Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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Firm Wins Wind/Hail Jury Trial for State Farm in Rio Grande Valley

State Farm insured a large home in Mission, Texas which was hit in the now-infamous March 2012 hail and wind storm (which resulted in thousands of suits in The Valley against virtually every insurer providing commercial and residential property coverage in the region). At this residence, State Farm found some hail damage to the tile roof and other parts of the property, but the large deductible resulted in no claim payment. The tile on the residence had not been manufactured in the decade leading up to the storm so the insured, and his PA, argued that a total roof replacement was required because matching tiles couldn't be obtained. State Farm took the position in the claim stage that the hail damaged tiles could be replaced with harvested tiles from another undamaged slope and that harvested slope could be replaced with substantially similar tiles from another manufacturer or a tile boneyard.

The insured was a 60-year old Hispanic man who owns a small trucking company operating in south Texas. His wife doesn't speak English and didn't testify at trial. They custom built the home at issue in the suit 18 years ago. Plaintiff filed suit in early 2013 in Hidalgo County and State Farm removed it to federal court on fraudulent joinder grounds in *Joe Cantu vs. State Farm Lloyds*, No. 7:13-cv-00105, in the U.S. District Court for the Southern District of Texas, McAllen Division. On the eve of trial, Judge Micaela Alvarez granted State Farm's motion for summary judgement on the bad faith, Insurance Code, DTPA and fraud claims. Rick Daly and John Black of Daly & Black in Houston represented Plaintiff in the case and both lawyers tried the case. Late last Wednesday, January 27th, the 12-person jury returned a defense verdict in State Farm's favor on all issues.

Plaintiff's primary expert was Rob Kitto, a public adjuster and appraiser used by several members of the plaintiffs' bar in wind/hail cases across the state. State Farm's primary expert regarding the condition of the roof was Don Putnam of Putnam Roofing Consultants in Austin.

The jury panel came from both Hidalgo County and Starr County. The venire panel was 85% Hispanic and typical for the venue in terms of socio-economic background. Many of the 45 members of the venire panel who appeared for jury selection had personal hail claims on their residences and/or their cars following the March and April 2012 storms.

Chris Martin and Marilyn Cayce of our firm tried the case for State Farm and handled it from inception. We wish to thank State Farm for the opportunity to protect its interests in this case and for the chance to win it at trial.

Amicus Support Requested for Important Bad Faith Case 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 was filed last week 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

Houston Bankruptcy Judge Grants Summary Judgment for Insurers on Most Issues in Pollution-Exclusion Dispute

This month, Bankruptcy Judge Marvin Isgur provided helpful clarification on a common pollution-exclusion provision in *Rodney Tow v. Gemini Ins. Co. (In re ATP Oil & Gas Corp.)*, 12-36187, 2016 WL 270049 (Bankr. S.D. Tex. Jan. 20, 2016). ATP Oil & Gas and Greystar Corporation had entered into a Master Service Agreement (MSA) through which Greystar agreed to provide labor and equipment to ATP to support ATP's hydrocarbon operations. The MSA required Greystar to defend and indemnify ATP for claims involving injuries to Greystar's employees working for ATP on ATP's platform. As part of the MSA, ATP was named as an additional insured in the liability policy Gemini Insurance Company issued to Greystar. ATP also held its own liability policy issued by certain Lloyd's Underwriters.

While ATP was in Chapter 11 Bankruptcy, an employee of Greystar was injured by chemical fumes while working on a platform owned and operated by ATP. Rodney Tow, the bankruptcy trustee, filed an adversary proceeding against Gemini and the Underwriters for refusing to defend against the employee's lawsuit. Before Judge Isgur issued the present opinion, he had already denied Tow's request for declaratory judgment that Gemini and the Underwriter's owed ADT a duty to defend the lawsuit. The issue now turned on Gemini's motion for summary judgment that it did not owe ADT a duty to defend or indemnify and the Underwriter's motion that it owed no duty to indemnify. Both insurers also moved for summary judgment on Tow's extra-contractual claims for violations of the Texas Insurance Code.

The insurers' motions turned on the interpretation of the following pollution exclusion from the Gemini policy:

a. Bodily Injury or Property Damage arising out of or resulting from the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of Pollutants:

1. At or from any premises, site, or location which is or was at any time owned or occupied by, or rented or loaned to, any Insured. However, this Subparagraph (1) does not apply to:

i. …

ii. Bodily Injury or Property Damages for which You may be held liable, if You are a contractor and the owner or lessee of such premises,
site, or location has been added to Your policy as an Additional Insured with respect to Your ongoing operations performed for that Additional
Insured at that premises, site, or location; and such premises, site, or location is not and never was owned or occupied by, or rented or loaned
to, any Insured, other than that Additional Insured.

