Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JAN 18, 2018

ANOTHER TEXAS COURT FINDS TIMELY PAYMENT OF APPRAISAL AWARD PRECLUDES EXTRA-CONTRACTUAL LIABILITY

In granting summary judgment in an insurer's favor, the San Antonio Court of Appeals rejected arguments that the Texas Supreme Court's recent efforts to clarify standards for insurer's extra-contractual liability in *USAA Tex. Lloyds Co. v. Menchaca*, 2017 WL 1311752 (Tex. April 7, 2017) should allow a lawsuit to proceed despite timely payment of an appraisal award. In *Alvarez v. State Farm Lloyds*, No. 04-17-00251-CV, 2018 WL 340135 (Tex. App.—San Antonio Jan. 10, 2018) (mem. op.), the insured claimed wind and hailstorm damage to their residence. State Farm investigated the claim and because the damage was less than the deductible, no payment was issued. The insured ultimately filed suit and State Farm invoked the appraisal clause in Alvarez's policy. An award was later entered for an amount in excess of the deductible and State Farm issued full and timely payment of the award in compliance with the policy and the Texas Insurance Code. State Farm then filed a motion for summary judgement in the pending lawsuit.

State Farm argued its timely payment of the amounts owed under the appraisal award precluded the breach of contract and extra-contractual claims asserted against it. The insured argued the recent Texas Supreme Court's decision in *Menchaca* overruled the cases State Farm relied upon in seeking summary judgment of the extra-contractual claims, including *Garcia v. State Farm Lloyds*, 514 S.W.3d 257 (Tex. App.—San Antonio 2016, pet. denied). The court noted that it had recently examined this precise issue in *Ortiz v. State Farm Lloyds*, No. 04-17-00252-CV, 2017 WL 5162315 (Tex. App.—San Antonio Nov. 8, 2017, pet. filed) (mem. op.). In *Ortiz*, the court held *Menchaca* did not abrogate *Garcia*. In *Ortiz*, the court recognized that under *Garcia*, an insurer's payment of an appraisal award entitles the insurer to summary judgment on an insured's contractual and extra-contractual claims. Accordingly, because State Farm timely paid the appraisal award and because Alvarez failed to present evidence of an independent injury; summary judgment was properly granted as to all claims.

FEDERAL COURT EXAMINES THE TIMELY FILING OF FLOOD-INSURANCE CLAIMS & GRANTS SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS

In this recent case involving flood-insurance payments for damage from a Houston storm, a federal district judge in Houston examined the statute of limitations under a FEMA administered flood-insurance policy. In *Ali Ekhlassi v. National Lloyds Insurance Co. & Auto Club Indemnity Co.*, No. CV H-17-1257, 2018 WL 341887 (S.D. Tex. Jan. 9, 2018), a lawsuit was filed in January 2017 for insurance payments for a storm that occurred in May 2015.

In May 2015, just after the flood, the insured reported his losses to National Lloyds. A few days later, National Lloyds sent an adjuster to inspect the property. The adjuster estimated losses for "flood loss clean-up and other covered damages," but found that all other damages were excluded under the policy. On October 6, 2015, National Lloyds sent the insured a letter stating that he had not yet submitted a proof of loss form for his claim and that it could not process his claim payment until it received his proof of loss. The letter informed the insured that he had 240 days from the date of loss to provide the signed and sworn proof of loss and that National Lloyds was denying payment for "any building and contents items not subject to direct physical loss by or from flood" and "all non-covered items located below the lowest elevated floor of your post-FIRM elevated building." The insured provided the sworn proof of loss to National Lloyds in December, 2015. On January 11, 2016, National Lloyds sent the insured a second letter rejecting the proof of loss, confirming that it would pay only the previously determined amount, and referring the insured to the October 6, 2015 denial letter. One year later, on January 11, 2017, the insured sued National Lloyds and Auto Club alleging breach of contract, violations of Chapters 541 and 542 of the Texas Insurance Code, and violations of the Deceptive Trade Practices Act.

National Lloyds moved for summary judgment asserting the lawsuit had not been timely filed. The Court began by noting that "FEMA requires strict adherence to all conditions precedent" and that a claimant is required to file suit within one year of receiving a notice of denial. The insured argued that the October letter had not been a notice of denial. The Court disagreed and stated plainly that the October letter "made it clear" that is was a denial. Having failed to file suit within one year of the denial notice, the Court granted summary judgment as to all claims.

