Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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U.S. DISTRICT COURT ADDRESSES INSURANCE ADJUSTER'S LIABILITY FOR ALLEGED UNFAIR SETTLEMENT PRACTICES

Last week, the United States District Court for the Western District of Texas held that Texas Insurance Code Section 541.060(a)(2) (failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement) is ambiguous with respect to the issue of whether insurance adjusters can be held individually liable under the Section, but the Court refrained from deciding the issue and resolving the Fifth Circuit court split on the issue. In *Shrimad Holdings, L.P. d/b/a Quality Inn & Suites v. Seneca Insurance Co. and David Carberry*, No. 1:17-cv-968-RP, 2018 WL 1635655 (W.D. Tex. [Austin Division] March 04, 2018, mem. op.), one of Quality Inn & Suites' hotels was damaged in a storm. Quality Inn subsequently filed suit alleging that its insurer, Seneca Insurance Company, and Carberry, the adjuster, violated Texas Insurance Code Section 541.060(a)(2) by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of Quality Inn's insurance claim in which liability had become reasonably clear. Seneca removed the case to the U.S. District Court for the Western District of Texas, Austin Division. Seneca was not diverse from Carberry, but it contended that insurance adjusters, like Carberry, cannot be held liable under Section 541.060(a)(2) and, thus, Carberry was improperly joined in the suit and removal was proper because Seneca and Quality Inn were diverse. In response, Quality Inn filed a motion to remand the cause to Texas state court.

In support of its position, Seneca cited decisions of the Northern and Southern Districts of Texas holding that insurance adjusters cannot be held liable under Section 541.060(a)(2) because adjusters do not have settlement authority on behalf of the insurer. In opposition, Quality Inn cited decisions of the Northern, Southern, and Western Districts of Texas holding that insurance adjusters can be held liable under Section 541.060(a)(2) because adjusters have the ability to affect or bring about the settlement of a claim.

Instead of resolving the circuit court split, United States District Judge Robert Pitman concluded that "[b]oth the quantity of decisions on each side of this issue and the quality of analysis favoring each conclusion are evidence that reasonable jurists can disagree on the provision's scope, [and] there is thus an ambiguity with respect to the question of whether Section 541.060(a)(2) applied to Carberry." Because ambiguities are construed against removal and in favor of remand, the court – "for the purpose of deciding Quality Inn's motion to remand" – held that Section 541.060(a)(2) applied to Carberry. As such, the parties lacked complete diversity and the case was remanded to Texas state court, without a resolution of the circuit court split and without a decision on whether claims against insurance adjusters under Section 541.060(a)(2) are actionable.

COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT FINDING INSURED FAILED TO PRODUCE EVIDENCE THAT LOSS OCCURRED DURING POLICY PERIOD

Last week, the Court of Appeals of Texas, Corpus Christi, affirmed summary judgment in favor of Texas Farm Bureau Underwriters on the grounds that there was no evidence that the loss occurred during the policy period. In *Schrader v. Texas Farm Bureau Underwriters*, No. 13-17-00309-CV, 2018 WL 1633575 (Tex. App.—Corpus Christi, April 05, 2018, mem. op.), two of Schrader's farming tractors were stolen sometime between November 30, 2013 and December 13, 2013 – according to Schrader's affidavit testimony. The farming tractors were insured under a policy with Texas Farm Bureau Underwriters ("TFB") until the policy was cancelled effective 12:01 a.m. on December 05, 2013 due to Schrader's failure to pay the premium. Schrader made a claim for his stolen tractors, which was denied by TFB on the grounds that the policy was not in force for the date of loss. Schrader subsequently sued TFB for refusing to cover the losses. TFB moved for traditional and no-evidence summary judgment, which the trial court granted.

On appeal, Schrader argued that a lapse in coverage on December 05, 2013, did not entitle TFB to summary judgment because his affidavit testimony, in which he stated that he last saw the tractors on November 30, 2013 and the tractors were stolen sometime between that day and December 13, 2013, created a fact issue as to whether his loss occurred before the policy was cancelled. The court disagreed and affirmed summary judgment. The court relied on the rule that "an inference is not reasonable if it is based only on evidence that is susceptible to multiple, equally probable inferences, requiring the factfinder to guess in order to reach a conclusion." With the rule in mind, the court reasoned that although Schrader's statement may [have] support[ed] a finding that the tractors were stolen sometime between November 30 and December 13, it [did] not support a reasonable inference that the tractors were stolen before 12:01 a.m. on December 5, because it [was] at least equally probable that the tractors were stolen after that time. The court further reasoned that Schrader's affidavit testimony did "no more than create a mere surmise or suspicion that the tractors were stolen during the policy period." Accordingly, the court held that Schrader did not produce more than a scintilla of evidence supporting his claim that the loss occurred during the policy period, and that summary judgment was proper on that basis.

