Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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POLICYHOLDER'S BID TO REDEFINE "DOOR" AS "WALL" REJECTED

The Beaumont Court of Appeals recently affirmed a jury's finding of no coverage for wind-driven rain from Hurricane Ike which entered under a set of French doors and damaged a home's interior. In *Iler v. RVOS Farm Mutual Ins. Co.*, No. 09-16-00011-CV, 2017 WL 5486011 (Tex. App.-- Beaumont Nov. 16, 2017) (slip op.), the homeowner's policy excluded "loss caused by windstorm, hurricane or hail... to the interior of a covered building... unless direct force of wind or hail makes an opening in a roof or wall." There was no evidence of any damage to the door or wall other than the loss of the door's weather stripping during the hurricane. RVOS denied the claim on the ground there was no wind-created opening. The Ilers asked the trial court to find as a matter of legal policy construction that any wind-created separation between a door and its frame or a window and its frame was an opening in a wall that would create coverage for the resulting loss. The court refused and the case was tried before a jury, resulting in a certain amount of "theater of the absurd" in the questioning of the witnesses, as both sides tried to establish through testimony whether a door or doorway is an opening in a wall.

The question of whether wind made an opening in the wall ultimately went to the jury, and the Ilers asked the court to instruct the jury that rain entering through a separation between a door and its frame is a covered loss. The court declined to do so and sent the question to the jury strictly on the policy language itself. The jury found no breach of contract. On appeal, the precise question was whether the Ilers' requested jury instruction should have been allowed, as the Ilers contended that the issue submitted was a question of law that should not have been determined by the trial court. The court disagreed noting that "while it is true that the jury should not be called upon to construe the legal effect of an instrument…the submission of a jury question is not error where the wording in the question does nothing more than present a question to the jurors based upon the facts." The underlying theme throughout the opinion is that a door is a door and a wall is a wall, and if the trial court declines to instruct the jury that a door is a wall, the appellate court is not going to disturb that decision. The trial court's judgment was affirmed.

TEXAS PERSONAL AUTO POLICY DOES NOT COVER PUNITIVE DAMAGES

The San Antonio Court of Appeals recently held that a personal auto policy which covers "damages for bodily injury" does not on its face cover punitive damages. In *Farmers Texas County Mut. Ins. Co. v. Zuniga*, No. 04-16-00773-CV, 2017 WL 54718887 (Tex. App-- San Antonio Nov. 15, 2017 (slip op.), Farmers' insured hit a pedestrian and was slapped with a judgment for $93,000 in actual damages and $75,000 in punitive damages. Farmers brought a declaratory judgment action to determine whether its policy covered the punitive damage award and if so, whether Texas public policy allowed coverage of the award. (Meanwhile, the insured filed for bankruptcy and assigned his rights against Farmers to the injured pedestrian.)

The court compared the language of the Farmers policy to other liability policies considered by other Texas courts, and drew a distinction between an insuring agreement covering "all sums which the insured shall become legally obligated to pay as damages because of... bodily injury," to the narrower Farmers policy, which only covered "damages for bodily injury." The court concluded that while the "all sums" insuring agreement may be broad enough on its face to include punitive damages, the phrase "damages for bodily injury," standing alone, does not include punitive damages, and nothing else in the Farmers policy created coverage for punitive damages. Therefore, the court did not address the public policy question. Notably, the court expressly rejected *Manriquez v. Mid-Century Ins. Co.*, 779 S.W.2d 482 (Tex. App.-- El Paso 1989 (writ denied), which was the claimant's chief legal support, and which had previously construed language similar to the Farmers policy to include punitive damages.

HOUSTON COURT OF APPEALS RE-AFFIRMS TEXAS RULE LIMITING AGENT DUTIES

In an unpublished opinion, Houston's First Court of Appeals recently upheld and re-affirmed the long-standing Texas rule limiting an insurance agent's legal duties to (1) using reasonable diligence in attempting to place the *requested* insurance and (2) informing the client promptly if unable to do so. In *Ruch v. Ted W. Allen & Assoc., Inc.*, 01-15-01081-CV, 2017 WL 4682031 (Tex. App.—Houston [1st Dist.] Oct. 19, 2017, no pet. h.), a condominium HOA sued both its property manager and its insurance agent, arguing they had not acquired a sufficient amount of insurance for the property. The property had $5 million in property insurance, and after suffering a major fire loss, the property was significantly underinsured.

The insurance agent moved for and won summary judgment on the ground that it had no contractual relationship with the insured, nor did it owe any duty imposed by law to affirmatively recommend insurance to the insured or to obtain more or different insurance than the insured requested. In a brief opinion relying on the landmark Supreme Court of Texas opinion on this issue, *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992), the court of appeals affirmed summary judgment in favor of the agent. The property manager also won summary judgment on different grounds and that was also affirmed.

Editor's Note: While this opinion does not break new legal ground and is not particularly significant on its own (the court did not

even find it worth publishing), it takes on greater significance in light of the coming wave of Hurricane Harvey lawsuits, which will likely include a large number of claims against agents for failure to obtain or recommend flood insurance. It will undoubtedly be helpful for agents and their attorneys to have this very recent Houston opinion confirming the continued relevance and vitality of *May* in their pockets.

FEDERAL COURT EXAMINES SCOPE OF CGL EXCLUSION J(5): "THAT PARTICULAR PART OF REAL PROPERTY" IN OIL WELL CASE

In this recent case involving damage to an underground oil well casing, a federal district judge in San Antonio was called upon to construe the scope of the CGL policy's Exclusion J(5) and determine exactly how much of the damage to the well fell within its scope. While Exclusion J(5) only applies to "that particular part of real property on which you… are performing operations," the factual question of its exact meaning and scope varies in different circumstances. In *CBX Res., LLC v. ACE American Ins. Co.*, 5:17-CV-17-DAE, 2017 WL 4639233 (W.D. Tex. Oct. 16, 2017), well casing was damaged during a fracking operation and could not be recovered from the well bore, resulting in the well having to be plugged and abandoned.

ACE argued the well was a singular unit with no severable non-essential components, and therefore the exclusion covered the entire well, while the judgment holder argued it only applied to the casing itself. The court noted that unlike other cases cited by the parties, the insured was hired to oversee construction of the entire well and the scope of its work included all parts of the well. And Fifth Circuit precedent holds a well casing is not an independently functioning component of a well. Therefore, the court agreed with ACE and held that Exclusion J(5) barred coverage for all the damage to the entire well. The court went on to hold that coverage was also barred by the Professional Services exclusion, and that nothing in the Underground Resources and Equipment Coverage endorsement restored coverage for the loss.