Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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ALLEGATIONS AGAINST INDEPENDENT ADJUSTERS SUFFICE TO STATE A CLAIM - MOTION TO REMAND GRANTED

Last Tuesday, the Houston Court of Appeals affirmed a trial court's order granting an insurance agency's motion to dismiss an insured's breach of contract, breach of the duty of good faith and fair dealing and Texas Insurance Code and DTPA claims, finding that the claims had no basis in law and, awarding the agency its attorney fees in defending the lawsuit. In Texas City Patrol, LLC v. El Dorado Insurance Agency, 2016 WL 3748780 (Tex. App – Houston [1st Dist.] July 12, 2016), a Texas City Patrol ("Patrol") employee was seriously injured in a hit-and-run accident. Their commercial auto insurer, Progressive, initially denied the claim after finding that the insured had rejected underinsured motorist coverage. The President of Patrol disputed that they had rejected coverage and met with an El Dorado Insurance Agency ("Agency") employee who showed him what Patrol's President believed to be a falsified application rejecting the coverage. On a later visit, another Agency employee showed him the file and he found another application where the underinsured motorist coverage had not been rejected. Progressive subsequently paid $30,000 on the underinsured motorist claim and $2,500 in personal injury protection benefits.

Patrol then filed suit against the Agency asserting causes of action for breach of contract, breach of the duty of good faith and fair dealing and various causes of action under the Texas Insurance Code and DTPA. The Agency filed a motion to dismiss the lawsuit as groundless in law or fact, under Texas Rule of Civil Procedure 91a, and the trial court granted the motion awarding the Agency $3,000 in attorney's fees. This appeal followed. On appeal, the court first observed that the only contract at issue, was the insurance contract with Progressive and therefore, Patrol's breach of contract cause of action against Agency had no legal or factual basis. The court also observed that under Texas law, an insurance agent's only common law duties to a client are: 1) to use reasonable diligence in attempting to place the requested insurance and, 2) to inform the client promptly if unable to do so. Examining the common law claims for breach of the duty of good faith and fair dealing, the court observed that they arise out of Progressive's insurance contract, that they are non-delegable and, that the trial court properly dismissed them.

Similarly, the court examined Patrol's claims under the Texas Insurance Code for alleged violations of the Prompt Payment of Claims Act and found that Sections 542.055-060 only apply to insurers and that Patrol was not entitled to relief against the Agency under these sections. The same rationale was applied to certain unfair claim handling allegations under Texas Insurance Code Chapter 541. Lastly, the court examined allegations under Texas Deceptive Trade Practices Act and the requirement that the consumer's "reliance" on the prohibited acts be a "producing cause" of the damages claimed. The court observed that Patrol's President did not rely on the Agency's alleged misrepresentations, but instead insisted on the opposite, that they had not rejected the coverage and Patrol received payment as a result.

Finding that the trial court had properly granted the Agency's motion to dismiss, and observing that an award of attorney fees to the prevailing party under rule 91a "is mandatory, not discretionary" the award of attorney fees to the Agency and the motion to dismiss Patrol's claims, were affirmed.

COURT REJECTS POLICY INTERPRETATION EXTENDING COVERAGE FOR WELL BLOWOUT AND COSTS RELATED DUE TO EXISTING GEOLOGIC CONDITIONS

Recently, a Texas appellate court reversed a $9.63 million jury verdict against insurers ruling the insured was not entitled to additional coverage and penalties in a lawsuit involving coverage sought for two well blowouts off the Louisiana coast. In *Gemini Insurance Company v. Drilling Risk Management, Inc.,* No. 04–15–00318–CV, 2016 WL 3625666 (Tex. App. - San Antonio July 6, 2016), Drilling Risk Management Inc. filed suit over a partial denial of coverage by Gemini Insurance Co. and Berkley Oil & Gas Specialty Services LLC claiming the insurers should have paid for casing and lining equipment used to shore up a well after two previous blowouts.

Drilling Risk Management Inc. was hired to drill a well off the Louisiana coast under a turnkey fixed price drilling contract. DRMI first encountered an unexpected weak pressure zone and then a high pressure zone both causing a blowout. DRMI was then forced to drill a second "sidetrack" well. The second well then hit another weak pressure zone and high pressure zone, causing another blowout.

DRMI was finally able to successfully drill a third sidetrack well after installing a liner to protect against the high and low pressure zones.

DRMI was an additional insured on a policy that covered "well out-of-control" events like blowouts and the redrilling costs that follow. DRMI made policy claims for each blowout and was paid close to $4.5 million in covered expenses for bringing the two blowouts under control and another $3 million for the expense of drilling the multiple sidetrack wells. However, the insurers denied coverage for $1.7 million of other redrilling expenses including the additional casing and liner because those costs were not caused by the blowouts. The insurers concluded that the casing and liner costs were costs DRMI knew they would have prior to drilling the well.

