Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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COURT OF APPEALS FINDS FENCE IS NOT A STRUCTURE ATTACHED TO THE DWELLING

Last Tuesday, the Houston Fourteenth Court of Appeals affirmed summary judgment in favor of an insurer after finding a damaged fence on the insured property was an "other structure" covered by a lower policy limit and not a part of the dwelling. In *Nassar v. Liberty Mutual Fire Insurance Company*, the insured's fence sustained $58,000 in damage as a result of Hurricane Ike. But, because the insurer found the fence was not part of the dwelling, it only qualified for coverage as an "other structure" which was limited to 10% of the dwelling limit or $24,720 as paid. The insured filed suit and the trial court agreed with the insurer's policy interpretation and granted summary judgment in their favor. The insured appealed.

On appeal, the court of appeals determined the policy language was unambiguous and the insured's proposed interpretation of the policy language claiming the fence is part of the structure would render meaningless the subsection which "includes structures connected to the dwelling only by a fence." Further, the court affirmed summary judgment on the extra-contractual claims finding no breach of contract, no extreme conduct that could support a bad faith claim without a breach of contract, and that "there is no general fiduciary duty between an insurer and its insured." Lastly, the court rejected the insured's arguments disputing an appraisal award based in part on a waiver theory and affirmed summary judgment in favor of the insurer.

FEDERAL COURT DISMISSES CLAIMS AGAINST ADJUSTER & DENIES INSURED'S MOTION TO REMAND

Last Monday, a federal District Court judge in the Northern District of Texas denied the homeowner's motion to remand a wind/hail lawsuit against the insurer and adjuster after finding the claims against the adjuster should be dismissed. In *Aguilar v. State Farm Lloyds*, 2015 WL 5714654 (N.D.Tex. - Ft. Worth, Sept. 28, 2015), the insured was dissatisfied with the adjustment of their claim for wind and hail damage and filed a lawsuit in state court against State Farm and the adjuster alleging fraud, conspiracy and violations of the Texas Insurance Code. State Farm removed the lawsuit to federal court asserting the adjuster was improperly joined. The insured then sought to have the case remanded.

In a well reasoned and concise opinion, Judge McBride observed: "Although the complaint goes on for page after page, it is clear that plaintiff's claims arise out of the insurer's alleged breach of duty to her and the insurer's denial of her claim." The court noted that adjustors have no contractual relationship with the insured and do not owe a common law duty of good faith and fair dealing. Further, any cause of action under the Texas Insurance Code must be based on an act prohibited by statute and not simply based on the insurer's denial of coverage. Lastly, "post-loss statements regarding coverage are not misrepresentations under the Insurance Code." Based on case law setting forth these concepts, the court found no plausible claims against the adjustor, denied the motion to remand and dismissed the claims against the adjuster.

JURY FINDS ALLSTATE LIABLE FOR BREACH OF CONTRACT AND BAD FAITH FOR HOMEOWNERS' SMOKE DAMAGE CLAIMS ARISING FROM BASTROP WILDFIRES

Following the 2011 wildfires in Bastrop County, Texas, five insureds sued Allstate claiming damage to their residences due to smoke and claiming Allstate breached the contract and committed bad faith in the adjustment of their smoke/soot claims. On September 24th, a Bastrop County jury agreed with the homeowners and awarded damages against Allstate for breach of contract, unconscionable acts in adjusting the claims, breach of the common law duty of good faith and fair dealing knowingly committing unfair or deceptive acts or practices in handling the claims. The case is *Godward, et.al. v. Allstate Texas Lloyds, Inc.*, No. 29,358 (21st Dist. Ct., Bastrop County, Tex. Sept. 26, 2015). See below for the jury charge.

View Document(s):

Jury Charge

BENEFICIARY HAS STANDING TO BRING CLAIMS RELATED TO LIFE INSURANCE POLICY AND BENEFITS

In *Slack v. The Prudential Ins. Co. of America*, 2015 WL 5604678 (E.D.Tex – Tyler, Sept. 22, 2015)(Magistrate decision), Tom Slack, purchased a life insurance policy from The Prudential Ins. Co. of America and named his wife Marcia Slack as the beneficiary. Mrs. Slack contended community funds were used to pay additional premiums and the policy was represented to be one which made use of "vanishing premiums." Mrs. Slack filed suit when she received $274,391.56 in benefits instead of $500,000 after Mr. Slack died.

