Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MARCH 10, 2015

NATIONAL LLOYDS WINS FIRST WIND-HAIL JURY TRIAL IN THE VALLEY LAST WEEK

National Lloyds won the first wind-hail case tried in Hidalgo County when the jury returned its verdict late last Monday night.

This case was the first of several thousand wind-hail cases pending in The Valley to be tried to verdict. The Mostyn Law Firm from Houston represented Andrea and Martin Amaro and Scott Doyen of Doyen Sebesta in Houston represented the carrier. The case arose from a March 2012 hailstorm in McAllen which resulted in thousands of lawsuits being filed against every property insurer in Hidalgo County. This trial lasted six days. Amber Mostyn and Randy Cashiola tried it for the Amaros. Plaintiffs asked for structural damage to the house and a new roof. Plaintiffs also asked for more than $200,000 in attorney fees. Judge Rose Reyna (the MDL judge in Hidalgo County for some carriers including National Lloyds) tried the case. The jury returned its verdict late last Monday and answered "no" to every question. Question 4 proved particularly fascinating because the jury found the carrier didn't get what it needed to properly adjust the claim until the eve of trial, almost 3 years after the weather event in question. The complete jury verdict can be found below.

Wind-hail cases continue to proliferate across the state but Hidalgo County remains the epicenter of this litigation cottage industry of the plaintiffs' bar. It has been estimated by some industry trade groups that more than 10,000 wind-hail suits have been filed across the state against Texas property insurers in the last 2 ½ years. It has also been reported by industry trade groups that some carriers' claim-to-suit ratio has exploded from a 20 year average in Texas and across the country of 1% to an amazing 35% or higher in Texas due to wind-hail claims and suits. National Lloyds was set for trial again next week in Hidalgo County against other homeowners represented by The Mostyn Law Firm, but Mostyn's motion for continuance was granted last Friday and that case has been reset for trial in May.

VIEW DOCUMENT(S):

Complete Jury Verdict

TEXAS COURT OF APPEALS CONSIDERS WHETHER A COURT MAY BAR A CLAIMANT FROM RECOVERING ATTORNEYS FEES WHERE ITS LAWYER PREVIOUSLY DEMANDED MONIES TO WHICH THE CLAIMANT WAS NOT ENTITLED

The end may be near for one practice preferred by some plaintiffs' lawyers seeking breach of contract damages: opening litigation with excessive settlement demands designed to either provide a windfall for those lawyers and their clients or needlessly increase the cost of litigation for the lawyer's own benefit. See, *United Services Automobile Association v. Hayes*, in the Court of Appeals for the First District of Texas, No. 01-14-00133-CV. In *Hayes*, which is currently pending in Houston's First Court of Appeals, the court will rule on whether an insured's excessive pre-suit settlement demand bars the insured as a matter of law from recovering attorney's fees it would be otherwise entitled under Chapter 38 of the Texas Civil Practice and Remedies Code.

Hayes arises out of a first party coverage dispute stemming from Hurricane Ike. Two insureds contended that the hurricane had "unsealed" roof shingles. The insureds and its insurer, however, disagreed regarding the scope of damage caused by the hurricane and could not resolve the claim. The insureds subsequently retained lawyers to represent them, and those lawyers issued a pre-suit demand letter. Although the insureds had, according to the evidence disclosed at trial, incurred only about $53,000 in damages and $952.50 in attorney's fees at the time of their demand, the insured's lawyers demanded over $600,000 to settle the lawsuit.

At trial, the evidence showed that the roof had "unsealed" shingles after the hurricane, but no evidence was presented regarding the state of the roof prior to the hurricane. The jury returned a verdict of $20,000 in favor of the insured and found that a reasonable and necessary fee for the insureds' lawyers' services was $312,500. In a post-verdict hearing, however, the insurer argued that no attorney's fees could be properly awarded under Texas law because the pre-suit demand sought monies to which the insured was not

entitled, rendering the demand excessive as a matter of law. The trial court agreed and struck the jury's $312,500 attorney's fees award from its judgment.

The insured appealed contending that a jury, not the court, must decide whether a demand is excessive. The insurer filed a cross-appeal on grounds that the evidence failed to establish a direct physical loss as required to trigger coverage because, even though the evidence established that the roof contained "unsealed" shingles after the hurricane, there was no evidence showing the state of the shingles at any other time. The MDJW Newsbrief will continue to report on these important issues impacting insurers throughout the state as this matter progresses.

[Editor's Note: Levon Hovnatanian, Kevin Cain, and Chris Martin of our firm have had the privilege of representing USAA in this matter at trial and on appeal. We thank USAA for the opportunity to protect its interests in these important matters.]

