Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JULY 28, 2015

NORTHERN DISTRICT OF TEXAS DETERMINES PLAINTIFF IMPROPERLY JOINED INSURANCE AGENT – DENIES PLAINTIFF'S MOTION FOR REMAND

In *Davis v. State Farm Lloyds*, 3:15-CV-0596-B, 2015 WL 4475860, at *4 (N.D. Tex. July 21, 2015), the Northern District of Dallas denied a Plaintiffs' Motion for Remand, and determined that causes of action alleged against the insurance agent were insufficient. Plaintiffs sued State Farm and Plaintiffs' agent for negligent misrepresentation; fraud; violation of the Texas Deceptive Trade Practices Act; and Civil Conspiracy to commit illegal acts for damages allegedly suffered. In fact, the Court noted that Plaintiffs' Original Petition was so vague that it had to presume the case involved Plaintiffs' house.

Conducting a 12(b)(6) analysis into Plaintiffs' pleadings, the Court analyzed the causes of action Plaintiffs brought against the non-diverse insurance agent. The Court reiterated the standard for improper joinder, and noted that State Farm successfully demonstrated there was no possibility of recovery against the agent.

Analyzing each cause of action asserted against the agent, the Court determined Plaintiffs' negligent misrepresentation claim merely echoed elements for each cause of action, and Plaintiffs' claims lacked the requisite factual support or context from which the Court can draw the reasonable inference that the agent is liable.

The Court noted Plaintiffs' allegations are a collection of threadbare recitals of the elements of the claim, conclusory statements, and even ambiguous assertions that provide no facts to indicate the viability of the negligent misrepresentation claim.

The Court also noted that Plaintiffs' fraud claim merely made conclusory accusations that Defendants made representations that were material and false. The Court noted that the accusation that Defendants made representations that Plaintiffs were adequately insured lacked the requisite factual support to uphold a fraud claim against the agent.

With regard to the sufficiency of Plaintiffs' DTPA claim, the Court noted Plaintiffs merely quoted excerpts of the DTPA that listed actions constituting "false, misleading, or deceptive acts or practices." Plaintiffs did not adapt or supplement this statutory language with facts regarding their particular circumstances. Plaintiffs made no effort to clarify what statements or advertisements the agent made or what she may have failed to disclose in the course of her dealings with Plaintiffs.

Consequently, the Court dismissed the agent under the doctrine of improper joinder and denied Plaintiffs' Motion for Remand.

DALLAS COURT OF APPEALS HOLDS NO DUTY TO DEFEND WHEN GAS LEAK IS NOT TIMELY REPORTED TO THE INSURER

The Dallas Court of Appeals affirmed a trial court's granting of summary judgment in favor of Mid-Continent in a coverage dispute in *Nicholas Petroleum, Inc. v. Mid-Continent Cas. Co.*, 05-13-01106-CV, 2015 WL 4456185, at *1 (Tex. App.—Dallas July 21, 2015, no. pet. h.).

Mid-Continent insured a gas station located in Dallas, Texas for its underground storage tanks, for the Policy period of September 17, 2007 to September 17, 2008, and a renewal for the policy period of September 17, 2008 to September 17, 2009. The policies were claims-made policies and explicitly stated "THIS INSURANCE DOES NOT APPLY TO CLAIMS WHICH OCCUR BEFORE THE RETROACTIVE DATE SHOWN HERE: 9/17/07."

In May 2006, the gas station owner received a letter from the Texas Commission on Environmental Quality ("TCEQ") because the gas storage tank system was close to an area of contamination, and the TCEQ requested the gas station owner to make immediate arrangements to determine whether there was any evidence of contamination due to leakage or spillage from the gas station owner's tank.

Shortly thereafter, the business next door to the gas station notified the gas station owner that it had retained an attorney to pursue claims related to the contamination of its building from what appeared to be leaking from the gas station's underground storage tanks.

The gas station did not perform a subsurface investigation as required by the May 2006 TCEQ letter. In fact, the TCEQ reiterated its requests for subsurface testing on multiple occasions.

In August 2008, the gas station owner's neighbor filed its original petition against the gas station for "migration of off-site contamination onto its property." In early September 2008, motorists in the area near the gas station also reported a strong odor of gas near the station.

The TCEQ conducted its own inspection of the gas station in the fall of 2008, and it located a leak in the station's super unleaded line. The leak was fixed on October 20, 2008. However, because of the leak, the TCEQ directed the gas station owner to contact a licensed correction action specialist to assess the extent of the contamination and submit a release determination report. The release was signed on November 25, 2008 certifying the report for accuracy.

According to the gas station owner, it did not receive notice of a claim under the policy until the TCEQ sent a letter on February 5, 2009 stating it "has become aware that a release has occurred from a storage tank system [on Nicholas's property]" and Nicholas was the "responsible party. Approximately two months later, on April 10, 2009, the gas station owner notified Mid-Continent of the litigation with its neighbor.

The gas station ultimately settled the lawsuit with its neighbor and entered an agreed judgement. However, Mid-Continent denied coverage and refused to reimburse the gas station owner for the agreed judgment, the gas station owner filed a lawsuit against Mid-Continent alleging breach of contract, violation of the Texas Insurance Code, and breach of the duty of good faith and fair dealing.

The trial court granted Mid-Continent's motion for summary judgment. Specifically holding, the gas station owner failed to provide the required notice of its claim, and that the release occurred in 2005, which was before any insurance policy provided coverage.

The Court noted Mid–Continent's notice provision required Nicholas to not only provide notice of a claim "as soon as possible," but also required notice of a claim " ... in any event no later than thirty (30) days after receipt of the Claim by the Insured." Thus, given the specificity of the language, the policy's notice provision was a material part of the bargained-for exchange, and the gas station owner's failure to comply with the notice provision was a material breach. The court held the gas station owner failed to give written notice of a claim as soon as possible or within the only other time period allowed under the notice provision—thirty days after receipt of a claim.

Consequently, the Court affirmed the trial court's decision that Mid-Continent had no duty to defend the gas station owner's claim. Moreover, the gas station owner failed to comply with the specific notice requirement, which was a condition precedent to coverage.