4. At or from any premises, site or location on which any Insured or any contractors or subcontractors working directly or indirectly on any Insured's behalf are performing operations if the Pollutants are brought on or to the premises, site, or location in connection with such operations by such Insured, contractor, or subcontractor…

The court differentiated between subsections (1) and (4), concluding that (1) applied to releases of pollutions at or from premises owned or controlled by Greystar, whereas (4) excludes coverage if Greystar brought pollutants onto the platform *and* those pollutants were present in connection with Greystar's operations there. Applying the Texas "Eight Corners" Doctrine to Gemini's duty to defend, the Court found that the underlying lawsuit did not specify who brought pollutants onto the platform. Because an insurer owes a duty to defend if a complaint even potentially includes a covered claim, the Court held that Gemini could a duty to defend ADT because of the absence of specific allegations. The Court also noted that whether Gemini ultimately owed a duty to defend depended on resolution of a fact issue regarding the extent to which ADT or Gemini paid premiums on the policy, which affected enforceability of the indemnification provisions under Louisiana law. The court did not resolve that issue in this opinion.

The court next turned the Insurance Code claims against Gemini and the Underwriters. Relying on the principle that an insurer cannot be liable for statutory bad faith if it had a reasonable basis for denying coverage, it granted summary judgment for both insurers. It held that the Underwriters were reasonable because they conclusively owed no duty to defend, and that Gemini also had a reasonable basis because of its reasonable interpretation of the pollution exclusion, even though its interpretation may have been incorrect.

Finally, the Court made the rare finding that the Underwriters also owed no duty to indemnify as a matter of law. A court can generally not decide whether or not an insurer owes a duty to indemnify until the underlying lawsuit concludes. However, the Texas

Supreme Court recognized an exception to this general rule in *Farmers Texas Mutual Insurance Company v. Griffin*, holding that a court can decide the indemnification issue before the case is adjudicated if it finds no duty to defend as a matter of law *and* the same reasons that negate the duty to defend would also negate a duty to indemnify. The Court found that the exception applied to the Underwriters because the chemical fumes that caused the employee's injury qualified as pollution under the exclusion.

Houston Federal Judge Denies Remand of Bad Faith Case because of Improper Joinder of Policy's "Producer"

Judge Keith Ellison denied a plaintiffs' motion to remand this month in *Bradley James v. Chubb Custom Ins. Co.*, 4:15-CV-3102, 2016 WL 258470 (S.D. Tex. Jan. 21, 2016). The case arose out of a drilling contract between the plaintiffs and Victory Drilling. After Victory allegedly failed to perform its obligations under the contact, the plaintiffs obtained a judgment against Victory in state court. The plaintiffs then pursued claims against Victory's liability insurer Chubb Custom Insurance Company and the policy's "producer" U.S. Risk, Inc., alleging that these defendants wrongfully refused to pay the judgment. Though not at issue in this opinion, the Court noted that the plaintiffs qualified as insureds under the plain language of the policy because they were third-party beneficiaries.

Chubb removed the action to federal court, alleging that U.S. Risk was improperly joined as a sole non-diverse defendant. Chubb argued that plaintiffs' petition contained conclusory allegations that did not differentiate between the two defendants. Chubb also attached summary judgment-type evidence in the form of affidavits from officials of U.S. Risk and Chubb who testified that U.S. Risk did not issue the policy to Victory, had no contractual obligations under the policy, and did not have any responsibility regarding claims handling. Chubb also attached the policy, which simply listed U.S. Risk as the "Producer."

Although courts generally look only to the pleadings in deciding a motion to remand, Judge Ellison was willing to consider Chubb's extrinsic evidence because it went to an independent coverage issue. Based on Chubb's evidence, he held the defendants met their burden of showing that plaintiffs' improperly joined U.S. Risk to defeat federal diversity jurisdiction. He found that U.S. Risk was simply the agent or broker and that the plaintiffs did nothing to contradict Chubb's supporting evidence. Concluding that the plaintiffs had no reasonable basis of recovery against U.S. Risk, the Court not only denied the motion to remand but also dismissed the claims against U.S. Risk with prejudice.