Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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## FEDERAL COURT GIVES GUIDANCE ON DISMISSING ADJUSTER AND REMOVING UNDER CHAPTER 542A

In the wake of last year's amendment of the Texas Insurance Code to add Chapter 542A, litigants and courts have worked to determine the correct procedural approach for an insurer to accept the liability of its adjuster and remove an otherwise non-removable case to federal court. At least one federal court in the Southern District has previously rejected a method consisting of first moving for dismissal of the adjuster in state court, and then removing the case after the non-diverse defendant is dismissed. *See Massey v. Allstate Veh. and Prop. Ins. Co.,* No. H-18-1144 (S.D. Tex. May 16, 2018) (slip op.)

Last week, in *Electro Grafix, Corp. v. Acadia Ins. Co.,* SA-18-CA-589-XR, 2018 WL 3865416 (W.D. Tex. Aug. 14, 2018) (slip op.), a Western District court provided more definitive procedural guidance to successfully removing a case under 542A. There, Acadia issued a notice under 542A accepting its adjuster's liability as soon as it received the plaintiff's pre-suit demand, and before it had been served with suit. As soon as Acadia was served, it removed the suit to federal court, alleging the adjuster was improperly joined because its acceptance of the adjuster's liability under 542A eliminated all claims against the adjuster.

The plaintiff objected and argued the court could not consider Acadia's pre-suit 542A acceptance because it was outside the four corners of the pleadings. The court admitted that in the first instance, the court ordinarily conducts a 12(b)(6) type analysis which examines the face of the pleadings. However, in certain cases, the court may also, in its discretion, pierce the pleadings and conduct a summary inquiry. The court opined this was such a case. The court then took notice of the 542A acceptance, and held that in light of the acceptance, all claims against the adjuster "shall" be dismissed under state law. Therefore, because there is no reasonable basis of recovery against the adjuster under state law, the adjuster was improperly joined. The court then dismissed the improperly joined adjuster and denied the plaintiff's motion to remand.

**Editor's Note:** This case provides guidance to Texas litigants strongly suggesting that at least one correct way (perhaps not the only correct way) to accomplish the dismissal of an adjuster and removal of the suit under 542A is to give notice of acceptance as soon the carrier becomes aware of the suit, and once served, immediately remove the suit on an improper joinder basis, without conducting any motion practice in state court. As a matter of practice, it is likely advisable to ensure the 542A notice of acceptance is an exhibit to both the carrier's notice of removal and to any answer filed in any court.

## TEXARKANA COURT LOOKS TO FACTS TO DETERMINE DUTY TO DEFEND, APPLIES MENCHACA TO DISMISS EXTRA-CONTRACTUAL CLAIMS

The Texarkana court of appeals recently conducted a textbook duty-to-defend analysis under a CGL policy, highlighting the importance of focusing on the factual allegations showing the origin of the damages, rather than the legal theory of recovery. In *Bush Constr., Inc. v. Texas Mut. Ins. Co*., No. 06-18-00021-CV, 2018 WL 3862859 (Tex. App.—Texarkana Aug. 15, 2018) (slip op.), the insured's employee was injured on the job while using a piece of equipment designed and maintained by the insured. The claimant asserted a cause of action against his employer under the Federal Employers' Liability Act (FELA), which was expressly excluded from coverage, but the insured argued that because he had also asserted a cause of action for products liability, which was not excluded, the carrier must defend the whole suit. The court cut through the legal theories and looked at the alleged facts, which made clear the claimant was injured while he was performing work subject to the FELA, which barred coverage for all his damages, regardless of the theory of recovery.

After concluding the carrier had no duty to defend and therefore had not breached its contract, the court went on to dismiss the insured's extra-contractual claims. The court applied the Texas Supreme Court's recent holding in *USAA Texas Lloyds v. Menchaca* to conclude that the lack of coverage for the claim barred all extra-contractual causes of action. The insured argued its claims for unfair claim settlement practices under Texas Insurance Code Chapter 541 were not coverage-dependent, but the court once again relied on *Menchaca* to reject this proposition.

**Editor's Note:** The court did not mention the body of Texas law holding that common-law and statutory claims for bad faith are simply not recognized by Texas law in the context of third-party claims under liability policies. This is likely because this claim consisted solely of the insured's demand to recover its own defense costs incurred in the underlying suit after the carrier withdrew its defense, which is functionally a first-party claim (i.e., it is payable to the insured) even though it is asserted under a liability policy. A claim for indemnity, which is a pure third-party claim, would not have been controlled by *Menchaca*. Meanwhile, *Menchaca*

continues to be applied often by both state and federal courts in first-party cases for the proposition that in virtually all fact scenarios, lack of coverage defeats all extra-contractual claims.