DALLAS APPEALS COURT RULES IN FAVOR OF INSURER ON CONSTRUCTION BUSINESS RISK EXCLUSION

In *Dallas National Insurance Company v. Calitex Corp.*, 2015 WL 968308 (Tex.App.—Dallas, March 3, 2015), the Court of Appeals for the Fifth District of Texas at Dallas reversed the trial Court's judgment and rendered a take nothing judgment holding the insurer isn't responsible for almost $700,000 in damages and attorneys' fees awarded against its policyholder in underlying litigation brought by Calitex Corp. over construction defects at a town house project.

The insurance policy in question in this case is a commercial general liability insurance policy issued by Dallas National to Turnkey Residential Group, Inc. ("Turnkey"). In October 2006, Turnkey and Calitex entered into a written contract under which Turnkey, described in the contract as "the contractor," was to be paid by Calitex, described as "the owner," to construct a twelve-unit townhome complex in Dallas, Texas. Pursuant to that contract, the Project was to be completed by Turnkey no later than October 26, 2007. Construction of the townhomes began in November 2006. Problems arose with the project around February 2007, including leaking windows and deficient exterior stonework. Calitex sued Turnkey, its owner and a subcontractor in February 2008 in state court, seeking $600,000 in damages. On February 14, 2008, Turnkey sent Dallas National a notice of claim and a copy of Calitex's live petition at that time. In a March 4, 2008 letter to Turnkey, Dallas National stated it "has concluded that it has no obligation to defend or indemnify Turnkey as a result of the factual allegations asserted against Turnkey ... by Calitex."

At trial, the jury found in Calitex's favor, awarding the company $500,000 in damages and $193,500 in attorneys' fees against Turnkey. In November 2011, Calitex sued Dallas National for breach of contract as a third-party beneficiary under Turnkey's policy.

The trial court in the breach of contract suit granted Calitex's summary judgment motion to award the company the full $693,500 from the underlying judgment. In a subsequent trial, a jury awarded Calitex an additional $135,250 in attorneys' fees against Dallas National.

On appeal, Dallas National argued that even if the leaks and defective installation of the exterior stone constituted property damage, evidence shows that much of the damage occurred while construction was in progress, which falls within the business risk exclusion in the policy.

The appellate court agreed, noting that the insurer cited the testimony of a waterproofing expert who stated that he was called in by Turnkey to investigate and solve water leak problems after construction was "80 percent or 90 percent complete." Calitex's president also testified that he had been on-site every day and discovered that about a third of the units had leaks in August 2007 while construction was ongoing.

In the March 3rd opinion, the appellate panel concluded that Dallas National had shown that at least part of the property damage at issue falls within a business risk exclusion in the relevant commercial general liability policy because it occurred while the insured was still working on the project and that Calitex failed to allocate between damages covered under the policy and those that are excluded. Further, the panel found that because the insurer isn't liable to cover any of the underlying judgment, Calitex isn't a prevailing party on either of its claims in the and therefore also isn't entitled to recover attorneys' fees. The panel reversed the trial court's ruling granting summary judgment to Calitex and entered a take-nothing judgment in favor of Dallas National.

SOUTHERN DISTRICT OF TEXAS DENIES MOTION TO DISMISS AND FINDS THAT WAIVER OF SUBROGATION PROVISION DOES NOT BAR INSURER FROM ENFORCING CONTRACTUAL INDEMNITY OBLIGATIONS

The District Court for the Southern District of Texas, Houston Division, recently denied a motion to dismiss and found that a waiver of subrogation does not preclude an insurer from enforcing a contractual indemnity obligation.

In *Catlin Specialty Ins. Co. v. L.A. Contractors, Ltd*, 2015 WL 806912 (S.D. Tex)(February 25, 2015), Catlin brought suit to enforce contractual indemnity obligations and to recover amounts paid to settle a claim on behalf of its insured.

On June 1, 2010, Wolverine Construction and L.A. Contractors ("LAC") signed a Master Service Agreement. The Agreement included an indemnity provision whereby LAC and Wolverine mutually agreed to defend and indemnify one another for all claims asserted by the other's employees. Additionally, LAC was required to maintain worker's compensation, general liability insurance, and automobile liability insurance. The MSA stated that "the insurance requirements set forth herein are supplementary to and shall not limit or restrict as to amount, extent or otherwise the defense and indemnity obligations undertaken by [LAC] under this Agreement." Additionally, LAC agreed that its insurance policy "shall waive the right of subrogation against [Wolverine]." Another provision of the MSA stated that Wolverine's indemnity obligation "will be supported by insurance and will have the same requirements and conditions for insurance" as provided in paragraphs outlining LAC's obligations.

