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TEXAS INSURANCE LAW NEWSBRIEF

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COURT ENFORCES ARBITRATION PROVISION IN COVERAGE DISPUTE WITH ADDITIONAL INSURED

Last Thursday, the Beaumont Court of Appeals reversed a trial court ruling denying an insurer's motion to compel arbitration and remanded the case with instructions to order the parties to arbitrate their coverage disagreement. In *Lexington Insurance Company v. Exxon Mobil Corporation*, No. 09-16-00357-CV, 2017 WL 1532271 (Tex. App.—Beaumont, Apr. 27, 2017), Lexington sought to compel arbitration in a coverage dispute with Exxon involving an umbrella policy.

The claim arose from a fire at an Exxon refinery in April of 2013 that resulted in injuries to at least ten persons and the death of two. Three of the persons injured in the fire were employees of Brock Services, who was performing work at the refinery under a written agreement. Under the agreement, Brock was required to name Exxon as an additional insured on all of the liability policies required of Brock to obtain the work. Exxon sought coverage as an additional insured under Brock's Lexington umbrella policy. When Lexington failed to respond to Exxon's demand, Exxon sued Lexington alleging that they had wrongfully denied Exxon's claim. Lexington filed a motion to compel arbitration based on a clause in the umbrella policy. The trial court conducted a hearing on Lexington's motion for arbitration, and eventually denied it. Lexington filed an interlocutory appeal of that ruling.

On appeal, Exxon argued that it is not bound by the arbitration clause in the umbrella policy because Brock acquired the policy, it did not negotiate to have a policy that contained an arbitration clause and, it is an additional insured under the agreement. Exxon argued that enforcement of the arbitration clause under circumstances where it did not directly acquire the policy from the carrier would be unconscionable.

The appellate court disagreed. The court found that Exxon cannot both seek recovery under the terms of Lexington's policy and at the same time avoid its other provisions. Under the doctrine of direct benefits estoppel, non-signatories to arbitration agreements may be bound to the arbitration clause of a contract when the plaintiff is suing to enforce all of the other terms of a written agreement. The court also found that Exxon had failed to provide support for their claim that enforcement would be unconscionable. And, that Texas public policy favors arbitration of disputes.

In sum, the appellate court found that "Exxon is not entitled to enforce some of the umbrella policy's terms but to defeat others." Consistent with that reasoning, the court reversed the trial court's order denying the motion to compel arbitration. The court further remanded the matter to the trial court with instructions to render an order compelling Lexington and Exxon to arbitrate their disagreements over Exxon's contract rights under Lexington's umbrella policy.

COURT APPLIES PREJUDICE REQUIREMENT TO INSURED'S FAILURE TO PROVIDE SWORN PROOF OF LOSS

On April 10th, Judge Amos Mazzant of the Eastern District of Texas adopted the report and recommendations of a magistrate and denied an insurer's Rule 12(b)(1) and 12(b)(6) motions to dismiss. In *Wilson v. Allstate Ins. Co.*, No. 4:16-CV-970, 2017 WL 1313854, at *1 (E.D. Tex. Apr. 10, 2017) the District Judge analyzed whether the insured's failure to comply with the Proof of Loss requirement in an insurance policy warrants dismissal.

Tommy Wilson filed suit against his insurer asserting breach of contract and violations of the Texas Insurance Code. Wilson had a Texas Homeowner's Insurance Policy issued by Allstate Vehicle and Property Insurance Company. Wilson submitted a claim for damage to his residence from a storm in March 2016 and later filed suit alleging that Allstate grossly underestimated the property damage.

Allstate filed a Motion to Dismiss arguing that Wilson's suit was not yet ripe because of he failed to comply with the Policy's express requirement to submit a sworn proof of loss before filing suit. And the parties agreed that Wilson did not submit a proof of loss prior to initiating litigation. Nevertheless, the Magistrate Judge entered a report recommending the denial of Allstate's motion. Allstate objected to the Magistrate's report and recommendation.

Judge Mazzant overruled Allstate's first objection finding that the Magistrate Judge assumed the proof of loss provision applied to this dispute and then proceeded to analyze the prejudice, if any, imposed on Allstate by Wilson's failure to comply with the policy requirement. The court also found that under Texas law the proof of loss provision in an insurance contract is "akin to a notice provision" aimed at "aiding the insurer in administration of its coverage of claims." Further, the court found that "under current Texas law, regardless of whether a policy provision is characterized as a covenant, condition precedent or exclusion, the insurer must still demonstrate prejudice caused by the plaintiff's non-compliance."

Allstate claimed it suffered prejudice because it was forced to prematurely litigate the claim before receiving the information contained in the proof of loss. Utilizing the prejudice analysis, the court found that a finding of prejudice could not be supported. In making this finding, the court recited the history of the case and noted that Wilson timely submitted a claim, Allstate had an opportunity to inspect the damage, and that the parties engaged in correspondence for several months regarding the disputes between them. Finally, the court noted that "Plaintiff's civil complaint provides the bulk of the information required by the terms of the

POL." Based on the finding that the Allstate had suffered no prejudice, the court denied the motions to dismiss and allowed the case to proceed.

SOUTHERN DISTRICT JUDGE FINDS NO COVERAGE FOR LIQUOR RETAILER'S CHALLENGE TO INDEMNITY CLAIMS FOLLOWING CYBER BREACH

U.S. District Judge Gray H. Miller of the Southern District of Texas recently found that Texas liquor store chain, Spec's Family Partners Ltd., is not entitled to coverage for approximately $4 million charged by its credit card processor following two data breaches.

In *Spec's Family Partners Ltd. v. The Hanover Insurance Co.*, case number 4:16-cv-00438, in the U.S. District Court for the Southern District of Texas, Specs sought coverage under its insurance policy for losses stemming from data breaches in 2012 and 2014. Spec's filed suit against its insurer, Hanover Insurance Co., alleging Hanover breached both its policy and an agreement to fund a lawsuit against credit card processing company FirstData Merchant Services Corp.

After the data breaches, the credit card companies issued fines to FirstData totaling about $9.5 million for credit monitoring, replacement cards and reimbursement of fraudulent transactions. Based on indemnity provisions in their merchant agreements, FirstData then made demands on Spec's for claims arising from the data breaches totaling almost $10 million. After making the demands, FirstData over time withheld $4.2 million from Spec's daily payment card settlements. Spec's eventually filed suit over the withheld receipts against FirstData in Tennessee. Hanover refused to pay litigation costs for that lawsuit.

Hanover argued that filing a suit didn't constitute a defense. The court agreed and also found that the demands from FirstData were made under the indemnification provisions of the merchant agreement with Spec's and did not trigger coverage under the Policy. Finding no coverage under the Policy, the court dismissed the lawsuit with prejudice. A sealed memorandum opinion and order granting a motion for judgment was entered on March 15. After considering the parties' arguments, the judge unsealed the order.