Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JUNE 30, 2015

LIMITATIONS PERIOD BARS CLAIMS ON RESIDENTIAL INSURANCE POLICY SINCE CARRIER DID NOT CHANGE ITS CLAIM DECISION.

This case is one of the thousands of wind-hail cases arising out of the 2012 storms in the Rio Grande Valley. *Chapa v. Allstate Texas Lloyds*, 2015 WL 3833074 (S.D. Tex – McAllen June 22, 2015) arose from a wind and hail storm which struck the Valley and allegedly caused damage to Chapa's home on March 29, 2012. Chapa immediately filed a claim with Allstate. An adjuster inspected the house on April 9th and determined the RCV was $24,713. Allstate cut a check for the ACV on April 10th and paid the recoverable depreciation on June 22, 2012. The claim was closed the same day. Two years later, on June 12, 2014, a Public Adjuster sent a letter to Allstate notifying them that Chapa hired them to represent Chapa on the claim. On June 16, Allstate sent two letters to the PA. The first letter acknowledged the PA's representation and stated Allstate was "continuing to investigate [the] insured's loss." The second letter advised a re-inspection would not be granted but said the PA could submit a new estimate if the PA disagreed with Allstate's estimate. A week later, Allstate followed up with another letter stating it reserved the right to deny coverage for the March 29, 2012 loss "supplement" because it came 26 months after the loss was settled. On August 4, 2014, the PA forwarded an estimate to Allstate in the amount of $67,671 and Allstate denied it by letter dated the same day. Suit was filed by Chapa in December of 2014 in state court for breach of contract, violations of Sections 542 and 541 of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and violations of the DTPA. The case was then removed to federal court. Allstate filed a motion for summary judgment on all of Chapa's claims based on limitations, both contractual and statutory.

At the center of the dispute was the question of when did the causes of action for breach of contract and extra-contractual damage accrue. The parties agreed the proper limitations period for breach of contract was two years and one day (under the insurance contact) and two years for the extra-contractual claims (under the applicable statute). Plaintiff contended limitations did not expire on June 22, 2014 because the carrier reopened the claim later in June by proceeding with a re-investigation of the loss and recognizing there were some additional damages found in August of 2014. Thus, Plaintiff argued the date of determination of the claim was August 2014 when Allstate made its "final" claim decision. Plaintiff's secondary argument contended Allstate restarted the limitations period when it reopened the claim and investigation in August of 2014.

Last week, the trial court granted Allstate's Motion for Summary Judgment on limitations because the insurer paid the claim and "closed the case file" on June 22, 2012. The 5th Circuit Court of Appeals has recognized that, "the cause of action begins to accrue, at the latest, upon the issuance of a final letter and the closing of the claims file. Any request by the plaintiff to reopen the claim does not toll or extend the limitations period following the claim decision … [if] it does not change its position on the claims…"

NOTICE PROVISION IN EXCESS POLICY DOES NOT FOLLOW FORM WITH PRIMARY POLICY SUCH THAT THE EXCESS CLAIM MUST BE REPORTED DURING THE PRIMARY POLICY PERIOD.

In *Illinois Union Insurance Co. v. Sabre*, 2015 WL 3917981 (Tex. App.-Fort Worth June 25, 2015), Sabre Holdings Corp., Site 59.com LLC, Travelocity.com LP, Travelocity.com LLC and Sabre Inc. (collectively "Sabre") were sued by various governmental entities for failing to fully remit hotel taxes collected from consumers. Sabre was primarily insured by American International Specialty Lines Insurance Company ("AISLIC"). The excess carrier was Illinois Union Insurance Company ("IU"). The policy period for both policies was March 15, 2004 to March 15, 2005. Sabre's broker notified AISLIC of the first three suits on March 11, 2005, and the primary carrier provided a defense with payments up to $15 million. On December 14, 2010, Sabre sent letter notification to IU of the claims. IU denied coverage because it alleged the excess policy "followed form" with the primary policy and the primary policy was a "follow form policy which means that it follows all the terms and conditions of the primary policy." It argued: "As such, this claim would have to have been reported … during the same policy period as it was reported to" AISLIC because the primary policy was a "claims made and reported policy." Sabre filed suit for declaratory judgment and moved for summary judgment. The Court granted the summary judgment.

The Court held it was not dispositive that the excess policy was a follow form policy because there was a non-follow form endorsement that stated: "As a condition precedent to coverage under this policy, the Insureds shall give to the Insurer as soon as

practicable written notice and the full particulars of … the exhaustion of the aggregate limit of liability of any Underlying Policy." The Court continued:

Thus, the insuring clause as amended by the endorsement could be reasonably interpreted to mean that the excess policy follows form to the definitions, exclusions, and limitations of the primary policy, but not the terms and conditions of the primary policy. Because the reporting requirements in the primary policy are more properly characterized as conditions rather than definitions, exclusions, or limitations, the insuring clause can be read as not incorporating the notice conditions of the primary policy…. To construe both of these provisions as requiring concurrent notice of the circumstances to AISLIC would not be reasonable because these specific sections deal with circumstances of which the primary insurer would already be aware.

