carrier who never made its own settlement offer. Plaintiff sued the UIM carrier on various theories under the Texas Insurance Code.

The Court dismissed claims based on "material misrepresentations" because the failure of the UIM carrier to make a settlement offer is not a misrepresentation per se and the carrier's prior approval of the settlement does not prevent it from later contesting the extent of the UIM policyholder's damages or the allocation of liability. However, the Court denied the motion to dismiss the claims that the UIM carrier failed to settle when liability was reasonably clear upon the presentment of documentation about the accident after the prior settlement. Additionally, the Court held that the consent to the prior settlement could be misleading when the carrier subsequently refused to settle, and therefore the Court denied the motion to dismiss related claims. The Court's partial denial of the motion to dismiss was framed solely as recognizing a claim was alleged, but the resolution was still left up to a jury.

INDEPENDENT INJURY RULE APPLIES TO EXTRA-CONTRACTUAL CLAIMS WITH PROFESSIONAL LIABILITY CARRIERS

In *Aldous v. Lugo*, 2014 WL 5879216 (N.D. Tex. November 12, 2014,) the federal district court denied in part and granted in part the Defendants' motion to dismiss under Rule 12b6. The dispute concerned the Defendants' obligation to pay the Plaintiffs' attorney fees under a professional liability policy. (Lugo was Plaintiff's insurance agent. Darwin National Assurance Company was the carrier.) Plaintiffs were in a dispute with their former client to recover their attorneys' fees. The former client sued them for legal malpractice. Plaintiffs prevailed in their suit, but ended up in a dispute with Lugo and Darwin as to how their attorney fee reimbursement should be handled and that attorney fees already paid by Plaintiffs would be reimbursed.

Plaintiffs sued Darwin under the Texas Insurance Code for failing to meet their obligations under the Policy and for refusing to pay Plaintiffs' expenses. The Court granted the dismissal of these claims because Plaintiffs' extra-contractual claims did not allege an independent injury from the contractual benefits owed under the Policy. These were mere breach of contract claims. Plaintiffs' DTPA claims against Darwin were also dismissed because "Plaintiffs must allege more than a mere breach of contract to maintain a DTPA claim." Plaintiffs were only seeking to recover the perceived benefit of the bargain under the Policy, and such does not support a claim for violation of the DTPA. Finally, the Court granted the dismissal of the claims for breach of the duty of good faith and fair dealing "under these facts" because the common law duty of good faith and fair dealing only exists "with regards to first party claims." In this case, Plaintiffs seek to recover their attorney fees incurred from defending themselves in a third party malpractice action. "There is no common law duty for third-party claims." Plaintiffs' remaining claims for breach of contract, Section 542 violations of the Texas Insurance Code and a declaratory judgment remain to be litigated.