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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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NO BREACH OF CONTRACT OR EXTRA-CONTRACTUAL LIABILITY WHEN CARRIER TIMELY PAYS AN APPRAISAL AWARD IN FULL

In *Quibodeaux, et al. v. Nautilus Insurance Company, et al*, Case No. 1:10-cv-739 (ED Tex, March 10, 2015), the United States Magistrate Judge for the Eastern District of Texas addressed a first party commercial property insurance dispute arising out of damages to two properties during Hurricane Ike. The carrier removed the dispute to federal district court and moved to compel binding appraisal under the insurance contract. The Court granted the motion, and later entered an appraisal award for $43,037 on one property and $25,087 on the other property. The Carrier promptly paid the awards in full within twenty days and the Plaintiffs accepted and cashed the payments. The Carrier then moved for summary judgment on Plaintiffs' breach of contract claims and extra-contractual claims (violations of the duty of good faith and fair dealing, violations of the Texas Insurance Code, violations of the prompt payment of claims and violations of the Texas DTPA).

The Magistrate recommended the District Court rule that a breach of contract claim does not survive where the Carrier timely pays all damages determined by the appraisal. Additionally, the Plaintiff is estopped from suing the Carrier for the initial failure to pay which subsequently resulted in the demand for appraisal. The Plaintiff attempted to argue it still had a claim for its contents damages which were not addressed by the appraisal award, but the Magistrate rejected the contents claim because a different Carrier had paid the same contents claim, and because it was untimely submitted in this case after the appraisal.

The Magistrate also recommended rejecting the extra-contractual claims because there was no breach of contract. The Magistrate recognized the general rule that extra-contractual liability normally requires a breach of contract. Without a breach of contract, the only basis for finding extra-contractual liability would be if one of the "*Stoker* exceptions" applied, either 1) the Carrier committed some act so extreme that it would cause injury independent of the Policy claim, or 2) the Carrier failed to timely investigate the insured's claim. The Magistrate noted that neither party argued these exceptions. Additionally, the Magistrate recognized the "failure to timely investigate" exception is not met by evidence that the adjuster investigating the structure claim was busy adjusting many Ike claims at the same time. The Magistrate further recommended that allegations claiming the adjuster's investigation was "incomplete" do not meet either *Stoker* exception. Finally, the Magistrate recognized Plaintiffs' "prompt payment of claim" cause of action failed when the Carrier timely paid the full appraisal award. The Magistrate recommended a full summary judgment on all of Plaintiffs' claims be granted to the Carrier.

VERDICT AGAINST INSURANCE AGENT OVERTURNED WHEN PLAINTIFF'S COUNSEL PRESENTED SPECULATIVE CALCULATIONS OF LOST REVENUE AND FAILED TO TIE IT TO COVERED BUSINESS INTERRUPTION COVERAGE

In *Smith-Reagan & Associates, Inc. v. Fort Ringgold Limited, et al*, No. 04-13-608-CV (Tex.App.-San Antonio March 11, 2015), the San Antonio Court of Appeals reversed the trial court's judgment and rendered a take-nothing judgment on Plaintiff's $325,000 jury verdict against an insurance agent for failing to procure business interruption insurance from Highlands Insurance Company on Plaintiff's hotel. The hotel sustained extensive damage after a storm, and 43 of the 64 rooms were closed due to mold. Highlands paid the property damage claims, but rejected the lost income claim because there was no business interruption coverage. Plaintiff sued the insurance agent for failure to procure business interruption coverage and misrepresenting that Highlands had provided such coverage.

On appeal, the Court of Appeals noted that the jury charge closely tracked Texas case law holding "[t]he measure of the liability for an [agent's] failure to procure insurance is the amount that would have been due under the insurance policy [if] it had been obtained." Here, the Plaintiff "presented no evidence of how business interruption damages would have been calculated if the policy had been obtained…. [They] did not present, as such evidence, testimony about or a copy of a policy providing business interruption coverage during the relevant time period." Plaintiffs argued at trial their damages amounted to $1,175,796 based on the number of closed rooms multiplied by the rate and the number of days closed. This amount would include operating expenses, but Plaintiff admitted "he did not know how much he would have been entitled to receive if the policy had included business interruption coverage." The Court of Appeals recognized the estimate of lost gross revenue was speculative since they were based on an assumed occupancy rate and because the amount of expenses for those closed rooms was not presented in the calculation. Moreover, the calculations were not tied to what would be recovered under a policy with business interruption coverage. The Court of Appeals

accordingly held the matter could not be remanded for a new trial on damages because "we cannot say some evidence exists to warrant a remand for a new trial on damages." The only evidence offered at trial was deemed speculative.

COMMUNICATIONS BETWEEN INSURED, INSURED'S DEFENSE COUNSEL AND INSURER ARE PROTECTED UNDER FEDERAL WORK PRODUCT PRIVILEGE

In *Nester, et al. v. Textron, Inc, et al*, 2015 WL 1020673 (WD Tex. March 9, 2015), the US Magistrate Judge for the Western District of Texas considered several discovery motions in a personal injury case contending Plaintiff Nester was injured in 2011 while using a Workhorse cart manufactured by Textron. The discovery motions centered on obtaining information about a 2005 fatal accident and its investigation. Among the material withheld from production under claims of privilege were documents consisting of communications between Textron's "in-house counsel, outside counsel, in-house counsel representative, Textron Personnel and Textron's insurance carrier representative" regarding developments in the instant case.

The Magistrate first recognized: "Defendants have not met their burden to establish this document is protected under the Texas attorney-client privilege; there is nothing in the privilege log or the document itself that would show whether the insurance carrier was a joint client along with Textron, and Texas law does not recognize a general insurer-insured privilege."

The Magistrate later recognized documents between the insured, its counsel and its liability carrier were protected under the federal work product privilege in Fed.R.Civ.P. 26(b)(3) because it specifically protects from disclosure "documents and tangible things that are prepared in anticipation of litigation or for trial or by another party or its representative (including the other party's … **insurer** or agent)." (Bold in original.)

LEGISLATIVE UPDATE: S.B. 1166 PROPOSED CHANGES TO TEXAS PROMPT PAYMENT OF CLAIMS ACT

The Texas Legislature is in session and last Friday, March 13th, was the last day to file new bills. In a flurry of activity, one such bill, S.B. 1166 may have a significant impact on insurers defending first party claims in Texas. S.B. 1166 seeks to add language to Section 542.058(b) of the Texas Insurance Code and provides new exceptions to the Prompt Payment of Claims Act penalty provisions when: 1) the amount of damages awarded in litigation or arbitration is less than 80 percent of a rejected settled offer, 2) the claimant fails to provide an affidavit of damages as required under a new Section 542.0595 or, 3) the insurer pays the claimant based on the amount awarded in appraisal within 15 business days after the award is made.

S.B. 1166 also amends Section 542.060 making it clear that the 18% interest penalty applies only to the "disputed" amount, that any attorney's fees award "must bear a reasonable relationship to any damages awarded" and interest only begins to accrue on the date an affidavit of damages is provided as required under the new Section 542.0595. Below is a link to S.B. 1166. We will continue to monitor this proposed legislation and all other insurance-related legislation and report as further developments arise in Austin.

View Document(s):

S.B. 1166