Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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STATE FARM WINS TWO MORE TEXAS WIND-HAIL CASES

Two weeks ago, a 12-person jury in Hidalgo County delivered a defense verdict for State Farm in a wind-hail case arising from the now-infamous March 2012 storm (which resulted in thousands of bad faith cases being filed in Hidalgo County against virtually every P&C carrier in the state). In *Ram and Nisha Tolani vs. State Farm Lloyds*, No. C-3260-13-H, in the 389th Judicial District Court of Hidalgo County, the insureds were unhappy with the amount State Farm paid to replace their roof following the storm. They sued for additional replacement benefits for the new roof as well as for allegedly unpaid damage to their brick siding, AC unit, fence and interior sheetrock. Judge Letty Lopez was the trial judge and the insureds were represented at trial by Trey Mendez of Brownsville and Pete Ferraro of Austin. The judge allowed breach of contract, bad faith, Insurance Code, DTPA, fraud, punitive damage liability predicates and attorney fee questions to go to the jury. The 12-person jury returned a unanimous defense verdict following a trial that lasted over parts of two weeks. State Farm's lead counsel at trial was Ray Ortiz of Jones, Andrews & Ortiz in San Antonio.

During the same time, a federal jury in Plano was hearing another wind-hail against State Farm in *Carlos Paz vs. State Farm Lloyds*, No. 4:14-CV-693, in the US District Court for the Eastern District of Texas. In this case, the insured's home was located in the north Dallas suburb of Allen and his insurance claim arose out of a hail and windstorm on April 3, 2014. The insured alleged the amounts paid by State Farm for a new roof were inadequate and also sought damages for allegedly unpaid damage to his exterior siding, AC unit, and outside furniture. Judge Ron Clark, the Chief Judge of the Eastern District who normally sits in Beaumont, tried the case in Plano. The insured was represented by Scott Hunziker of the Voss Law Firm in Houston. Prior to trial, Judge Clark granted State Farm's motion for summary judgement on all of the extra-contractual claims asserted by the insured. At trial, the jury unanimously concluded State Farm did not breach the contract. State Farm's lead counsel at trial was Rhonda Thompson of the Dallas office of Thompson, Coe, Cousins & Irons.

Congratulations to Ray Ortiz, Rhonda Thompson, their trial teams and the in-house counsel from State Farm managing these cases on these two great trial wins.

FEDERAL COURT IN MCALLEN GRANTS INSURER'S MSJ ON ALL CLAIMS FOLLOWING PAYMENT OF APPRAISAL AWARD IN WIND-HAIL CASE

Earlier this month Judge Micaela Alvarez of the Southern District of Texas, McAllen Division, granted summary judgment as to all claims on behalf of an insurer for its compliance with the appraisal process. In *Dizdar v. State Farm Lloyds*, No. 7:14-cv-00445, (S.D. Tex. February 4, 2016), the insureds sued their carrier for damages allegedly suffered at their property as a result of the now-infamous March 29, 2012 hail and wind storm in the Rio Grande Valley.

Almost three months after the storm, Mr. Dizdar reported a claim to State Farm and State Farm inspected the property on June 23, 2012, estimating the loss to the property at $1,096. On the same day, the carrier issued to the insured a payment of $199, after applying depreciation and the deductible.

A month later, State Farm received an estimate from the insureds' contractor alleging the damages to the property totaled at least $24,000. The insureds then requested a re-inspection of the property. Subsequent to the re-inspection, the carrier issued an additional payment of $49 for the insureds' storm claim. After payment was issued, State Farm had no discussions with the insureds regarding "any concerns or complaints" about the adjustment of their claim until this suit was filed in April of 2014.

Plaintiffs filed their lawsuit in state court alleging various insurance related causes of action against State Farm. Subsequently, it removed the case to federal court where, several months later, Plaintiffs' counsel invoked the appraisal provision of the insurance policy. Plaintiffs and State Farm filed an agreed motion to abate the case pending completion of the appraisal process which the Court granted.

