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TEXAS INSURANCE LAW NEWSBRIEF

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NO NEED TO BE NAMED: FIFTH CIRCUIT ALLOWS PLAINTIFFS TO ADD CLAIMS UNDER FORCE-PLACED POLICY WITHOUT BEING NAMED INSUREDS

Last Monday, the Fifth Circuit held that insured individuals had standing to amend their complaint to add their mortgage lender's flood insurer as a defendant despite the fact that the individual plaintiffs were not named insureds on the forced-placed flood insurance policy. In *Cotton v. Certain Underwriters at Lloyd's of London*, 2016 WL 4083901, (5th Cir. 2016), Alfred and Rubbie Cotton's rental properties were damaged when Hurricane Isaac made landfall in the summer of 2012. The Cottons had purchased windstorm policy, but did not purchase flood insurance. Instead, their mortgage lender, First American Bank and Trust, obtained a "force-placed" flood insurance policy from Lloyd's. After Hurricane Isaac, both the Cottons and First American filed claims under their policies, and both insurers made payments to cover the damage.

In October 2013, the Cottons filed suit against their windstorm insurer, contending that it had not paid enough to cover the wind damage to their rental properties. Two months later, the Cottons added Lloyd's as a defendant, seeking additional payments under the force-placed flood policy as well. Lloyd's then filed a motion to dismiss, arguing that the Cottons did not have standing to enforce the flood policy because they were not parties to the policy. In response to the motion to dismiss, the Cottons sought leave to amend their complaint to add the named insured on the flood policy, First American, as a plaintiff and the district court allowed the amendment. Subsequently, the Cottons settled their claims against their wind insurer, leaving only First American's claim against Lloyd's at issue. Accordingly, Lloyd's again sought to get First American's claims dismissed by arguing that since the Cottons did not have standing to enforce the policy, the district court never had jurisdiction to address the Cottons' motion to file an amended complaint. The district court denied the motion, and the jury eventually entered an award against Lloyd's.

On appeal, Lloyd's again raised the argument that the Cottons lacked standing to bring a claim under the flood insurance policy and the court did not have jurisdiction to rule on their motion to amend as a result. In analyzing whether the Cottons had standing to bring a claim against Lloyd's, the Fifth Circuit used the constitutional test for standing. Namely, the Fifth Circuit concluded that the Cottons merely needed to show that they had been injured, that Lloyd's caused the injury, and that the relief they request would compensate the injury. The Court held that the Cottons claim met those requirements because a ruling against Lloyd's would indirectly compensate them, noting that First American had credited the initial flood insurance payments against the Cottons' loan balance. Lastly, the Fifth Circuit addressed the subject matter jurisdiction argument advanced by Lloyd's. Even if the it had concluded that the Cottons lacked standing, the Fifth Circuit reasoned that the district court still had jurisdiction to consider their motion to file an amended it answer because the claim against their flood insurer was still pending when amendment was sought. As a result, the Fifth Circuit affirmed the district court's decision to grant the Cottons leave to amend their complaint and affirmed the jury's award against Lloyd's.

FIFTH CIRCUIT DISMISSES DEFAMATION AND TORTIOUS INTERFERENCE CLAIMS AGAINST MULTIPLE INSURERS

Recently, in *Bruce Copeland v. State Farm Insurance Company; Wellington Insurance Company; Liberty Mutual Insurance Company*, 15-10921, 2016 WL 4010441, at *1 (5th Cir. July 26, 2016), the Fifth Circuit affirmed the trial court dismissal of an insured's defamation and tortious interference claims against Liberty Mutual and Wellington Insurance Companies, and granted summary Judgment in favor of State Farm Insurance Company.