[Editor's Note: This case highlights the unique nature of claims under flood-insurance policies and the willingness of Texas courts to strictly enforce them.]

POLITICAL ACTIVITIES BY CHURCH ARE NOT ADVERTISING & CARRIER HAS NO DUTY TO DEFEND

A federal judge in El Paso recently granted summary judgment in favor of State Farm Lloyds, holding State Farm had no duty to defend or indemnify its insured, a conservative church who was sued for violating the Texas Election Code. In *Word of Life Church v. State Farm Lloyds*, EP-17-CV-00049-DCG, 2018 WL 297617 (W.D. Tex. Jan. 4, 2018) (slip copy), the church and its pastor began circulating a recall petition against the mayor of El Paso after the mayor broke a tie vote of the City Council to restore city benefits to same-sex partners of city employees. (The City Council vote came after a public referendum, supported by a PAC created by the pastor, in which voters of El Paso voted to rescind the existing grant of benefits.) The mayor sued the church and the pastor for violating the Texas Election Code by misusing church resources to file and circulate recall petitions. The court found that the church and pastor had violated the statute, and the parties agreed that the church owed the mayor $475,000 in damages.

The church sought defense and indemnity under its insurance policy with State Farm, which State Farm denied on the ground that the suit did not allege a potentially covered "advertising injury" under the policy's Coverage B. State Farm contended, and the court agreed, that the church's posting on its website announcing the recall petition and soliciting its members and the public to sign it did not meet the definition of an "advertisement" because it was not a marketing device designed to inform the public about the church's goods, products, or services. The church argued it was a strategy to solicit like-minded members, but the court observed that the notice listed six locations where people could go to sign the petition, and only one of them was the church, and rejected the idea that it was an advertising strategy to get people in the door. The court also rejected the church's argument that the mayor's suit alleged disparagement would have triggered coverage.

The suit also named the pastor individually, and the he argued the allegations against him triggered coverage because he allegedly committed a covered "wrongful act." The policy covered negligent acts, errors, or omissions ***directly related to the operations of the church***, and the pastor could not get around the disclaimer he had put on the church website, which stated it was owned by himself personally and not the church, and that in his official capacity as pastor, he neither encouraged nor discouraged the recall of the mayor. His own self-serving affidavit stating that the entire campaign was a church ministry and therefor "directly related to the operations" of the church, without corroborating evidence, was not considered competent summary judgment evidence. Thus, State Farm's decision to completely deny defense and indemnity to both church and pastor was ratified by the court. Because the court found no coverage and no breach of contract, the court also summarily disposed of all extra-contractual claims.

[Editor's Note: In an era in which some churches appear to be increasingly engaging in direct political activities such as forming PACs to pursue specific public policy goals and backing or opposing specific candidates, this timely case is a valuable lesson in both ecclesiology and coverage. It strongly suggests that when churches and their representatives engage in political activities, the very steps they take to try to protect themselves from improperly injecting the church too directly into politics, such as disclaimers and official statements of political neutrality, may simultaneously remove the resulting actions of church members and officials from liability coverage.]

UIM OTHER INSURANCE CLAUSE ENFORCEABLE IF CLAIMANT HAS SUFFICIENT AVAILABLE INSURANCE

The Eastland Court of Appeals recently affirmed judgment in favor of an auto insurer enforcing the "other insurance" clause in its UIM coverage. In *Elwess v. Texas Farm Bureau Mut. Ins. Co.*, 11-15-00286-CV, 2017 WL 6559654 (Tex. App.—Eastland Dec. 21, 2017, no pet. h.) (slip copy), Elwess, the claimant injured in an auto accident, recovered the $25,000 liability limit of the driver who hit him, and then recovered a $70,000 settlement from the UIM coverage covering the vehicle he was driving, which was owned and insured by his employer. He then sought to recover an additional $50,000 in UIM benefits from his own personal auto policy.

The UIM endorsement in his personal policy contained an "other insurance" clause which stated that with respect to vehicles not owned by the insured, it was excess over any other collectible insurance. Elwess argued that such clauses are invalidated as a matter of law and public policy by the Texas Insurance Code and Texas court opinions (including *Ranzau* and *Stracener*). The court recognized that public policy requires the claimant to have sufficient insurance available to cover his actual damages, but noted in this case, the parties stipulated Elwess's actual damages were $77,505 – less than the total amount he had already recovered from the tortfeasor's liability coverage and his employer's UIM coverage. The court observed that under these circumstances, the other insurance clause was valid, the claimant's damages had been fully compensated, and his personal carrier owed nothing. In other words, there is no public policy that requires courts to disregard the clear terms of policy to allow a claimant to recover a windfall above his actual damages.