Last November, State Farm filed a motion for summary judgment arguing: (1) an appraisal award had been issued setting the amount of loss at $1,682 for the replacement cost of covered damage and $1,584.06 for the ACV of the same covered damage; (2) the award was signed by each parties' appraiser; and (3) one

day after receiving the award, State Farm tendered payment of the ACV award to Plaintiffs in the amount of $590 (the appraisal award less the deductible and the prior payment).

The Court first granted Defendant's request to lift the abatement finding Plaintiffs had failed to identify any additional discovery likely to create a fact issue on each remaining claim. Judge Alvarez then turned to the breach of contract claim. The Court found that in breach of contract cases where liability derives from an allegation that the insurer wrongfully underpaid a claim, Texas law dictates that the insured is estopped from maintaining a breach of contract claim when the insurer makes a proper payment pursuant to the appraisal clause. Because Plaintiffs did not point to any issue of fact on a distinct contractual provision or of the validity of the appraisal process, Plaintiffs were "effectively foreclosed" from maintaining a breach of contract action. The Court further found the mere fact of a discrepancy between what was initially paid and the appraisal award cannot be used as evidence of breach of contract under Texas law.

The Court then turned to the common-law and statutory bad faith claims. Because Plaintiffs' claims related solely to the investigation and payment of the policy claim, and because Plaintiffs failed to even allege an act that would give rise to an independent injury summary judgment was granted on these claims. As to claims under Chapter 542, the Court found that in Texas, courts have constantly held that "full and timely payment of an appraisal award under the policy precludes an award of penalties under the Insurance Code's prompt payment provisions as a matter of law." Accordingly, summary judgment was granted as to those claims as well. Finally, the Court granted summary judgment as to the fraud and conspiracy claims as Plaintiffs had failed to show a genuine issue of material fact regarding these claims.

FEDERAL COURT IN FORT WORTH DISMISSES EXTRA-CONTRACTUAL CLAIMS BUT INSURED'S BREACH OF CONTRACT COUNTERCLAIM SURVIVES

Last week, Judge McBryde from the Northern District of Texas, Fort Division, partially granted a motion to dismiss on behalf of an insurer but allowed a breach of contract counterclaim to survive. In *Columbia Mutual Insurance Co. v. Trewitt-Reed Funeral Home, Inc.*, No. 4:15-CV-568-A, (N.D. Tex. February 5, 2016), the insurer brought a declaratory judgment action to determine coverage and the insured counterclaimed, asserting claims for breach of contract, violation of the Texas Insurance Code, and bad faith. The insured also also sought a declaratory judgment that the policy at issue provides coverage for the cost to repair the properties or, at least, that the policy is ambiguous and must be interpreted in defendants' favor, that is, to provide coverage.

Plaintiff argued that the second amended counterclaim failed to state any claim to relief plausible on its face and the request for declaratory judgment serves no independent purpose and must be dismissed. Judge McBryde first addressed the breach of contract claim and found that although the "details are somewhat sketchy, Lacy has pleaded a claim for breach of contract" because their pleading contained factual allegations of the existence of a policy and breach of that policy. Next turning to violations of the Texas Insurance Code, Judge McBryde found the allegations were conclusory and did not contain the necessary factual allegations as to who said what, when, and where, and how the insured was harmed. The Court found that bad faith claims suffered from the same deficiency. Finally, the Court found that Plaintiff was seeking a declaratory judgment under the Texas statute, which did not apply and would add nothing to the case since it is duplicative of the breach of contract claim. Judge McBryde ordered entry of final judgment as to the dismissal of the counterclaims for violation of the Texas Insurance Code, bad faith, and declaratory judgment.