COURT OF APPEALS HOLDS THAT INSURED'S DISCOVERY REQUESTS SEEKING INFORMATION ABOUT SIMILARLY-SITUATED THIRD-PARTY-INSUREDS WERE IMPROPER

Last week, the Court of Appeals of Texas, San Antonio, held that the insured's discovery requests to Allstate, which sought documents and information about similarly-situated third-party-insureds, were overbroad and not reasonably calculated to lead to the discovery of admissible evidence. In *In re Allstate Insurance Co.*, No. 04-18-00060-CV, 2018 WL 1610927 (Tex. App.—San Antonio, April 04, 2018, mem. op.), Brian Jones' property sustained damage in an April 2016 hailstorm, and he subsequently made a claim with his insurer, Allstate, for replacement of his roof. Allstate paid for some but not all of the alleged damage and, therefore, Jones sued Allstate alleging breach of contract and violations of the Texas Insurance Code. Then, Jones served Allstate with the following request for production and interrogatory:

Produce any and all documents, relating to or arising out of any and all claims filed by your insured(s) and/or paid by you arising out of the hail storm(s) on or about April 2016, within a 5 mile radius of 103 Tabard Dr. San Antonio, Texas 78213.

Please state the address, name, and telephone number of every insured of you [sic] within a 5 mile radius of 103 Tabard Dr., San Antonio, Texas 78213 in which you paid for any damage relating to the event, resulting out of a litigation, mediation, claim, or otherwise.

Allstate objected to the requests on various grounds, but the trial court overruled the objections. On mandamus, the court held that the requests were overbroad and not reasonably calculated to lead to the discovery of admissible evidence. The court relied on *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014), where the Texas Supreme Court stated that it "fail[ed] to see how National Lloyds' overpayment, underpayment, or proper payment of the claims of unrelated third parties is probative of its conduct with respect to [the plaintiff-insured's] undervaluation claims at issue" and "this is especially so given the many variables associated with a particular claim, such as when the claim was filed, the condition of the property at the time of filing (including the presence of any preexisting damage), and the type and extent of damage inflicted by the covered event." In relying on *Nat'l Lloyds*, the San Antonio Court of Appeals rejected Jones' argument that the requests were limited in scope to the April 2016 storm, to hail damage claims only, and to the location of plaintiff's house, reasoning that "such limits in and of themselves do not render the underlying information discoverable."

WESTERN DISTRICT OF TEXAS REJECTS INDEMNFICATION FOR PUNITIVE DAMAGES FROM GROSS NEGLIGENCE BY INTOXICATED DRIVER

Recently, the United States District Court for the Western District of Texas granted summary judgment in an indemnification matter addressing insurance coverage for an insured against whom punitive damages were assessed in a personal injury suit. In *Richard Brett Frederking v. Cincinnati Ins. Co.*, No. SA-17-CV-651-XR, 2108 WL 1514095 (W.D. Tex. Mar. 27, 2018), Frederking filed suit when Cincinnati denied payment as a third party beneficiary after he prevailed in a suit against Cincinnati's insured, Sanchez. The court found that Sanchez's gross negligence in driving while intoxicated and causing the underlying collision did not constitute a covered "accident" or "occurrence" as defined in the underlying policies and granted Cincinnati's summary judgment.

In September 2014, Frederking suffered serious injuries in an auto collision with Sanchez while Sanchez operated his employer's vehicle. Sanchez was arrested following the accident and eventually pled guilty to driving while intoxicated. Frederking sued Sanchez and Sanchez's employer, Advantage Plumbing, for negligence, gross negligence, respondeat superior and negligent entrustment. Cincinnati Insurance defended Sanchez and Advantage Plumbing under a reservation of rights and the trial court eventually granted Advantage Plumbing summary judgment on the claims of respondeat superior as Sanchez was not acting in the course and scope of his employment at the time of the accident. The jury ultimately found Sanchez negligent and grossly negligent for his actions and Advantage Plumbing negligent under the theory of negligent entrustment. The jury awarded Frederking both compensatory and punitive damages.

