Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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CONTRACTUAL LIMITATIONS PERIOD BARS SUIT IN HO BAD FAITH SUIT

In *Feurtado v. State Farm Lloyds*, 2016 WL 747777, No. 13-14-00488 – CV (Tex.App. -Corpus Christi-Edinburg February 25, 2016), the insured sued State Farm Lloyds, his homeowners insurer, alleging they underpaid his insurance claim submitted in February 2011. The claim arose out of a plumbing leak that caused water damage to his home. On February 21, 2013, the insured filed suit alleging breach of contract, breach of the duty of good faith and fair dealing, and violations of various provisions of the Texas DTPA and Texas Insurance Code. State Farm filed a motion for summary judgment alleging the suit was barred by the two year contractual limitations period in the insurance policy. The Court agreed and granted a case summary judgment in favor of State Farm.

The Court reasoned that a cause of action accrues when facts come into existence which authorizes a party to seek a judicial remedy. This is when the statute of limitations is triggered, unless the Plaintiff alleges the "discovery rule" that would defer the running of the statute. The discovery rule applies in instances when "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." An injury is "inherently undiscoverable when "it is the type of injury that could not be discovered through the exercise of reasonable diligence."

In the instant case, the Court recognized the undisputed summary judgment evidence showed State Farm paid the covered losses and notified the insured in writing on February 14, 2011. The claim file was formally closed on February 16th. The insured filed suit two years and five days later. The insured argued because of the discovery rule the cause of action did not accrue until several months later when he discovered the "full extent" of the alleged damages and realized State Farm had allegedly underpaid the claim. The Court disagreed and held the discovery rule did not apply for two separate reasons: 1) State Farm's action in February 2011 "left no ambiguity concerning the finality of its determination" of the claim, and 2) the insured failed to raise the discovery rule in his response to the motion for summary judgment.

COMPLIANCE WITH APPRAISAL AWARD IN WIND/HAIL CASE ENDS ALL CLAIMS

In *Mark Dizdar and Kelly Dizdar d/b/a Dizdar Development, Ltd and Penta Valley Rentals, LLC v. State Farm Lloyds, et al*, 2016 WL 695777, No. 7:14-CV-664 (S.D.Tex. February 22, 2016), the insureds filed suit against State Farm and the adjuster for claims related to storm damages to their property in McAllen, Texas, from the now-infamous March 2012 hail and windstorm in the Rio Grande Valley.[1]

The claim adjuster inspected the property on June 28, 2012 (shortly after the claim was made) and estimated the covered losses $7,980. State Farm issued payment for $4,970.80, after applying depreciation and the deductible. The insureds requested a re-inspection, and the same adjuster re-inspected the property on August 18th. Based on his new findings, State Farm issued a $1,743.35 supplemental payment. State Farm then closed its file. State Farm's next communication from the insureds was almost two years later when they received suit papers filed by Steven Mostyn on April 16, 2014. State Farm removed the case to federal court. The Court agreed to abate the case while the parties pursued contractual appraisal in April 2015. On October 9, 2015, the Court was apprised that that an award had been issued jointly by both parties' appraisers, and State Farm had promptly paid the Award, less the applicable deductible and prior payments. State Farm asked for the case to be dismissed because of their payment and the court granted summary judgment in favor of State Farm.

The Court granted summary judgement on the breach of contract claims because "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." Moreover, the Court specifically held that the difference between the initial estimate and the subsequent larger appraisal award does not show a breach of contract: "Texas law clearly holds the discrepancy between the initial estimate and the appraisal award cannot be used as evidence of breach of contract." Additionally, according to the Court, the initial denial of coverage for certain items did not constitute a breach of contract when they were later included in the appraisal award.