DRMI sued Gemini alleging they improperly denied covered claims and, committed unfair claim settlement practices. The trial court granted a summary judgment for DRMI on coverage and the claims for unfair settlement practices went to the jury. After a trial, the jury agreed with DRMI and the court entered judgment for roughly $3.5 million in actual damages and another $4 million for unfair settlement practices under the Texas Insurance Code. DRMI was also awarded $1.1 million in interest penalties and about $1 million in attorneys' fees.

On appeal, Gemini argued that that the high-pressure zones that caused DRMI to utilize well casing and a liner were not incurred "as a result of" an occurrence under the policy. DRMI argued that the policy language should mean once a well had been lost or damaged as a result of a blowout, all costs and expenses reasonably incurred to redrill the well are covered.

The Fourth Court of Appeals in San Antonio reversed and rendered a take-nothing judgment against DRMI. The court agreed with Gemini that the driller would have incurred those costs anyway because of pre-existing geologic conditions and was not entitled to compensation. The court also rejected DRMI's "too-broad" interpretation of the policy that once a blowout occurs, all costs and expenses reasonably incurred were covered. Because the court found there was no coverage, it did not reach the merits of the unfair settlement claims.

FIFTH CIRCUIT WEIGHS IN ON TEXAS DUTY TO DEFEND CASE INVOLVING A CRANE COLLAPSE

In *Hartford Casualty Insurance Company v. DP Engineering, L.L.C.*, 2016 WL 3552312 (5th Cir. June 29, 2016), the dispute arose from an industrial crane accident when it collapsed with its supported load, called a "stator," at Entergy Corp.'s Arkansas Nuclear One facility, causing widespread damage and personal injuries, including one death.

Entergy sued DP Engineering and Scroggins, along with others involved in the project, for breach of contract and negligence. DP Engineering, Entergy, and the other companies involved in the stator project were sued by the estate of the deceased worker and three injured workers. Scroggins was not a defendant in these four lawsuits. DP Engineering based in Fort Worth, and their employee John Scroggins tendered these lawsuits to Hartford and requested a defense under their general liability policies.

The underlying plaintiffs, including Entergy, alleged DP Engineering was hired for certain work related to the project. DP assigned Scroggins to perform work related to the stator project. The underlying lawsuit alleged that, in order to ensure the safe, efficient and effective lifting and movement of an article such as the stator a load test of the structure should have been completed before performing the actual project and not doing so was negligent. The underlying lawsuit further alleged that DP and Scroggins were involved in a decision not to perform a load test, instead relying on a representation that the structure had previously been used in the same configuration to lift equipment that exceeded the anticipated weight of the stator.

DP Engineering's insurers, Hartford Casualty Insurance Company and Hartford Lloyds Insurance Company, sought a declaratory judgment that there was no duty to defend or indemnify under their policies. Hartford Casualty had issued a primary insurance policy and an umbrella policy to DP Engineering. Hartford Lloyds had issued only a primary insurance policy. All three policies contained an exclusion of coverage for injuries or damages arising out of DP Engineering's professional services. Hartford argued the underlying lawsuits alleged "bodily injury" or "property damage," for which coverage was excluded because DP assumed liability in the insurance contract.

DP Engineering asserted counterclaims against Hartford, seeking a declaratory judgment that Hartford had a duty to defend and bringing a breach of contract claim for Hartford's refusal to accept the defense. Both parties moved for summary judgment. The district court granted Hartford's motion, holding there was no duty to defend or duty to indemnify, and denied DP Engineering's motion. The district court reasoned that the allegations in the underlying lawsuits only related to DP Engineering's professional engineering services, and so the policies' professional services exclusions applied. The court entered judgment for Hartford on Hartford's claims and DP Engineering's counterclaims.

On appeal, the court agreed that Hartford did not have a duty to defend, but ruled "the district court should not have determined the duty to indemnify based on the pleadings in the underlying lawsuit." The court found that since under Texas law the duty to defend is determined by pleadings and the duty to indemnify is decided by facts that eventually come out of an underlying lawsuit, both duties

can arise independently of one another. The court reasoned that the Texas Supreme Court has identified only one scenario where the duty to indemnify can be resolved solely on the pleadings in the underlying lawsuit: where there is “no set of facts that could be proved” that could provide coverage.

The court reasoned that “The underlying lawsuits here involve complex facts and multiple allegedly negligent parties," and there is ‘an array of possible factual and legal scenarios,’ that could have caused the crane and stator to fall, some of which may create coverage.” The court concluded that, “The allegations in the underlying lawsuits here do not conclusively foreclose that facts adduced at trial may show DP Engineering also provided non-professional services, which would be covered under the policy.”

Based on these findings the court affirmed the district court’s summary judgment ruling on the duty to defend, but reversed the ruling as to the duty to indemnify.