Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JANUARY 13, 2016

IMPORTANT BAD FAITH QUESTION BEFORE THE TEXAS SUPREME COURT

The Fifth Circuit Court of Appeals has sent a certified question to the Texas Supreme Court asking the high court to clarify the bad faith standard in Texas, and the Texas Supreme Court has accepted the case and issued an aggressive briefing schedule in *IN RE: DEEPWATER HORIZON Cameron International Corporation v. Liberty International Underwriters*, No. 14–31321, ___ F.3d ___ (November 19, 2015).

The certified question addresses arguments made by the policyholder in this case as to whether *Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129 (Tex. 1988)* remains good law in Texas. The issue is whether a plaintiff suing an insurer for bad faith under the Texas Insurance Code must prove damages which are independent of the breach of contract in order to support the extra-contractual claims against an insurer. The insured argued in the Federal District Court in New Orleans as well as before the Fifth Circuit that the old *Vail* decision from 1988 remains good law and no independent injury is required. LIU, in contrast, argued the matter was settled by the Texas Supreme Court a decade ago in *Provident American Ins. Co. vs. Castaneda*, 914 S.W.2d 273 (1996), and an independent injury is required in order for an insured to recover extra-contractual damages under Texas law. Although the Fifth Circuit has followed *Castaneda* in multiple prior cases over the past decade, this Panel decided to certify the question to the Texas Supreme Court.

The Fifth Circuit certified the following question to the Texas Supreme Court: "Whether, to maintain a cause of action under Chapter 541 of the Texas Insurance Code against an insurer that wrongfully withheld policy benefits, an insured must allege and prove an injury independent from the denied policy benefits?"

The brief of LIU in the Texas Supreme Court is due at the end of January and amicus briefs from other insurers are being sought. If any carrier is interested in joining with others in the insurance industry to make sure that all of the appropriate issues are fully briefed before the Texas Supreme Court, please contact Chris Martin at 713-632-1701 or by email at: martin@mdjwlaw.com

[Note: Chris Martin, Robert Dees and Kevin Cain of Martin, Disiere, Jefferson & Wisdom have had the privilege of representing Liberty International before the Federal District Court in New Orleans, before the Fifth Circuit Court of Appeals, and before the Texas Supreme Court along with Judy Barrasso and Catherine Giarruso of the Barrasso Usdin firm in New Orleans, and we thank LIU for the opportunity to do so.]

SUPREME COURT OF TEXAS OVERTURNS LONGSTANDING RULE AND HOLDS THAT LOSS-OF-USE DAMAGES ARE AVAILABLE IN TOTAL PROPERTY DESTRUCTION CASES

In a case of interest to property and auto insurers, the Texas Supreme Court weighed in on the oft-criticized rule that loss-of-use damages are not available in total destruction cases. In *J & D Towing, LLC v. Am. Alternative Ins. Corp.*, No. 14-0574, 2016 WL 91201, at *1 (Tex. Jan. 8, 2016) the Supreme Court of Texas weighed in on the rule in Texas that loss-of-use damages are generally not recoverable in total damage cases. As the Court described the issue, the case addressed whether it should be cheaper to totally destroy a truck than it is to partially destroy it. J&D Towing lost its only tow truck when a negligent motorist collided with the truck and rendered it a total loss. The question presented was whether in addition to recovering the fair market value of the truck immediately before the accident, could J&D recover loss-of-use damages, such as lost profits?

The relevant facts were undisputed by the parties. J & D is a towing company in Huntsville, Texas. In 2011, J & D owned only one tow truck, a 2002 Dodge 3500. On December 29, 2011, a car struck the passenger side of J & D's truck. Both parties stipulated that the negligence of the driver of that car, was the sole proximate cause of the accident. The parties also stipulated that the accident rendered the truck a total loss. American Alternative Insurance Corporation (AAIC) relied on authority from other Texas courts of appeals and cases from the Texas Supreme Court, arguing that Texas law distinguishes between *partial* destruction and *total* destruction of personal property, allowing loss-of-use damages for the former but not for the latter. J & D countered that this

distinction belies common sense and is out of step with the majority trend in other jurisdictions permitting loss-of-use damages in total-destruction cases.

The Court of Appeals agreed with AAIC. The Texas Supreme Court began with a thorough and insightful examination of the historical roots of the rule on loss-of-use damages and the current "clear consensus" in other jurisdictions that loss-of-use damages *are* available in total-destruction cases. The Court concluded that allowing loss-of-use damages in partial destruction cases but not in total destruction is "illogical." The Court went on to hold that the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury.

FEDERAL COURT APPLIES TEXAS LAW AND FINDS PAYMENT OF AN APPRAISAL AWARD PRECLUDES ALL ADDITIONAL CLAIMS

Last week, Federal District Court Judge Smith in the Waco Division of the Western District granted summary judgment as to all claims on behalf of an insurer for compliance with the appraisal process. In *Marvin Carter v. State Auto Property & Casualty Insurance Company.*, No. 6:14-cv-00468, (W.D. Tex. January 6, 2016), the insured was suing his carrier to recover damages for breach of contract, bad faith and breach of Texas Insurance Code § 542.058 based on the handling of a claim for hail damage to his roof. The insurer evaluated Carter's claim for hail damage and determined that approximately $3,000 was required to fix his roof. After Carter accepted the $3,000, he filed suit claiming that the insurer had underpaid his claim and that the roof would cost more than $3,000 to repair. On November 3, 2014, the insurer invoked an appraisal provision contained within the Policy. The standard appraisal provision required each party to select impartial appraisers who then agree on an umpire, who sets the amount of loss if the appraisers fail to reach an agreement as to the amount of loss based on their own estimates.

In this case, the umpire determined that the amount needed to fix Carter's roof was approximately $49,000, which the insurer promptly paid. After State Auto paid the appraisal award, both parties moved for summary judgment arguing towards opposite conclusions, stating the appraisal award was conclusive as a matter of law on the breach of contract and extra-contractual claims. The insurer argued the plaintiff's claims were barred as a result of its payment of the appraisal award and full compliance with the Policy.

Judge Smith agreed with the insurer citing to Texas law that full compliance with the appraisal provision of the policy negates a claim for breach of contract, even when the ultimate value of the loss is higher than what was originally paid. Judge Smith also found that with no evidence, or allegation of any "extreme" act or independent damages, the claim for bad faith also fails. Finally, as to the claim for § 542.058 prompt pay penalties, Judge Smith referenced Texas case law and found that payment of an appraisal award "extinguishes any claim for attorneys' fees and statutory interest stemming from a prompt pay deadline imposed by§ 542.058." Based on these findings, the Court denied Plaintiff's motion and granted summary judgment in favor of the insurer as to all claims.