Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

SEP 1, 2016

FEDERAL INTERPLEADER ATTORNEY FEE AWARD SURVIVES CHALLENGE

A federal district judge in Dallas recently upheld an award of attorney fees in an interpleader action, rejecting a claimant's challenge. In *Jackson Nat'l Life Ins. Co. v. Dobbins*, 2016 WL 4268770 (N.D. Texas Aug. 15, 2016), a set of claimants argued the carrier should not be awarded attorney fees in an interpleader action when the claim is of a type that arises in the ordinary course of business, an argument which would presumably mean an insurance carrier could never recover fees in an interpleader, since resolving claims is part of an insurer's ordinary business. The court rejected this position, essentially holding that while such a rule may be fine for other federal circuits and other states, it is not Fifth Circuit law. The court ordered the carrier to submit evidence supporting its fee application, since it had not done so initially.

The court's other significant holding addressed the scope of the discharge to which an interpleader is entitled. Some of the claimants argued the carrier should not be discharged at all because they had counterclaims against the carrier. The court noted the mere existence of a counterclaim or possible counterclaim does not necessarily preclude discharge in interpleader, and that the discharge the stakeholder receives is only as broad as the claimants' rights to the property at issue. Thus, if a claimant has independent grounds for a claim against the carrier, the claimant may bring a separate suit for claims that are unrelated to the policy proceeds.

COURT OF APPEALS HOLDS LIABILITY INSURER'S IMPROPER SCRAPPING OF THIRD-PARTY CLAIMANT'S VINTAGE MERCEDES IS ACTIONABLE, INSURANCE CODE/DTPA CLAIMS ALLOWED TO PROCEED

The Dallas Court of Appeals recently vindicated certain claims against an auto insurer by a third-party claimant, for declaring her lovingly restored 1983 Mercedes to be a total loss after an accident. In *Letot v. USAA*, 2016 WL 438725 (Tex. App.-- Dallas August 17, 2016), Letot was in a collision with USAA's insured. USAA declared the car a total loss, sent Letot a check for the car's $2,500 actual cash value, and reported it to TxDOT as a salvage motor vehicle. TxDOT flagged the vehicle as a salvage, which invalidated Letot's registration and prevented her from operating or selling it until she obtained a salvage title. Letot rejected USAA's check and opted to sell the car as scrap since she could do nothing else with it.

In the ensuing lawsuit, Letot asserted a number of claims against USAA, and USAA initially won summary judgment. On appeal, the court held USAA's tender of a check, later rejected and returned, could not gain USAA a statutory safe harbor because it was a mere tender, not "payment" of a claim. The court also upheld Letot's Insurance Code and DTPA claims even though she was a third-party claimant. The Texas Insurance Code allows any "person" to make a claim, but to the extent the Insurance Code claim is based on a tie-in violation of the DTPA, the claimant must still show consumer status under the DTPA. USAA attacked Letot's standing under the Insurance Code, but not her standing under the DTPA, and thus her Insurance Code/DTPA claim was remanded and allowed to proceed.

DALLAS COURT EXAMINES LIABILITY CARRIERS' DUTIES IN CONSTRUCTION DEFECT CASE

The Dallas Court of Appeals recently considered the duty to defend and indemnify under a CGL policy in light of the "injury in fact" rule set forth in *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008), and the "fully adversarial trial" requirement of *State Farm Fire & Cas. v. Gandy*, 925 S.W.2d 696 (Tex. 1996). In *Great American Lloyds Ins. Co. v. Vines-Herrin Custom Homes*, 2016 WL 4486656 (Tex. App.--Dallas Aug. 25, 2016), the insured sought coverage for an underlying suit involving alleged construction defects to a home. This case presents a grab bag of insurance law lessons, including the actual injury rule, the concurrent causation doctrine, and the fully adversarial trial requirement.

The insured was covered for a period of four consecutive years by two carriers - Great American Lloyds had the first two years, and Mid-Continent had the following two years. During this period, the insured built the home and sold it to the homeowner, who sued the builder three years later alleging numerous defects which appeared as early as a week after moving into the home. Both carriers denied the builder's tender of the suit, forcing the builder to defend itself. To save costs, the builder and homeowner agreed to

arbitration, as a result of which the homeowner was awarded substantial damages. The builder assigned its claims against the carriers to the homeowner in exchange for a covenant not to confirm or enforce the arbitration award. This coverage suit followed.

A roller coaster ride of appeals, reversals, and remands ensued. The trial court initially rendered judgment in favor of the builder, but shortly afterward, the Supreme Court of Texas issued *Don's Building Supply*, establishing the "injury in fact" rule for determining the time property damage occurs. The trial court re-opened the evidence, concluded that *Don's Building Supply* required expert testimony to establish the exact date the property was physically inured, and rendered judgment in favor of the insurers.

The builder (now functionally the homeowner due to the assignment) appealed, and the Court of Appeals reversed and remanded, holding that the actual injury rule does not require the insured to establish the exact date of injury as long as it can establish it was within the policy period. In this case, Great American insured the builder continuously from the time the house was built to the time the homeowner noticed the defects, so the property damage must have occurred during Great American's policy period. Therefore, Great American had a duty to defend and indemnify the builder.

After remand, the trial court "reversed course entirely" and entered a new judgment in favor of the builder, holding that both carriers were jointly and severally liable for the entire arbitration award based on evidence given by the homeowner that at least some of the damages had occurred during three of the four policy years. The court denied the insurers' request for additional findings of fact as to how much of the damage had occurred during each policy period. This time the insurers appealed, arguing they could not be held jointly and severally liable for the entire award, or in fact for any of it, because the homeowner did not prove how much of the damages occurred in each policy period.

On this second appeal, the Court of Appeals reversed and remanded again. The court rejected the insurer's new arguments regarding the actual injury rule, holding it had already decided that issue in the first appeal and it was now the law of the case. The insurers also argued there was no "legal obligation to pay" as contemplated by their insuring agreements because the arbitration award had never been confirmed as a result of the settlement agreement. The court disagreed and held that an arbitration award is a legal obligation to pay even if it is not immediately enforceable. The insurers also challenged the award on the ground that it was not the product of an actual, fully adversarial trial and violated public policy as stated in *State Farm v. Gandy*. The court pointed out that unlike *Gandy*, the insurers here had both wrongfully refused to defend the insured and had rebuffed all of the insured's invitations to participate in the defense, and therefore had no grounds under *Gandy* to complain about the way the insured defended itself.

Finally, the insurers argued the homeowner had not met its duty to specifically segregate the covered and non-covered damages with respect to each policy period. The Court of Appeals agreed the carriers could not be held jointly and severally liable for the entire award, since they were only bound to cover the damages that occurred during their respective policy periods, but concluded rendering a take-nothing judgment, as the insurers requested, was not the correct answer. Instead, the case must be remanded for a third round in the trial court, and we can all hope the third time will be the charm.

We previously reported on the first appeal here:

http://www.mdjwlaw.com/newsroom-news-TIN-20120116-Item6.html