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TEXAS INSURANCE LAW NEWSBRIEF

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SUPREME COURT OF TEXAS GRANTS DISCOVERY MANDAMUS FOR CARRIER IN WIND-HAIL MDL

Last Friday, the Supreme Court of Texas granted mandamus relief protecting an insurer from a trial court's order requiring it to produce certain institutional discovery including management reports which contained global claims, financial and other business information. In In re National Lloyds Ins. Co., No. 15-0452, 2016 WL 6311286 (Tex. Oct. 28, 2016), the trial court had ordered National Lloyds to produce voluminous institutional management reports and corporate emails, and denied a subsequent request for reconsideration and an in camera review of the documents in question. The Corpus Christ Court of Appeals denied mandamus relief holding National Lloyds had waived its objections by withdrawing them. This mandamus to the high court of Texas followed.

The Supreme Court disagreed noting National Lloyds had timely lodged its objections in compliance with the Rules and had made clear at every stage of the proceedings its contention that the reports in question were beyond the scope of permissible discovery. Quoting a previous opinion on a similar discovery dispute also involving National Lloyds, the high court observed that it was unclear how National Lloyds' payment or handling of other claims was probative of its conduct with respect to the wind-hail claims at issue, especially given the many variables associated with any particular claim. The Supreme Court concluded that scouring other claims in hopes of finding similar claims with different results was a classic “fishing expedition” and impermissible under its prior holdings in Dillard v. Hall and Texaco v. Sanderson.

The high court rejected the plaintiffs' argument that their “pattern and practice” allegations entitled them to broad discovery of corporate strategy, and concluded the reports in question were not sufficiently related to the claims at issue. The court also concluded the fact that the case was part of a multi-district litigation plan did not automatically entitle the plaintiffs to such broad discovery, and held the same relevance standard applies whether the suit involves a single claim or an MDL involving hundreds of claims – discovery must still be reasonably tailored to the time, place, and subject matter.

[Editor’s note: Plaintiffs’ counsel in this MDL proceeding in Hidalgo County, and in this mandamus, was the Mostyn Law Firm from Houston which is notorious for harassing carriers across the state with overly broad and oppressive institutional discovery about an endless litany of business practices. The wind-hail docket in The Valley remains quite large and bad faith cases arising out of wind and hail storms have spread to more than 40 other counties statewide over the past three years. Congrats to National Lloyds and its counsel on having the courage to take this fight to the Texas Supreme Court and for this win which will be of tremendous help in trial courts across the state in the future when faced with broad institutional discovery about the carrier’s business practices.**]**

NO BAD FAITH IN BATTERED BENTLEY CASE DUE TO INSURED’S FAILURE TO COOPERATE & MSJ GRANTED FOR CARRIER

A federal judge in Dallas granted summary judgment last week in favor of an auto carrier, dismissing all of a policyholder's extra-contractual claims in an auto damage dispute. In *Alhamzawi v. GEICO Casualty Co.*, N0. 3:15-CV-3295-K, 2016 WL 6277809 (N.D. Tex. Oct. 25, 2016), the insured's Bentley was damaged in a hail storm. GEICO inspected the vehicle, estimated repairs at $6,000, and paid the insured accordingly. Alhamzawi disagreed and submitted three additional estimates from three body shops ranging from $26,000 to $32,000. Alhamzawi then took his car to his brother's shop and paid his brother $30,500 in cash to repair the car, without giving GEICO an opportunity to conduct a re-inspection. The insured produced a cashier's check written to his brother for $15,000, which had not been cashed.

Not surprisingly, GEICO issued a reservation of rights and began an investigation of the insured's failure to comply with the policy terms by having the Bentley repaired without allowing GEICO to re-inspect it. GEICO ultimately denied the claim, citing Alhamzawi's failure to cooperate with the investigation and failure to produce material information. In the resulting bad faith suit, GEICO moved for summary judgment on all claims.

Relying on well-established Texas law holding that a mere *bona fide* dispute does not constitute bad faith, and equally established law holding if there is no common-law bad faith there can be no Insurance Code violation for the same conduct, the court granted GEICO's motion for summary judgment as to all of Alhamzawi's claims except breach of contract. The court specifically noted that it

was reserving the right to also dismiss the breach of contract claim at a later time – an unusual move which suggests the court is seriously considering dismissal. The court observed that merely submitting three additional estimates, including the one from his brother noting that all repairs had been completed, not only failed to create a fact issue as to whether coverage was reasonably clear – it affirmatively proved he failed to comply with GEICO's supplement procedures by having the Bentley repaired without allowing GEICO an opportunity to re-inspect. Although Alhamzawi testified that he made the vehicle available for re-inspection before repairing it, there was no other evidence supporting this claim, and the court refused to consider the plaintiff's own self-serving testimony to defeat summary judgment.