The lawsuit arouse out of an alleged employment contract between Bruce Copeland ("Copeland") and a law firm owned by Alice Bonner of Houston, Texas. Copeland alleged that he was hired by Bonner to do paralegal work in 2011. After a tornado hit Lancaster, Texas, in April 2012, Copeland thought the disaster was a business opportunity. He claimed that he helped find office space in Dallas and began to seek clients in need of legal assistance in filing claims with insurance companies. Several months later, Copeland said he learned that Bonner denied hiring him and told clients and insurers that Copeland had stolen her identity. Copeland contended that several insurance companies, which included Liberty Mutual, State Farm, and Wellington, opened investigations into Copeland's contractual relationship with Bonner and declined to pay invoices for services Copeland performed.

In June 2013, Copeland filed this lawsuit against Bonner and the defendant insurance companies. Copeland alleged the defendants slandered him and tortuously interfered with his contract with Bonner. Copeland obtained a default against State Farm and Liberty Mutual, which the district court later set aside. The claims against Liberty Mutual and Wellington were dismissed on a Rule 12(b)(6) motion. The district court then granted summary judgment for State Farm.

On Appeal, Copeland argued the District Court erred in setting aside the clerk's entry of default against Liberty Mutual and State Farm. The Fifth Circuit determined Copeland attempted to serve the defendants by certified mail, and in Texas service may be effectuated on a corporation's president, vice-president, or registered agent by certified mail. The trial court determined Liberty Mutual was not properly served because someone other than the company's agent signed the return receipt. The trial court also determined State Farm was not properly served because the summons was not addressed to the agent. Consequently, the Court of Appeals determined the trial court did not abuse its discretion in setting aside the clerk's entry of default against State Farm and Liberty Mutual.

Copeland next challenged the trial court's dismissal of his defamation and tortious interference claims against Liberty Mutual and Wellington on Rule 12(b)(6) grounds. With regard to the defamation allegations, the Court determined the only allegation against the insurance companies is that the companies and their insureds discussed Bonner's identity-theft accusation. The Court concluded that was not enough for the trial court to draw the reasonable inference that Liberty Mutual and Wellington are liable for defamation. The Court also concluded Copeland did not allege any defamatory statement was made with negligence regarding the truth of the statement justified the trial court's dismissal of his claim.

The Court also concluded the trial court did not err by dismissing Liberty Mutual and Wellington's tortious interference with an existing contract claims because Copeland's injury was not the proximate result of the defendant's interference. Here, Copeland pleaded that the alleged interference occurred months after the law firmed denied any contractual relationship with Copeland.

Next, the Court evaluated the claims against State Farm, and determined that Copeland's claims for defamation and tortious interference also failed. Copeland asserted State Farm did not provide sufficient evidence to justify State Farm's Motion for Summary Judgment. While the Court recognized that the evidence in the record did not support dismissal on summary judgment grounds, State Farm also moved in the alternative for judgment on the pleadings 12(c). Consequently, the trial court's decision focused on Plaintiff's pleadings, not evidence, and the Court affirmed the dismissal due to Copeland's failure to state a claim.

Ultimately, the Court affirmed the trial court's dismissal of all of Copeland's claims against the insurance company defendants.

DALLAS COURT OF APPEALS AFFIRMS DISMISSAL OF BAD FAITH CAUSES OF ACTION AND REMANDS CASE TO PROCEED ON BREACH OF CONTRACT AND PROMPT PAYMENT ACT CAUSES OF ACTION

Recently, in *KLZ Diamond Tools, Inc. v. TKG Gen. Agency, Inc.*, 05-14-00458-CV, 2016 WL 3947412, at *9 (Tex. App.—Dallas July 18, 2016, no. pet. h.) the Dallas Texas Court of Appeals affirmed a trial court's order granting summary judgment in favor an insurer for claims for negligent misrepresentation, common law fraud, violations of the DTPA, multiple damages, and exemplary damages. However, the Court reversed the trial court's order granting summary judgment in favor of the insurer for breach of contract, violations of the Prompt Payment Act, and attorney's fees, and remanded those claims for further proceedings.