The Court also ruled against the insured on their poorly alleged claims for breach of the duty of good faith and fair dealing, violation of the Prompt Payment of Claims statute, fraud and conspiracy. Regarding the duty of good faith and fair dealing, the Court noted that

all of the insured's allegations focused on the investigation and handling of the claim. Consequently, the Court held there was no allegation of "independent injury" that would be required to sustain a claim for breach of the duty of good faith and fair dealing. Regarding the prompt payment of claims, the Court noted 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." Because the insureds "failed to allege an action which would constitute a violation of the now-resolved payment dispute," the Court granted summary judgment. Finally, the Court ruled against the insureds on the fraud and conspiracy claims because "to the extent these allegations even properly state a claim, Defendants have sufficiently showed the absence of a genuine issue of material fact by proffering evidence of proper completion of the appraisal process and tendering of payment. In contrast, Plaintiffs have failed to offer evidence to the contrary."

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[1] This case should not be confused with the identically styled case brought by the same Plaintiff's counsel, Steven Mostyn, in the same area, but under a different Civil Action No. 7:14-CV-00445 (S.D. Tex)(Hon. Hinojosa.) This case arose from the same storm, but involves a different property, in Mission, Texas. A similar motion for summary judgment is set for hearing March 22, 2016.

MOTHBALLS ARE A POLLUTANT -- NO COVERAGE FOR ANY INSURED

Construing the pollution exclusion of a commercial general liability policy, a magistrate judge in the Eastern District of Texas recently recommended summary judgment be granted in favor of a liability insurance carrier, exonerating the carrier from any duty to defend or indemnify its insured against an underlying suit under either a CGL policy or an umbrella policy. In *United Fire & Casualty Co. v. Condeb, L.P.*, No. 5:14CV150 (E.D. Tex. Feb. 22, 2016), the insured, Condeb, faced an underlying lawsuit alleging that toxic chemicals/pesticides and fumes had contaminated the claimant's workplace, which was managed by Condeb, and injured the claimant. The toxic chemicals turned out to be mothballs that been placed in the building's attic in an effort to drive out squirrels. Apparently, the mothball fumes were so strong they drove out the employees as well.

Condeb had a commercial package policy issued by United Fire, which contained CGL and umbrella coverage. Both coverages contained pollution exclusions. While defending Condeb under a reservation of rights, United Fire sought a declaratory judgment that it owed no duty to defend or indemnify Condeb under either policy.

Condeb did not dispute that mothballs were a pollutant, but argued that only one of the two Condeb entities sued was the owner of the property – the other Condeb entity was the management company and did not own the property at issue. Nevertheless, the magistrate judge observed that the pollution exclusion applies to a discharge of pollutants at premises owned or occupied by "any insured." Thus, the ownership of the property by one of the Condeb entities caused the pollution exclusion to apply to all the insureds, even those who do not own the property.

The magistrate judge also recommended United Fire be granted immediate summary judgment on its duty to indemnify Condeb, even though the underlying suit had not yet been tried. Relying on the rule set out in *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex.1997), the magistrate judge concluded the allegation that maintenance employees of "the Defendants" were responsible for placing the mothballs in the attic meant any liability either defendant could possibly incur would necessarily arise out of pollutants, and thus there was no possibility United Fire would ever have a duty to indemnify under these facts.

SOUTHERN DISTRICT EXAMINES SCOPE OF WATER DAMAGE COVERAGE & RULES IN INSURER'S FAVOR

Judge Ellison of the Southern District of Texas recently conducted a detailed lesson on how to parse coverage for a water damage claim resulting from an accidental discharge. In *Praetorian Ins. Co. v. Arabia Shrine Ctr. Houston*, No. 4:14-CV-3281, 2016 WL 687564, (S.D. Tex. Feb. 19, 2016), the insured, Arabia Shrine, suffered a large water damage loss when an 8-inch fire suppression water main under the slab ruptured, releasing over a million gallons of water into the building. The water caused the building slab to heave and crack in one area, undermined the slab in other areas, and damaged floor coverings, baseboards, drywall, and furniture throughout 95% of the building.

Although Praetorian's experts concluded the total cost of repairing all the damage would be approximately $1.8 million, Praetorian issued a coverage decision that the majority of the loss was excluded, and the ***only*** covered costs were (a) the cost of accessing the burst pipe (~$12,000), the $25,000 limit of the policy's Masonic Coverage Extension, and the $25,000 business personal property limit. Thus, Praetorian paid approximately $62,000.