AUTO INSURER NARROWLY ESCAPES LARGE DEFAULT IN UIM SUIT ON RESTRICTED APPEAL

Last Wednesday, a Texas court of appeals threw out a $960,000 default judgment against State Farm in an underinsured motorist case. In *State Farm County Mutual Automobile Ins. Co. v. Diaz-Moore*, No. 04-15-00766-CV, 2016 WL 6242842 (Tex. App.—San Antonio Oct. 26, 2016), State Farm's insured was injured in a motor vehicle accident. She sued both the alleged tortfeasor and State Farm, alleging the tortfeasor was an underinsured motorist and she was entitled to UIM benefits from State Farm as well as damages from the underinsured motorist. Neither defendant answered the suit and Diaz-Moore took a default judgment in excess of $960,000 against the driver and State Farm.

State Farm missed the window to overturn the default judgment by ordinary means and filed a restricted appeal. State Farm argued Diaz-Moore's claim against State Farm was not yet ripe because she had not yet established both liability and that her damages exceeded the tortfeasor's liability insurance. The court disagreed and noted that while this would be true at trial, to determine ripeness at this stage of the case, it would only examine whether she had pleaded facts which, if true, would establish a claim against State Farm. The court held she had adequately pleaded her UIM case against State Farm, and pointed out that Texas law allows a policyholder to sue its insurer directly for UIM benefits without joining the tortfeasor motorist at all and then litigate both liability and underinsured status in that lawsuit. This is a sharp contrast to the Texas rule for liability carriers which generally prohibits joining a liability carrier in the suit against the alleged tortfeasor.

Ultimately, the default judgment was reversed but only due to Diaz-Moore's failure to obtain a reporter's record of the default judgment proceedings. A failure to obtain a reporter's record establishes error on the face of the record as a matter of law.

FEDERAL JUDGE CONSIDERS EXTRINSIC EVIDENCE, HOLDS NO DUTY TO DEFEND

Last Monday, a San Antonio federal judge relied on extrinsic evidence to grant summary judgment for an auto liability carrier in a duty-to-defend case. In *Sentry Select Ins. Co. v. Drought Transportation, LLC*, No. 15-CV-890, 2016 WL 6236375 (W.D. Tex. Oct. 24, 2016), the insured under a business auto policy sought defense in an auto accident lawsuit. The pleadings merely alleged that the defendant driver had been working in the course and scope of his employment for Circle Bar and/or Drought Transportation, and provided no other facts about the circumstances of the accident. Sentry sought to show that the vehicle, owned by Drought, had been rented or leased to Circle Bar and was being used in Circle Bar's business at the time of the accident. These facts, not mentioned in the petition, brought the accident within the scope of a business use exclusion which barred coverage for autos leased out to other businesses.

The court found that because the pleadings were silent as to exactly how the vehicle was being used at the time of the accident, the case fell within the bounds of an exception to the Texas eight-corners rule: (a) it was impossible to determine potential coverage from the face of the petition, and (b) the facts crucial to determining coverage did not overlap the merits of the suit. Because the petition was silent as to whether the vehicle had been leased or loaned to anyone, it was impossible to determine coverage without resorting to extrinsic evidence. The court was careful to consider only evidence showing whether and to whom the truck had been leased, and whether it was being used in that entity's business, ***not*** the disputed liability question of which of the two defendants controlled the driver.

This opinion further cements a line of federal cases, led by *Northfield Ins. Co. v. Loving Home Care, Inc.* and *Ooida Risk Retention Group v. Williams*, openly recognizing an exception to the Texas “eight-corners” rule for determining a duty to defend under liability policies, which ordinarily requires that the duty to defend be determined solely on the face of the pleadings. (In contrast, the majority of state courts in Texas are continuing to follow the Supreme Court’s lead in not openly recognizing any exceptions at all.) The court in this case also held there was no duty to indemnify under the *Griffin* rule which holds indemnity, ordinarily not justiciable until after liability is established, *could be* decided at the outset because there was no duty to defend and the same facts which negate the duty to defend likewise negate any possibility of a duty to indemnify.