After unsuccessfully attempting to collect the punitive damages from Cincinnati, Frederking filed this action for breach of contract on the underlying policy. Cincinnati denied Sanchez was operating the vehicle with Advantage Plumbing's permission at the time of the accident and denied its obligation to pay the punitive damages under the policy. Cincinnati filed summary judgment asserting it had no duty to indemnify Sanchez for the remaining punitive damages.

The court noted an insurer's duty to indemnify is triggered by the underlying facts of a loss event and in determining whether the damages established at trial are covered by the policy terms, the court considers: (1) whether the language of the policy covered the exemplary damages; and (2) if coverage is established, whether public policy allows or prohibits coverage based on the underlying facts, including legislative provisions.

Reviewing the policy language, the court found Sanchez's collision was the natural and expected result from a driver operating a vehicle while intoxicated and therefore did not constitute a covered "accident" or "occurrence" under the policies. The policies at issue did not define accident specifically (other than as a continuous or repeated exposure to conditions resulting in bodily injury or property damage) therefore the court applied the term's plain meaning. Accordingly, the court followed established jurisprudence finding a deliberate act or an act where the resulting damage is the natural and expected result from an insured's actions does not constitute an "accident." The court concluded that Sanchez intentionally became intoxicated and operated a vehicle and therefore the ordinary events stemming from those actions did not constitute an "accident" or "occurrence" under the policies. Ultimately, the court held, because Cincinnati was only required to indemnify for an "accident" or "occurrence," Cincinnati had no duty to indemnify for the

punitive damage awards and granted Cincinnati's summary judgment.

SOUTHERN DISTRICT OF TEXAS DENIES INSURER'S SUMMARY JUDGMENT WHILE DEFINING SCOPE OF SETTLEMENT AGREEMENT

Recently, the United States District Court for the Southern District of Texas addressed the scope of a settlement agreement between and insurer and insured; resolving if the agreement covered one, or multiple lawsuits. In *Bazan v. State Farm Lloyds*, No. 7:17-CV-00402, 2018 WL 1518552 (S.D. Tex., Mar. 28, 2018), Bazan filed two lawsuits relating to two losses to the same property. Upon settlement and release, there was dispute as to whether the agreement released all claims, or just those regarding the first loss (and lawsuit). The court found that the language of the agreement applied only to the first lawsuit and denied State Farm's motion for summary judgment on the second suit.

Bazan allegedly suffered property damage in two separate storms, the first on March 26, 2016 and the second on May 31, 2016. Following the first storm, State Farm inspected the property, found damage amounting to $1,441.45, and did not issue payment as the amount was less than Bazan's deductible. In November 2016, Bazan's counsel issued a demand letter to State Farm supported by a $22,439.82 adjustment. One week later, Bazan filed suit on the claim.

The second storm occurred on May 31, 2016, which State Farm assessed the replacement cost value as $9,708.75. Subtracting the deductible and depreciation, State Farm issued payment in the amount of $2,528.33 and approved complete replacement of the roof. Thereafter, State Farm issued a supplemental payment of $2,496.77. In September, counsel for Bazan again issued demand on the claim for the same $22,439.82 adjustment, but for the May storm. While the second claim was open, but prior to issuing demand, Bazan proceeded to file suit.

In between suits, the parties entered into a settlement agreement disposing of the first suit. After Bazan filed the second suit, State Farm filed summary judgment alleging that the settlement disposed of both suits. Reviewing the terms of the agreement, the court disagreed. The court noted that, as an affirmative defense, a release is subject to contractual construction which, in considering the four corners of the underlying agreement, addressed only the first lawsuit. The agreement failed to mention the second suit, and although the second suit did not exist at the time of the agreement's execution, the second claim did, therefore the absence of any referencing language to the second claim was clear evidence that the agreement only intended to settle the first lawsuit. Notably, the court commented that, even with the expansive language provided within a settlement and release, the specific defining language of "Insurance Claim" and "Underlying Lawsuit," addressed the claims relating to the first suit, thereby precluding the May storm claims and the resulting second lawsuit. As a result, the court denied State Farm's summary judgment and associated alternate request to abate.