VOLUNTARY INTOXICATION DOES NOT RENDER SEXUAL ASSAULT AN ACCIDENT FOR PURPOSES OF LIABILITY COVERAGE

The Beaumont Court of Appeals recently affirmed a trial court judgment in favor of USAA finding that voluntary intoxication does not render sexual assault an "accident" as needed to trigger coverage under a homeowners policy. In *Bishop v. USAA Texas Lloyd's Co.*, 09-14-00445-CV, 2016 WL 423564, (Tex. App.—Beaumont Feb. 4, 2016), USAA denied defense of its insured for a lawsuit against him alleging negligence and an intentional/offensive touching of his stepdaughters. After the incident, the stepdaughters sued Gates—the USAA insured. USAA informed Gates that his insurance policy did not cover defense or indemnity for the underlying lawsuit because at the time of the offensive touching, his stepdaughters were insureds living at his house and that intentional conduct was not covered by the policy.

The stepdaughters obtained a default judgment against Gates, and in their subsequent petition against USAA, the stepdaughters alleged Gates did not "intend" to touch either of them in an offensive manner because the night of the assault Gates had taken Ambien with alcohol.

At trial, the USAA representative testified the stepdaughters were considered insureds because they resided in the home with their mother who was married to Gates at the time of the assault. The representative further testified that consuming Ambien and alcohol is an intentional act. Although the policy covers negligence claims, intentional acts are not covered; thus, USAA declined to defend Gates's intentional actions. Gates's insurance policy covered claims against an insured for damages because of bodily injury caused by a covered occurrence. The policy defined "occurrence" as an "accident" during the policy period that resulted in bodily injury or

property damage. The policy excluded coverage for bodily injury "caused by the intentional or purposeful acts of any insured, including conduct that would reasonably be expected to result in bodily injury to any person...."

The trial court heard testimony suggesting that Gates was not intoxicated on the night of the assaults, which indicated that Gates intentionally assaulted the stepdaughters. The stepdaughters also alleged that at some point during the proceedings against him, Gates claimed he intended no harm and had ingested Ambien and alcohol before the assaults. Nevertheless, the Court noted a criminal assault is an intentional act and voluntary intoxication does not negate the intent or knowledge elements of criminal conduct. Accordingly, the court of appeals found the trial court reasonably concluded that Gates committed the intentional act of sexual assault and that his intent was not negated by any voluntary consumption of alcohol and Ambien. The evidence thus supported the finding that Gates's intentional conduct was not an "accident" and, consequently, not an occurrence under the policy, regardless of whether he intended or expected to cause harm.

INSURER WINS SUMMARY JUDGMENT ON EXCLUDED DRIVER ENDORSEMENT IN BEAUMONT

In *Antoine v. Am. Serv. Ins. Co., Inc.*, 09-14-00235-CV, 2016 WL 422524 (Tex. App.—Beaumont Feb. 4, 2016), the Beaumont Court of Appeals held that an insurer was entitled to summary judgment because the automobile policy did not cover the excluded driver in a collision.

American Service Insurance Company insured Herman Berry's truck through a policy that excluded certain drivers. Nakia Mazeil was driving Berry's truck when he hit an SUV that was occupied by Angela and Erica Antoine. Subsequently, the Antoines sued Berry and Mazeil, claiming they had been injured in the February 2008 collision. American Service asked the trial court to declare that Berry's policy did not cover the collision because Berry's truck was being driven by Mazeil, a driver the policy specifically excluded. American Service moved for summary judgment. In their response, the Antoines argued that American Service failed to prove that the excluded-driver endorsement was in force when the collision occurred because it failed to produce any evidence to show that Berry's signature was genuine or to show that Berry had signed the endorsement before the collision. In their appeal, the Antoines also argued the excluded-driver endorsement is ambiguous, vague, and unenforceable. However, the Court of Appeals noted the Antoines filed no summary judgment evidence to support their claim that Berry's signature was not authentic, or to show that Berry failed to sign the excluded-driver endorsement on the policy in force on Berry's truck when the collision occurred. Accordingly, the Court of Appeals affirmed the finding that Mazeil was an excluded driver and no coverage was afforded.