Slack sued Prudential alleging violations of the DTPA, Texas Insurance Code, negligence, negligent misrepresentation, gross negligence and fraud. The case was removed to federal court, and Prudential filed a motion for judgment on the pleadings on the basis that Slack did not have standing to bring these claims. The U.S. Magistrate disagreed and denied the motion without prejudice.

Regarding Slack's status to bring the DTPA claims, Prudential argued Slack was not a consumer because she was not a party to the original contract and only became involved after the alleged wrongdoing. The Court ruled privity of contract was not necessary for standing. Consumer status is determined by Slack's "relationship to the transaction, not by a contractual relationship." Additionally, there is no requirement the wrongful act must occur simultaneously with the sale or lease of goods or services. The Court declined to impose a "temporal prerequisite." When the pleadings alleged that community funds were used to pay policy premiums, that allegation supports her consumer status under the DTPA.

Regarding Slack's standing under the Texas Insurance Code, Prudential argued a mere "third party" to the contract does not have standing to sue. Additionally, Prudential argued claims under the Texas Insurance Code do not survive the insured's death. The Court disagreed with Prudential. Standing under the Texas Insurance Code is afforded to a "person" who suffers an injury during her course of dealing with someone in the business of insurance. Additionally, the Court noted an intended third party beneficiary does have standing to sue. Finally, life insurance claims "necessarily survive the death of the insured because only then can beneficiary receive the benefits of the policy."

The Magistrate then summarily held that the alleged facts support the other common law claims.

INSURER PREVAILS IN A TEXAS DECLARATORY JUDGMENT ACTION CONCERNING A WEST VIRGINIA PERSONAL INJURY CASE

In *Zurich American Ins. Co. v. Cabot Oil & Gas Corp*., 2015 WL 5604068 (S.D. Tex. – Houston, Sept. 23, 2015), Zurich issued a workers compensation and employers liability policy to Cabot Oil & Gas ("Cabot.") Taylor was then injured while welding for Cabot and he filed a personal injury law suit in West Virginia against Cabot. Zurich filed a motion to intervene in the West Virginia case. Cabot responded with a motion for declaratory judgment arguing Zurich owed Cabot a duty to defend and a duty to indemnify. The West Virginia court granted Zurich's motion to intervene and set the case for trial in November 2015. Zurich then filed this declaratory judgment suit in Texas. Cabot moved to dismiss the Texas suit and Zurich moved for summary judgment.

The Texas court denied Cabot's motion to dismiss based on weighing the six factors the Fifth Circuit Court of Appeals typically uses when determining whether or not to dismiss a declaratory judgement suit and held the last factor was dispositive: 1) "arguably" Zurich's liability can be litigated in the West Virginia case since Zurich was allowed to intervene to the extent the intervention was allowed solely for the purposes of submitting some special interrogatories to the jury, but not for purposes of discovery or participating in the trial; 2) Zurich did not file the Texas suit in anticipation of Cabot; 3) Zurich did not engage in impermissible forum shopping because the result will be the same under both Texas and West Virginia law; 4) Zurich did not use the declaratory judgment process to gain access to a federal forum on improper or unfair grounds; 5) the federal forum in Texas is a convenient forum since no one argues it would be unduly burdensome; 6) the federal case is ready for resolution, and its dismissal would force the West Virginia court to start from scratch. Thus, the Texas federal court denied the motion to dismiss because "on balance, none of the other factors [beyond #6] weigh strongly in favor of dismissal, while resolving the solitary issue of Zurich's liability in this Court would better serve the purposes of judicial economy."

The Texas court then granted Zurich's motion for summary judgment on the basis that West Virginia law governs the disposition of the case. In this case, while Cabot does business in several states, the Zurich policy contains an express provision for insured risks in West Virginia entitled the "West Virginia Employers Liability Insurance Intentional Act Exclusion Endorsement." This endorsement excludes bodily injury resulting from 'deliberate intention as that term is defined by West Virginia Code sec. 23-4-2.' Since the underlying Complaint in the West Virginia case alleged Cabot acted with "deliberate intent as described in Chapter 23, Article 4, Section 2(d)(2)(ii), of the Code of West Virginia," the Texas court held there was no coverage under the Zurich policy and granted Zurich's summary judgment.