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NORTHERN DISTRICT OF TEXAS CONSIDERS EXTRINSIC EVIDENCE IN FINDING NO DUTY-TO-DEFEND SUIT TO WHICH NO COVERAGE APPLIES

Last week, the Northern District of Texas held that State Farm Lloyds did not have a duty to defend its insured, finding that the relevant policy provision – unlike those typically at issue in Texas cases where the duty to defend is defined more broadly – required a duty to defend only if suit was brought to which coverage applied. In *State Farm Lloyds v. Richards*, No. 4:17-CV-753-A, 2018 WL 2225084 (N.D. Tex. [Fort Worth Division] May 15, 2018, mem. op.), ten-year-old Jayden died operating an off-road all-terrain vehicle ("ATV") while in the care of his grandparents (pursuant to a child custody court order). Jayden flipped the ATV while driving near, but not on, the premises of the grandparents' residence. Jayden's parents brought suit against the grandparents alleging they were negligent in allowing Jayden to operate the ATV without a helmet or safety gear and without instruction or supervision. The grandparents made a demand on State Farm to defend and indemnify them under their homeowners policy with State Farm. In response, State Farm filed a declaratory action and sought declaration that it did not have a duty to defend or indemnify them.

The insurance policy provided, in part, that "if a claim is made or a suit is brought against an insured for damages because of bodily injury to which this coverage applies, caused by an occurrence, State Farm will pay up to its policy limits of liability for the damages for which the insured is legally liable and will provide a defense at its expense."

In analyzing the case, the court noted that the grandparents' policy with State Farm was unlike those typically at issue in Texas cases. That is, typically the duty to defend is defined more broadly than the duty to indemnify, requiring the insurer to defend any suit brought against its insured even if the allegations of the suit are groundless, false or fraudulent. In those cases, courts rely upon the language of the pleadings and the insurance policy, and do not go outside, to determine the duty to defend (eight-corners or complaint-allegation rule).

In the case at hand, though, the court found, based on the policy's provision, that the duty to defend arose only if suit was brought to which coverage applied, and the policy did not require State Farm to defend all actions against its insureds. Consequently, the court found that it was not restricted by the eight-corners rule and relied on the grandparents' admissions in their discovery responses that Jayden was off their premises when the accident occurred. Accordingly, the court held that State Farm had no duty to defend because occurrences "off an insured location" were excluded from coverage.

AMARILLO COURT OF APPEALS FINDS NO "MISTAKE OF FACT" UNDERLYING UMPIRE'S APPRAISAL-DECISION, AND DENIES INSURED'S MOTION TO VACATE UMPIRE'S AWARD AND APPOINT A NEW UMPIRE

Last week, the Amarillo Court of Appeals denied the insured's motion to vacate the umpire's appraisal-decision and appoint a new umpire, holding that a disagreement between the appraisers did not constitute a "mistake of fact" resulting in an unintended award. In *Abdalla v Farmers Insurance Exchange*, No. 07-17-00020-CV, 2018 WL 2220269 (Tex. App.—Amarillo, May 14, 2018, mem. op.), the insured's residence sustained water damage, which was covered under his insurance policy with Farmers Insurance Exchange ("Farmers"). However, the extent of the damage and insurance proceeds payable was disputed and submitted to appraisers in accordance with the policy's terms, and then to an umpire appointed by the trial court. Subsequently, the umpire found that the appraisal made by Farmers' appraiser was the "more sound and well supported appraisal" and designated a certain amount as the actual cash value of the insured's loss, which Farmers tendered. Nevertheless, the insured believed that the umpire's award was a product of "mistake" and he moved the trial court to vacate the award and appoint a new umpire. The insured's allegation of "mistake," though, was simply that there was a disagreement between the appraisers about the extent of water damage and the ultimate award of damages omitted damages that the insured's appraiser thought should have been included.

The court observed that Texas courts have recognized three grounds on which the results of an otherwise binding appraisal may be set aside: when the award (1) fails to comply with the policy, (2) was made without authority, or (3) resulted from fraud, accident, or mistake. "Mistake" applies when the complainant establishes that the appraisers were operating under a mistake of fact which resulted in an unintended award. In the case at hand, the court, noting that a split of opinions between the appraisers was precisely what the umpire was called upon to settle, concluded that the disagreement between the appraisers "fell short of illustrating the umpire operated under a mistake of fact resulting in an unintended award." Accordingly, the court denied the insured's motion to vacate.

INSURER'S PRE-SUIT COMMUNICATIONS AND POST-SUIT REQUEST FOR STATUS UPDATE TO COMPLAINANT-PLAINTIFF'S COUNSEL DID NOT BAR THE INSURED'S DEFENSE OF LIMITATIONS

Last week, the Fort Worth Court of Appeals concluded that Travelers' pre-suit communications and post-suit request for status update to third-party complainant-plaintiff did not bar the insured's defense of statute of limitations. In *Woods v. Soules*, No. 02-17-00336-CV, 2018 WL 2248488 (Tex. App.—Fort Worth, May 17, 2018, mem. op.), Mr. Woods was driving his motorcycle when Mr. Soules, driving a commercial truck, allegedly failed to yield the right of way causing Mr. Woods to crash his motorcycle. The accident occurred on August 22, 2014. Mr. Woods filed suit on February 21, 2017, after the expiration of the statute of limitations. As such, Mr. Soules moved for summary judgment on his affirmative defense of limitations. In response, Mr. Woods contended that the doctrines of equitable estoppel and waiver barred Mr. Soules from asserting the defense of limitations. That is, Mr. Woods contended that Mr. Soules' insurer, Travelers, induced him into delaying filing suit beyond the statute of limitations (equitable estoppel) and engaged in conduct inconsistent with the assertion of a limitations defense (waiver).

In support of his theory of equitable estoppel, Mr. Woods relied on the fact that the Travelers' adjuster told Woods' counsel that Travelers had accepted liability and the adjuster informed Woods' counsel that Travelers would need Woods' medical bills and records or a medical release to obtain his bills and records. On appeal, the court held that Mr. Woods did not raise a genuine issue of material fact in support of his theory of equitable estoppel, and affirmed the trial court's order granting summary judgment if favor of Mr. Soules. The court reasoned that (1) no communications or conversations occurred between Woods' counsel and any Travelers' representative between June 2016 and when the statute of limitations ran, and (2) Travelers did not pay Woods' bodily injury claim or send any type of written acceptance of liability for Woods' bodily injury claim. The court further reasoned that "although Travelers had paid Woods' property damage claim and was working with Woods' counsel to collect information regarding Woods' medical expenses, no summary judgment evidence existed that these communications contained false facts or concealed material facts.

In support of his theory of waiver, Mr. Woods relied on the fact that Travelers requested a status update from Woods' counsel after the statute of limitations expired. According to Mr. Woods, the request for a status update was inconsistent with Travelers' subsequent assertion of limitations and indicated the intent on the part of Travelers to waive the defense of limitations. On appeal, the court noted that no case law supported Mr. Woods' contention (i.e. "Travelers' single incident of post-limitations conduct—requesting a status update—constitute[d] conduct clearly demonstrating . . . an intent to waive the affirmative defense of limitations") and affirmed the trial court's order granting summary judgment in favor of Mr. Soules.