In February of 2011, Wolverine obtained insurance through Liberty Mutual. Included in Liberty Mutual's contract was a waiver of transfer of rights to recovery against others to Liberty that stated: "We waive any right of recovery we may have against the person or organization shown in the Schedule above." The schedule indicated that the waiver extended to "[a]ll persons or organizations where the named insured has agreed, by written contract executed prior to the date of occurrence, to waive rights of recovery against such person or organization." In addition to its contract with Liberty Mutual, Wolverine obtained an excess liability policy with Catlin. Wolverine's contract with Catlin contained a similar waiver stating that Catlin waived any right of recovery "as per written contract." On April 14, 2011, the estate of an employee of LAC brought a claim against Wolverine in Zapata County, Texas, alleging that the employee died as the result of a workplace injury. Wolverine demanded indemnity from LAC based on the MSA, but LAC did not defend or indemnify Wolverine as required by the Agreement.

In July 2013, Wolverine entered into a settlement with the decedent's estate. In connection with the settlement, Catlin paid more than the jurisdictional minimum on behalf of Wolverine and pursuant to the terms of Wolverine's insurance policy

Catlin filed this lawsuit on February 4, 2014, alleging contractual indemnity and breach of contract against LAC. On September 5, 2014, LAC filed a Motion to Dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and 12(c).

LAC argued that the language of the MSA created an unlimited waiver of subrogation between LAC and Wolverine. LAC maintained that because it had a written contract granting a waiver of subrogation, that waiver applies to the underlying insurance contract, which extended subrogation to all organizations agreed by written contract to waive subrogation, and that therefore Catlin failed to state a claim upon which relief can be granted. Catlin responded that LAC has a duty to indemnify Catlin under the terms of the MSA, and that, even assuming that LAC's waiver of subrogation was valid, LAC could not enforce the provision because it materially breached its agreement with Wolverine.

Catlin relied on the Texas Supreme Court's decision in *Ken Petroleum Corp. v. Questor Drilling Corp*., 24 S.W.3d 344 (Tex.2000). In that case, the court considered whether a provision regarding a waiver of subrogation precluded plaintiff's underwriters from enforcing an indemnity agreement. The court found that a provision that waived plaintiff's right to subrogation in certain circumstances did not prevent plaintiff's underwriters from enforcing an indemnity agreement against defendant.

The Court found that Wolverine and LAC's contract contained an indemnity provision that stated that LAC would protect, defend, indemnify and hold Wolverine harmless from all claims asserted by LAC's employees. Additionally, the contract specifically stated that "[t]he insurance requirements set forth herein are supplementary to and shall not limit or restrict as to amount, extent or otherwise the defense and indemnity obligations undertaken by [LAC] under this Agreement."

On recommendation from the magistrate, the Court concluded that the motion to dismiss should be denied because Catlin has made a short, plain statement showing that it is entitled to relief under the MSA and that Catlin had adequately stated a claim upon which relief can be granted.

THE TEXAS WORKERS' COMPENSATION DIVISION HAS EXCLUSIVE JURISDICTION OVER CLAIMS FOR MISREPRESENTATION OF AN INSURANCE POLICY WHEN THE ALLEGED MISREPRESENTATION OCCURRED WITHIN THE CLAIMS-SETTLEMENT CONTEXT

This past Friday, the Supreme Court of Texas determined that a trial court abused its discretion when it refused to dismiss claims over which the Division of Workers' Compensation had exclusive jurisdiction over the insurance company's investigation, handling, and settling of claims for workers' compensation.

In, *In Re Crawford & Company, Company & Company Healthcare Management, Inc., Patsy Hogan and Old Republic Insurance Company*, No. 14-0256 (February 27, 2015), Glenn Johnson, an employee of ASARCO, suffered serious injuries at work. Due to the

severity of his injuries, Mr. Johnson was entitled to receive lifetime workers' compensation benefits. In 2008, disputes over the amounts of benefits that he was entitled to receive resulted in a contested hearing. Separate from the administrative proceedings, Mr. Johnson and his wife filed an underlying suit against ASARCO's workers' compensation insurance provider. The Johnson's allege that over a period of 10 years, the insurer engaged in "a battle plan to discourage and deny" benefits that the Johnsons were entitled to receive. The Johnsons pleaded numerous causes of action, in tort and contract, and alleged violations of the statutory duties under the Texas Insurance Code and Texas Deceptive Trade Practices Act.

