

# TEXAS INSURANCE LAW NEWSBRIEF

DECEMBER 21, 2015

## FIFTH CIRCUIT AFFIRMS SUMMARY JUDGMENT OF NO DUTY TO INDEMNIFY BASED ON DIFFERENCES BETWEEN TEXAS AND NEW MEXICO LAW.

In *Liberty Insurance Corp. v. Dixie Electric, LLC*, No. 15-10279, 2015 WL 9145494 (5<sup>th</sup> Cir. December 16, 2015), the Fifth Circuit of Appeals affirmed the summary judgment granted Liberty in a declaratory judgment suit filed in District Court in the Northern District of Texas, Dallas Division. The Fifth Circuit adopted the District Court's analysis holding there was no duty to indemnify Liberty's insured, Dixie Electric, for a judgment rendered in a New Mexico wrongful death action for \$1,000,000.

The underlying plaintiff was electrocuted to death while working underneath an energized power line at the direction of his supervisor, in clear violation of company policy and federal regulations. The Court recognized the workers compensation and employer's liability policy only provided coverage for "bodily injury by accident" that has not been caused by the intentional conduct of the employer. The court held because both Texas and New Mexico law define "accident" as "an unexpected event," then "any liability-producing event that would satisfy the New Mexico standard for Dixie's liability in the Underlying Lawsuit would necessarily preclude coverage for Dixie under the Policy." In this case, there was no coverage for Dixie's "willful" conduct.

The Court recognized under New Mexico law "willful conduct" would be covered because it is less than intentional conduct but more than mere negligence. However, under Texas law coverage would be afforded for conduct that equated to gross negligence. The Court refused to equate the New Mexico standard of "willful conduct" with the Texas standard for "gross negligence" and, therefore, there was no coverage for the intentional conduct.

## SPLIT IN AUTHORITY SUPPORTS GRANTING MOTION TO REMAND.

In *Shade Tree Apartments, LLC v. Great Lakes Reinsurance (UK) PLC, et al.*, No. A-15-CA-843-SS, 2015 WL 8516595 (WD Tex. December 11, 2015), the court granted the plaintiff's motion to remand this first party property insurance coverage case which had been removed from state court based on diversity of citizenship. The Court noted the removal by the carrier was based on the two Texas defendant adjusters who were allegedly improperly joined to defeat diversity jurisdiction. The Carrier must show the plaintiff had "no possibility of recovery" against them in order to prevail against the plaintiff's motion to remand.

When analyzing if the plaintiff has no possibility of recovering against the adjusters, the Court recognized plaintiff must allege actionable conduct against them which must be reviewed under the Texas pleading standard of "fair notice" pleading. The only claims examined were those alleged for deceptive or misleading acts in violation of the Texas Insurance Code. The issue is whether the Plaintiff "has alleged sufficient facts to support a reasonable basis to predict recovery against [the adjusters] under this theory of liability." The Court held the allegations went beyond "boilerplate pleadings" because they "specifically outlined the way in which [the adjusters] failed to properly adjust its claim."

The Carrier further argued that a recent line of authorities hold adjusters can only be held liable under the Texas Insurance Code "if they misrepresent the scope of the coverage or have settlement authority on behalf of the insurer." The Carrier argued against remand because the Plaintiff did not specifically allege the adjusters misrepresented any details of the policy or that they had any settlement authority. The Court recognized "a split in authority regarding the scope of an insurance adjuster's liability under the Texas Insurance Code" and held that the split "must be resolved in favor of remand." The motion to remand was therefore granted.

## SUMMARY JUDGMENT ON PROPERTY DAMAGE CLAIM UPHeld BECAUSE INSURED FAILED TO ADVISE CARRIER OF ADDITIONAL CLAIMS

In *Maria v. State Farm Lloyds*, No. 7:14-CV-536, 2015 WL 8618435 (SD Tex. December 14, 2015), State Farm filed a motion for summary judgment on Plaintiff's first party property coverage claim because State Farm did not breach its insurance contract and because the extra-contractual claims were "derivative of their defunct breach of contract claim." The motion was granted and upheld.

The Court found no breach of contract because after State Farm tendered payment to repair or replace the damaged property. While Plaintiffs contend the payments were insufficient, they never told State Farm they had completed the repairs (which the policy required in order to receive additional payments) nor did they notify State Farm of any deficiency in the payments after the work was completed. The Court expressly recognized State Farm did not have a general duty under the policy to pay damages, and the insured failed to comply with the policy conditions in order to trigger additional duties under the contract.

The Court held there was no breach of the common law duty of good faith and fair dealing because the bad faith claims “relate solely to property damage that Plaintiff’s failed to notify State Farm of before filing suit.” Likewise, Plaintiff’s claims under the prompt payment of claims chapter failed because “it is undisputed here that State Farm tendered payment pursuant to the Policy, the same day it completed its inspection. Again, Plaintiffs failed to notify State Farm of their additional claims.”

## NEWSBRIEF TO RESUME JANUARY 11TH

The Texas Insurance Newsbrief will resume our publication the week of January 11th. We wish all of our readers in the U.S. a Merry Christmas and Happy New year! MDJW will be closed from Wednesday December 23rd through Friday December 25th and on January 1st.