KLZ Diamond Tools, Inc. suffered a burglary that resulted in the loss of $400,000 worth of inventory. KLZ's insurer and administrator sent lengthy document requests, requests for sworn statements, and requests to produce substantial amounts of documents. The insured became frustrated with the process, and issued a letter that outlined its attempts to cooperate with the insurer's investigation and decried the insurer's "delay tactics and endless request for irrelevant information." The insurer paid $204,051.11 in advance to the insured while it continued to investigate the insureds claims. The insurer made no further payments to KLZ, and KLZ later filed suit against the insurer for claims under the DTPA, breach of contract, violations of the Texas Insurance Code, negligent misrepresentation, and common law fraud.

The Insurer filed an Amended No-Evidence Motion for Summary Judgment, challenging each of KLZ's claims as well as its recovery of multiple and exemplary damages and attorney's fees. KLZ responded and simultaneously filed its own traditional motion for summary judgment against the insurer. The two motions were heard together; at the hearing the trial court granted the insurers objections to KLZ's affidavit evidence. The judge found the evidence insufficient to prove up the attached evidence on KLZ's Motion for Summary Judgment and granted the insurer's Motion for Summary Judgment. Although KLZ later supplemented its affidavit evidence, the trial court signed the order granting the Insurer's Motion and denied KLZ's motion.

On appeal, the Court concluded there was a significant amount of summary judgment evidence before the trial court after the affidavit was stricken, including evidence the insurer attached to insurer's no-evidence motion, evidence KLZ attached to its own traditional motion, and evidence appellees produced in response to KLZ's traditional motion. As a result, the Court affirmed in part, and reversed in part the trial court's granting of the insurer's Motion for Summary Judgment in its entirety.

The Court concluded KLZ offered sufficient evidence to raise a material issue of fact as to its compliance with the conditions precedent under the Loss Conditions portion of the Policy. And, the Court reversed the trial court's ruling granting summary judgment in favor of the insurer on KLZ's breach of contract action. Because the Court determined a fact issue existed as to KLZ's breach of contract action, the Court also sustained KLZ's assertion that the trial court erred in granting a no-evidence motion in favor of the insurer for a violation of the Prompt Payment Act.

In its analysis, the Court affirmed the trial court's decision that the insurer did not violate the Texas Unfair Claim Settlement Practices Acts (Insurance Code 542.001–542.302)" in the following four ways: a) knowingly misrepresenting pertinent facts or policy provisions relating to the policyholder's claim, i.e. misrepresenting the claim valuation as being actual cash value.; b)failing to adopt and implement reasonable standards for prompt investigation of claims arising under its policies as a reservation of rights letter was issued before any investigation was accomplished; c) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear; d) compelling plaintiff to take legal action to recover the total amount of benefits due to them under the insurance policy under its policies by offering substantially less than the amount ultimately recovered in a lawsuit. KLZ argued the trial court improperly granted the insurers no-evidence summary judgment; however, the Court did not undertake an evidentiary analysis. Rather, the Court affirmed the trial court's decision and noted the there is no private cause of action for violations under section 542.003 of the insurance code.

KLZ argued the trial court erred by granting summary judgment on its DTPA claims. KLZ pleaded that insured had engaged in an unconscionable action or course of action in violation of the DTPA. However, on review, the Court determined neither KLZ's petition nor its brief identified any unfair act. Further, the Court did not find evidence of gross unfairness in the summary judgment record. The Court further noted evidence of an unconscionable action or course of action must involve more than mere breach of contract. Based on its analysis, the Court affirmed summary judgment in favor of the insurer with regards to KLZ's DTPA actions. The Court determined that KLZ's DTPA claims of misrepresentation are rooted in its contractual relationship with the insurer and to the extent the summary judgment record contained evidence of the insurer acting contrary its representations, KLZ's claim was governed by contract law, not the DTPA.

Consequently, the Court remanded the case to proceed on KLZ's breach of contract and violation of the prompt payment act, and affirmed the dismissal of KLZ's bad faith and fraud allegations.