The Johnsons alleged that the Texas Workers' Compensation Act did not require them to pursue their claims through its administrative procedures because the Act's administrative procedures do not apply to some of their claims. Specifically, the Johnson's alleged that the Worker's Compensation Act did not bar their claims because they were seeking damages that were "unrelated" to workers' compensation benefits and based on injuries that are "independent" of harm the Worker's Compensation Act was intended to prevent.

The insurer filed a plea to the jurisdiction and motion for summary judgment arguing that the Texas Workers' Compensation Act had exclusive jurisdiction over the Johnson's claims because they arose out of the workers' compensation claims-handling process. The trial court dismissed the Johnson's claims for breach of common law duty of good faith and fair dealing but refused to dismiss any of the other claims. The court of appeals denied the insurer's petition for mandamus relief.

The Supreme Court determined that the Division of Workers' Compensation has exclusive jurisdiction over the Johnsons' claims as the administrative agency responsible for overseeing the workers' compensation system of Texas. The Supreme Court further determined that the Court of Appeals' interpretation of Texas Mutual Insurance Co. v. Ruttiger, 381 S.W.3d 430 (Tex. 2012) was too narrow. While the Supreme Court recognized that its holding in Ruttiger does not necessarily bar claims for misrepresenting an insurance policy under the Texas Insurance Code, it noted that the holding in Ruttiger was based on the fact that "section 541.061 [of the Texas Insurance Code] does not specify that it applies in the context of settling claims." And, because section 541.061 does not evidence intent that it be applied in regard to settling claims, it is not at odds with the dispute resolution process of the workers' compensation system. Clarifying Ruttiger, the Court noted that instead of assessing whether a claim falls within the Workers' Compensation Division's exclusive jurisdiction, courts must look at the substance of the claim to determine if the Worker's compensation act bars a cause of action. As the Supreme Court reiterated in this case, "the current [Worker's Compensation] Act with its definitions, detailed procedures, and dispute resolution process demonstrat[es] legislative intent for there to be no alternative remedies."

While the Johnson's alleged that their claims for misrepresentation existed outside of the Worker's Compensation Act—thereby justifying their underlying lawsuit, the Supreme Court concluded that the Worker's Compensation Division has exclusive jurisdiction over a claim for "misrepresentation of an insurance policy" when the alleged misrepresentation occurs within the claims-settlement context. The Act's comprehensive system for resolving workers' compensation claims encompasses prohibitions against fraud and misrepresentations made within the claims settlement context, and grants the Worker's Compensation Division authority to regulate and sanction any such conduct.

Because all of the Johnsons' misrepresentation-based claims complained of misrepresentations that Crawford allegedly made in connection with its investigation, handling, and settling of the Johnsons' claims for workers' compensation benefits, the Workers' Compensation Division had exclusive jurisdiction to address those claims.

TEXAS DEPARTMENT OF INSURANCE FILES NOTICE OF INTENT TO INSTITUTE DISCIPLINARY ACTION AGAINST PUBLIC ADJUSTER FOR DEFRAUDING INSURANCE COMPANIES

Last month, the Texas Department of Insurance issued a notice of intent to institute disciplinary action against Robert Keith Taylor. The TDI noted that Mr. Taylor has been criminally prosecuted for defrauding insurance companies and committing mortgage fraud. On January 8, 2015, Mr. Taylor was convicted of federal felony offenses of false statement to a bank and wire fraud. Mr. Taylor was sentence to 28 months of confinement and ordered to pay $632,924.72 in restitution to American International Group and $376,468.80 to bank of America.

Mr. Taylor was also noted to have engaged in acts as a public adjuster in Texas through the TEI Group & Associates, Inc. However, TEI does not hold a public insurance adjuster license in Texas. Further, Mr. Taylor had reportedly colluded with an umpire that he had had a previous working relationship with during the appraisal process on a hail damage claim. As a result, the umpire awarded damages 120 times greater than the original $7,000 damage estimate.

Additionally, Mr. Taylor reportedly engaged in questionable practices in claims submitted to Travelers Insurance Company. Mr. Taylor refused to provide documentation to substantiate the cost of repairs associated with at least one loss. On two claims, the

insureds withdrew the claims because they were unaware that Mr. Taylor and TEI Group were representing them. Further, Mr. Taylor grossly exaggerated estimated losses—the TDI noted at least one instance where Travelers estimated a loss at around $27,000, and after Mr. Taylor became involved in the claim, the appraised value of the loss substantially increased to $856,000.

As such, the Commissioner informed Mr. Taylor of the TDI's intent to take disciplinary action against Mr. Taylor because he has been convicted of a felony as contemplated by the Texas Insurance Code, he does not have consent to engage in the business of insurance in Texas, performing acts as a public adjuster in Texas through an unlicensed corporation, and engaged in fraudulent or dishonest acts or practices.