Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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FEDERAL COURT DENIES REMAND AND EXPOSES COMMON PLEADING TACTICS OF PROMINENT PLAINTIFF'S ATTORNEY

What started as a standard remand proceeding ended this month with a ruling that provides a glimmer of hope for insurers who have struggled to exercise their right to have bad faith cases against them heard in federal court. *Davis v. Metropolitan Lloyds Ins. Co. of Texas*, No. 4:14-CV-957-A, 2015 WL 456726 (N.D. Tex. Feb. 3, 2015) is an unpublished order from Federal District Court Judge John McBryde from the Ft. Worth Division of the Northern District of Texas arising out of a bad faith case involving a hail claim. The case involved a homeowners' lawsuit filed in Tarrant County state court against Metropolitan Lloyds Insurance Company (MetLife) for hail damage. Plaintiff's counsel also added as a defendant MetLife's adjuster assigned to investigate the claim. MetLife removed the lawsuit to federal court based on diversity jurisdiction, arguing that the homeowner improperly joined the adjuster as a defendant to defeat federal jurisdiction. The homeowner, represented by Plaintiffs' attorney Richard Daly from Houston, then moved to remand the case to state court.

Without explicitly naming the attorneys involved in his order, Judge McBryde began his analysis with an apt introduction:

Certain attorneys representing insureds/claimants who are citizens of Texas and who are dissatisfied with the non-citizen insurer's response to the insured's/claimant's policy demand have developed a practice of filing suit in state court against the non-citizen insurer and an insurance adjuster or agent who is a citizen of Texas with the goal of preventing the insurance company from exercising its right to have the case removed to and heard by a federal court. The instant action is one of those suits.

The Court then looked to what it termed "boilerplate" allegations against the adjuster and found the allegations to be legally insufficient and also noted that these same allegations "repeatedly have been used by counsel for plaintiff in the bringing of state court actions of this kind."

The Court also rejected plaintiff's "summary-judgment-type evidence," which included a letter by MetLife to the plaintiff that simply enclosed the adjuster's estimate and requested any estimates from the plaintiff's contractor. The Court first noted this evidence was inadmissible, but added that even if the evidence *was* admissible, it would show a *lack* of liability on the part of the adjuster. The Court explained that if the letter proved anything, it proved that MetLife "did not consider whatever estimate [the adjuster] might have prepared to be determinative of its payment obligation and that it was open to discussion, and payment, based on an estimate by a contractor hired by plaintiff." In addition to finding the adjuster improperly joined and denying remand, the Court dismissed *sua sponte* the claim against the adjuster because of the same deficient allegations.

Judge McBryde's commentary in *Davis* serves as a good indicator that at least some federal courts are becoming frustrated with these well-known tactics by plaintiffs' attorneys to sue adjusters in every Texas bad faith case in an effort to improperly keep the cases in state court.

TEXAS SUPREME COURT ENDS LONGSTANDING RULE PROHIBITING SEAT-BELT EVIDENCE IN AUTOMOBILE-COLLISION TRIALS

Since the Texas Supreme Court first spoke to the issue in 1974, evidence of a driver's failure to use a seat belt has been inadmissible in Texas lawsuits involving car accidents. The Court reversed that rule this month with in an opinion that now allows evidence of a plaintiffs' failure to use a seatbelt as evidence of a plaintiff's comparative negligence.

Nabors Well Services, Ltd. v. Romero, No. 13-0136, 2015 WL 648858 (Tex. Feb. 13, 2015). arose from a collision between a Nabors Wells Services truck and a personal vehicle carrying eight occupants. Nabors tried to introduce expert testimony that five of the seven occupants were unbelted and ejected from the vehicle and wanted to argue that these occupants' failure to use seat belts had caused their injuries. Nabors also attempted to introduce evidence of the driver's previous citation for failing to properly restrain child passengers. Following Texas Supreme Court's ruling in *Carnation Co. v. Wong*, 516 S.W.2d 116 (Tex. 1974), the trial court excluded this evidence, with the trial ending in a $2.3 million verdict for the plaintiffs.

In revisiting its previous ruling in *Carnation*, the Court observed that *Carnation* was decided at a time when there was no law requiring seat-belt use and when the contributory-negligence rule in Texas entirely barred plaintiffs from recovery if they were negligent in any way. In contrast, all passengers today are required to buckle up, and drivers must ensure that persons seventeen or younger are also secured. Most important to the Court's analysis, however, was the comparative-negligence regime now in place in Texas, which requires a jury to allocate damages based on the fault of the respective parties. The Court held that because plaintiffs no longer suffered the risk that their claims would be completely barred for omissions such as seatbelt misuse, this evidence should now be admissible (if relevant) to prevent plaintiffs from gaining a windfall from their negligent conduct.

FEDERAL COURT IN HOUSTON FINDS NO DUTY TO DEFEND PATENT-INFRINGEMENT LAWSUIT

In granting summary judgment in favor of Continental Casualty Company last week, Judge Keith Ellison of the Southern District provided guidance on "personal and advertising injury" provisions in commercial insurance policies. The coverage dispute in *Uretek* arose from an underlying patent dispute between Uretek and its competitor Applied Polymerics. *Uretek (USA), Inc. v. Continental Cas. Co*., 2015 WL 667880 (S.D. Tex. Feb. 17, 2015). Uretek first sued Applied for patent-infringement of a lifting-process used in roadway maintenance and Applied counterclaimed alleging Uretek had misrepresented to third-parties that certain contracts were covered by the patent. Uretek requested a defense from Continental, which Continental refused.

Uretek held a general liability policy with Continental that provided coverage for "personal and advertising injury," which included damage from any "Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services…" The policy also excluded claims arising from: "The use of another's advertising idea in your 'advertisement'" and "Infringing upon another's copyright, trade dress or slogan in your 'advertisement.'" Uretek argued coverage was triggered by Applied's allegation that "Uretek disparaged the services of Applied and others." The Court disagreed finding the surrounding allegations concerned Uretek's own services and patent. In other words, Applied never alleged that Uretek disparaged a particular competitor's services to a third party, as required by the policy provision, but rather alleged that Uretek had attempted to mislead competitors regarding Uretek's patent to discourage competitors from bidding on similar pavement-lifting projects and mislead contractors into believing that Uretek was the sole provider of these services. Citing other cases that held similar personal-and-advertising provisions did not apply when underlying allegations involve a party making misrepresentations about its own product the Court granted summary judgment in favor of Continental finding it had no duty to defend Uretek.