FEDERAL DISTRICT COURT EXAMINES "YOUR WORK" EXCLUSION IN CGL POLICY

A federal district judge in Houston recently examined the CGL policy's "your work" exclusion and held it excluded all claims against a general contractor for damages to a house the contractor built. In *Patton v. Mid-Continent Cas. Co.*, CV H-15-1371, 2016 WL 3900799 (S.D. Tex. July 19, 2016), the insured, Black Diamond, was a homebuilder facing a construction defect claim by its customers, the Pattons. After winning an arbitration award against Black Diamond for claims associated with foundation movement of the house, the Pattons brought this suit against Mid-Continent to recover their award.

The case turned on whether the damages alleged by the Pattons, and for which they had obtained an arbitrator's award, fell within the "your work" exclusion. Because Black Diamond was the general contractor on the project, its work was the entire house, and therefore all damage to the house itself fell within the "your work" exclusion. There was some dispute whether Black Diamond's work also caused damage to the swimming pool, which was built by a separate contractor. However, the arbitrator did not award any damage for the pool. Ultimately, the court adopted the magistrate's recommendation in full, granting judgment on the pleadings in favor of Mid-Continent because all the damages awarded by the arbitrator fell within the "your work" exclusion.

FEDERAL COURT EXAMINES TRADEMARK AND TRADE DRESS CLAIMS UNDER EIGHT-CORNERS RULE

A federal judge in Dallas recently examined the duty to defend trademark infringement and related claims under the CGL policy's Coverage B. In *Laney Chiropractic v. Nationwide Mut. Ins. Co.*, 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016), two chiropractic clinics were in an unfair competition dispute. The claimant sued Laney Chiropractic, alleging Laney had stolen trade secret software and set up a competing business offering confusingly similar services using the claimant's registered trademarks and related phrases.

Laney's policy specifically excluded trademark-infringement claims, but covered claims for use of another's advertising idea, or infringement of another's copyright, trade dress, or slogan. The question was whether the claimant's suit against Laney alleged only excluded trademark infringement, or also alleged any potentially covered claim. The court examined the petition against Laney under the Texas eight-corners rule, noting the balancing act required by the rule: the court may draw reasonable inferences from the pleadings that may lead to a finding of coverage, and must resolve all doubts in favor of the duty to defend, ***but*** may not read facts into the pleadings or imagine factual scenarios that might trigger coverage. Moreover, if even one potentially covered claim is included, the carrier must defend the entire suit.

The petition unquestionably alleged infringement of the claimant's trademarked phrases, "Active Release Techniques" and "ART." The question was whether, in the numerous other allegations, there were potentially covered claims for use of another's advertising idea, trade dress, or slogan. The court carefully examined whether any of the wrongful acts alleged involved any of these claims. It rejected the advertising idea, trade dress, and slogan approach, and concluded that the petition ultimately alleged nothing more than excluded trademark-infringement claims, and Nationwide therefore had no duty to defend the suit.

Editor's Note: A tension appears in recent Texas duty-to-defend cases pits the concept of an actually alleged, potentially covered claim versus a claim which is only potentially alleged. The eight-corners rule focuses on the factual allegations rather than legalese, allows reasonable inferences to be drawn from the facts, and requires all doubts to be resolved in favor of accepting the defense. These principles have led some litigants to argue, and some courts to accept, that a potentially covered claim which is only inferred and not actually pleaded may trigger a duty to defend the suit. Here, the court cited Texas precedent appearing to state the covered claim must only be **potentially alleged** (*Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex. 2008)), in contrast to other cases such as *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 599 (5th Cir. 2011), which construe *Zurich v. Nokia* to mean that while coverage need only be potential, the claim itself must clearly appear in the pleading. This creates confusion in Texas duty-to-defend law which may ultimately require further clarification by the Supreme Court of Texas.