FAILURE TO SUBMIT SOLE NEGLIGENCE ISSUE TO JURY CREATES QUESTION OF FACT ABOUT EXCLUDING COVERAGE FOR VOLUNTARY PAYMENTS.

In *Hulcher Services, Inc. v. Great American Insurance Company*, 2015 WL 3921903 (E.D. Tex.-Sherman Division June 25, 2015), Hulcher Services provided derailment and rerailment services to Union Pacific Railroad. Hulcher was primarily insured by CNA. Great American provided umbrella coverage with limits of $25 million.

In September of 2003, James Collins, a Hulcher employee, was injured while moving equipment to the site of a Union Pacific collision that caused a derailment of twenty cars. Union Pacific and Hulcher notified CNA and Great American of the lawsuit filed by Collins against Union Pacific and co-worker Dinda Barnett. The jury ultimately determined Collins and Barnett were generally employees of Bulcher, they were also employed by Union Pacific at the time of the accident, Union Pacific was negligent, and Collins was not negligent. The trial court entered a judgment in favor of Collins for $2,558,826. CNA paid its policy limits but Great American refused to contribute above CNA's $1 million. Union Pacific demanded that Hulcher indemnify it and it did so. Hulcher then sued Great American.

Hulcher filed a motion for partial summary judgment and Great American filed a motion for summary judgment on the indemnity payment made by Hulcher under its contract with Union Pacific. Great American argued it was a voluntary payment thus it precluded all of Hulcher's claims as a matter of law under equitable subrogation principles.

It was undisputed Hulcher was not required to indemnify Union Pacific against any loss caused by Union Pacific's sole negligence. The issue then became whether or not this sole negligence question was determined by the jury in the underlying lawsuit. Great American focused on the finding that Union Pacific had the right to control the work of Collins and Barnett, the employee whose negligence that caused the accident.

The Court determined Union Pacific's sole negligence was not submitted to the jury in the underlying case and thus a question of fact precluded summary judgment. It held:

The Court agrees that the issue of whether Union Pacific was solely negligent for Collins injuries was not determined or argued to the jury in the underlying Collins litigation. The jury was never asked to determine whether Hulcher was also negligent … the issue was never argued nor submitted to the jury to consider….In the FELA context, the jury merely answered the question of whether Union Pacific's negligence, if any, 'played any part, no matter how small, in bringing about the harm, even if other factors also contributed to the harm.' This instruction on causation and the resulting answer by the jury is not sufficient to preclude a finding by the jury that Hulcher was also negligent, in addition to Union Pacific.

MDJW First Friday Webinar - Lessons Learned in Recent Hurricane and Windstorm Litigation

WAYNE PICKERING - PRESENTER
JULY 10, 2015

We're in hurricane season again! Wayne Pickering, a partner in the Houston office, will present "Lessons Learned in Recent Hurricane and Windstorm Litigation." Mr. Pickering will share his experiences in dealing with hurricane and windstorm litigation for the past six years with a focus on the potential minefield of litigation and the experiences of others who have gone before who have successfully navigated the minefield (or stepped on a mine in some cases!) in order to prepare attendees for what could happen the next time a tropical storm or hurricane impacts the Texas Gulf Coast.

Mr. Pickering's legal experience includes many years of experience at both the trial and appellate level in numerous facets of insurance litigation, including coverage issues, bad faith and extra-contractual claims, as well as litigating professional liability claims against insurance agents, brokers and claims adjusters. Mr. Pickering's experience also includes the representation of automobile manufacturers and manufacturers of commercial equipment and consumer products in products liability actions and warranty claims.

Mr. Pickering also has authored or co-authored numerous articles and edited treatises in the field of insurance law. See http://www.mdjwlaw.com/professionals-P-Wayne-Pickering.html for additional information about Wayne Pickering.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit and to the Texas State Bar for one hour of CLE credit. We do not apply for CE or CLE in any other state. However, we can provide a Certificate of Attendance for you to use in applying for credit with other agencies. Please note that we do not guarantee that any other agency will accept the Certificate of Attendance.

Register for this webinar at: https://attendee.gototraining.com/r/6724716837103453441. You will have the option of supplying your Texas Department of Insurance license number and/or Texas State Bar number during the registration process if you will be requesting CE or CLE credit. If you are not requesting credit, you do not need to complete those fields. After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar. **Registration will close 30 minutes before the presentation.**

If you have any questions, please send an e-mail to ce@mdjwlaw.com or call Cynthia Glenney at 713-632-1737.

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