LIMITS SETTLEMENT WITH ADVERSE CARRIER IS NOT A JUDGMENT, EVEN WHEN UIM CARRIER CONSENTS

In *Adedpipe v. Safeco Ins.*, No. 4:17-CV-347, 2018 WL 295428 (E.D. Tex. Jan. 4, 2018) (slip copy), a federal district judge in Sherman recently confirmed existing Texas law holding that the mere fact of a UIM carrier's consent to a settlement for the limits of the tortfeasor's policy does not convert the settlement into a judgment demonstrating that the claimant is "legally entitled" to more than the adverse limits. The injured claimant settled for the $30,000 limit of the tortfeasor's policy and did so with Safeco's approval and consent. Safeco then denied his UIM claim. When he sued Safeco for UIM benefits (and alleged various Insurance Code violations), the court granted Safeco's motion to dismiss. The court's message was clear that UIM claimant should go get an excess judgment from the tortfeasor, and then re-file. Of course, having released the tortfeasor, this is probably no longer possible for the

claimant.

[Editor's Note: The lesson here is that the UIM carrier may approve and consent to a limits settlement, and still demand full compliance with the policy condition that the claimant demonstrate he is legally entitled to more money from the tortfeasor. In some claims, this means obtaining a ***judgment*** against the tortfeasor, not a settlement. Thus, a claimant with damages exceeding the tortfeasor's liability limit is ill-served by settling for less than the amount of his damages and releasing the tortfeasor if he wants to recover additional sums from his own UIM carrier. Results may vary depending on how compelling the evidence is, but when in doubt, policyholders should not sign away their opportunity to recover an excess judgment against the tortfeasor.

FORT WORTH FEDERAL JUDGE SUMMARILY DISMISSES EXTRA-CONTRACTUAL CLAIMS IN MULTIPLE WIND/HAIL SUITS

Federal District Court Judge John McBryde of the Fort Worth Division recently granted the latest in a string of dismissals in favor of insurance carriers in residential wind/hail suits with formulaic cookie-cutter petitions against the carriers. In *Fernandez v. Allstate Texas Lloyds*, 4:17-CV-729-A, 2017 WL 6514684 (N.D. Tex. Dec. 19, 2017) (slip copy), Judge McBryde found improper joinder and dismissed the individually named adjuster, preventing a remand. After requiring the plaintiffs to amend their complaint to meet federal pleading standards, he then granted Allstate's motion to dismiss all extra-contractual claims, observing that the amended complaint did not allege any independent injury and at best alleged only a disagreement on the amount of money needed to repair the roof.

Similarly, Judge McBryde denied a motion to remand and dismissed an individual adjuster based on improper joinder in *5857 Park Vista, LLV v. United States Liability Insurance Company, et al*., No. 4:17-CV-818-A, 2017 WL 6210829, (N.D. Tex. December 7, 2017). Here, the court identified this case as one in "a long line" of cases in which a plaintiff attempted to join as a defendant an insurance adjuster or other non-diverse party in an effort to defeat removal jurisdiction. Plaintiff asserted the adjuster was liable for Texas Insurance Code violations, but failed to provide the court any facts to support the claims made in its petition. While liability for a violation of § 541 may extend to an adjuster who undertakes a proscribed settlement practice, mere nonpayment by the insurer of a claim cannot, by itself, create liability for the adjuster who handles the claim. Judge McBryde pointed out conclusory allegations of legal violations will not suffice, and a plaintiff "must spell out the who, what, when, where, and how" of the purported violations. Accordingly, the court concluded the adjuster was improperly joined to prevent the court from obtaining jurisdiction, and that the adjuster's citizenship should be disregarded for purposes of determining subject matter jurisdiction. The court dismissed the adjuster from the action, and denied the motion to remand.

[Editor's Note: In recent years, many federal judges have taken an increasingly lenient position on whether the facts alleged in a petition are sufficient to support Insurance Code claims against an individual adjuster. Thus, preemptive removals to federal court have become a less reliable tactic for carriers, and policyholders' motions to remand have been regularly granted by some Texas Federal Courts. These cases from Ft. Worth demonstrate the importance of knowing the history of the federal judges in the area where cases are filed which might be removable to federal court otherwise.]