In the resulting declaratory judgment and breach of contract/bad faith lawsuit, the court examined the scope of coverage on a summary judgment standard, and carefully and methodically applied the general rule requiring (1) the insured to prove coverage, (2) the carrier to prove any exclusion negating coverage, and (3) the insured to prove any exception to that exclusion once the carrier has proven the exclusion. The commercial property policy was a named-peril policy with a set of enumerated "Covered Causes of Loss."

First, the court examined the definitions of Covered Property and found that the burst pipe itself was not "Covered Property." Arabia Shrine argued the pipe was "fire-extinguishing equipment," but the court rejected this argument, noting that "fire-extinguishing equipment" was mentioned only in a list labeled "personal property." The pipes were clearly not personal property, and therefore they could not gain status as covered property by way of this list.

Foundations of buildings were also excluded from the definition of "Covered Property." While there was argument over whether the concrete slab was part of the "foundation," the court concluded it did not need to answer this question because it found the loss was caused by an excluded peril.

Next, the policy included an endorsement titled "Water Exclusion Endorsement" which excluded "water under the ground surface pressing on, or flowing or seeping through foundations, walls, floors, or paved surfaces…" Praetorian argued, and the court agreed, this exclusion barred coverage for the entire loss unless some portion of the loss was restored by an exception. Arabia Shrine pointed to a definition of "water damage" in the policy's "specified causes of loss" and argued it created a broad grant of coverage for water damage. The court rejected this proposal, citing existing Texas law holding an exception to an exclusion is not a broad affirmation of coverage, but only restores coverage within the context and scope of the particular exclusion where it appears. The court concluded the list of fourteen "specified causes of loss" functioned only as exemptions to the various exclusions in the policy, and noted that the Water Exclusion Endorsement did not contain any provisions restoring coverage for any of the "specified causes of loss." Arabia Shrine attempted iterations of this argument several times, and the court rejected them every time, holding the insured cannot lift exceptions from various parts of the policy, apply them out of context, and treat them as general grants of coverage.

Therefore, while water damage was a "specified cause of loss," the Water Exclusion Endorsement explicitly negates coverage for this particular type of water damage; i.e., "water under the ground surface pressing on, or flowing or seeping through foundations, walls, floors or paved surfaces."

Arabia Shrine also argued the "ensuing loss" provision for sprinkler leakage restored coverage, but the court also rejected this argument, noting that while the pipe was part of the automatic sprinkler system, the pipe itself was underground, rendering all water coming from it, "water under the ground surface…" The court also observed that the "ensuing loss" provision required a new and different type of damage to occur as a result of an excluded loss before the provision could create coverage. E.g., an excluded loss must cause a fire, explosion, or sprinkler leakage, and the sprinkler leakage must cause additional damage. Here, the excluded loss was water under the ground surface, and it was the only cause of loss. There was no ensuing loss from sprinkler leakage.

After concluding based on the above reasoning that Praetorian had paid the correct amount and properly denied the rest of the claim, the court also denied Arabia Shrine's claims for breach of contract, bad faith, and Insurance Code violations. The court relied on the general rule that "when the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive." Although the court acknowledged the few narrow circumstances mentioned in *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995), in which an extra-contractual claim might survive, it found Arabia Shrine had presented no evidence of those here.

ATTENDING PLRB ANNUAL CLAIMS CONFERENCE IN SAN ANTONIO?

If you are attending the PLRB Annual Claims Conference in San Antonio on April 17-20, please make plans to join the lawyers of our firm and many of our industry friends and clients at a reception on Monday, April 18th from 5:00 to 7:00 p.m. The event will start as soon as the afternoon classes end and will be held in the Atrium of the Marriott RiverCenter (one of the two conference hotels). Light food and beverages will be provided. More details will be announced in the weeks to come, but we hope to see many of our friends and clients there on Monday, April 18th!