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TEXAS INSURANCE LAW NEWSBRIEF

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FIFTH CIRCUIT ANNOUNCES "APPROPRIATE" RULE IN DETERMINING THE NUMBER OF "ACCIDENTS" UNDER INSURANCE POLICY - HOLDS THREE COLLISIONS CAUSED BY A RUNAWAY MACK TRUCK CONSTITUTED A SINGLE "ACCIDENT"

In a recent dispute between a primary liability insurer and an excess liability insurer over the number of "accidents" that occurred under the primary insurance policy, the Fifth Circuit Court of Appeals held that three collisions caused by a runaway Mack truck constituted a single "accident." In *Evanston Insurance C. v. Mid-Continent Casualty Co.*, No. 17-20812, 2018 WL 6037507 (5th Cir. November 19, 2018, mem. op.), in Houston, Texas, the driver of a Mack truck caused a series of collisions resulting in his death and the death of another driver, as well as injuries to the other motorists involved. The accident occurred when the insured vehicle, a Mack truck, struck a Honda Accord that was waiting in line at a toll plaza and pushed the Accord forward more than one hundred feet into the barrels separating two toll lanes. After that, the Mack truck continued to travel through the automatic toll lane for approximately sixty-six feet and struck a Dodge Charger. While traveling through the lane, the Mack truck struck the tollbooth and continued pushing the Charger until it pinned the Charger between the Mack truck and the retaining wall.

Subsequently, the occupants of the Accord and the family of the decedent-driver of the Charger brought suit against the owner of the Mack truck. Also, Harris County made demands for the cleanup and repair of the toll plaza.

The owner of the Mack truck held a primary commercial automobile insurance policy from Mid-Continent Casualty Company ("Mid-Continent") with a $1 million per-accident liability limit, and an excess policy with Evanston Insurance Company ("Evanston") with a $5 million per-accident limit. Mid-Continent's primary policy defined "accident" to include "continuous or repeated exposure to the same conditions resulting in bodily injury or property damage." The policy further provided that "[r]egardless of the number of covered autos, insureds, premiums paid, claims made or vehicles involved in the accident, the most [Mid-Continent] would pay for the total of all damages . . . resulting from any one accident [was] the [policy limit of $1 million]."

Mid-Continent, having concluded that the series of collisions was a single "accident," contributed $1 million to settle all claims and then asserted exhaustion of its policy limit and withdrew from litigation. Evanston, having concluded that each separate impact between the Mack truck and the vehicles and toll booth constituted separate accidents subject to separate liability limits, contributed $5.6 million to settle all claims and then filed suit against Mid-Continent seeking reimbursement and defense costs.

The Fifth Circuit held that there was one "accident" under the policy. In doing so, the court clarified previous Texas case law on the issue and pronounced the "appropriate" rule. The court concluded that there is a single "accident" when "there [is] one proximate, uninterrupted, and continuing cause which result[s] in all of the injuries and damage." There are multiple "accidents" when "the chain of proximate causation [is] broken by a pause in the negligent conduct or by some intervening cause, even if the insured's negligent conduct which caused each of the injuries was the same kind of negligent conduct." In the case at hand, the court reasoned that there was no indication that the driver of the Mack truck regained control of the truck or that his negligence was otherwise interrupted between collisions. Stated differently, "all of the collisions resulted from the same continuous condition – the unbroken negligence of the Mack truck driver."

TEXAS APPELLATE COURT ADDRESSES CONCLUSORY EXPERT REPORTS AND SEGREGATION OF STORM DAMAGES IN AFFIRMING INSURER/ADJUSTER SUMMARY JUDGMENT

Recently, the Texas Court of Appeals in Fort Worth addressed the topics of conclusory expert reports and segregation of damages in evaluating a first-party insurance action in *Richard Seim and Linda Seim v. Allstate Texas Lloyds and Lisa Scott*, No. 02-16-00050-CV, 2018 WL 5832106 (Tex. App.—Fort Worth, Nov. 8, 2018). The underlying suit related to Allstate's denial of the Seims' claim for storm damage to their home. The trial court ultimately granted Allstate and Scott's motion for summary judgment, and the Seims appealed up to the Texas Supreme Court. The Texas Supreme Court remanded the case and the Fort Worth court was tasked with determining—based on issues not previously addressed—whether the trial court was correct in granting Allstate and Scott's summary judgment. The issues in the summary judgment were twofold: (1) no evidence existed that the damage claimed was solely attributable to an August 2013 storm and not due to other causes (including previous storms); and (2) no evidence existed segregating the damage to the home sustained in the August 2013 storm as opposed to damage sustained by uncovered perils including previous storms.

The court began by recounting the procedural history of the Seims' suit: the original claim was for damage to the home sustained in an

August 2013 storm. Allstate sent Scott, an adjuster, to inspect the damage and Scott concluded that, although the home had interior water damage, there was no evidence of wind or hail damage to the roof. Because the Seims' policy only provided coverage for interior water damage if there was an opening in the roof caused by wind or hail, Allstate denied the claim.

The Seims filed suit and amended their pleadings three times with a wide variety of causes of action and factual assertions. Initially, the Seims complained of Allstate's handling of their initial claim for damage sustained from the August 2013 storm. The Seims then amended their petition, complaining of Allstate's handling of a different claim for damage sustained in a storm in April 2007. None of the amended claims were predicated on the claims relating to the August 2013 storm. The Seims then amended their petition again, this time adding Scott as defendant, and also complained of the April 2007 storm handling. Additionally, the second amended petition complained of Allstate's handling of two other claims, one for damage from a storm in April 2008 and the other for damage from a May 2012 storm. Again, none of additional claims were predicated on the claims relating to the August 2013 storm.

Allstate and Scott filed various motions for summary judgment and the Seims amended their petition for a third time, this time complaining exclusively of the handling of the August 2013 storm and deleting the claims stemming from the three other storms. They explained that they had made all of the repairs relating to the first three storms and had no water intrusion in the twelve months prior to the August 2013 storm. Allstate and Scott then filed a no evidence and traditional motion for summary judgment as to the claims in the Seims' third amended petition which the trial court granted and the Seims appealed.

Among the two remanded issues, the first centered on the report by the Seims' expert, Neil Hall and the statements made therein. Hall issued a report based on a July 2014 inspection concluding "it is difficult to determine what part and how much of the roof assembly and radiant barrier were damaged…[h]owever, clearly some of the damage described by Mrs. Seim occurred prior to the August 13, 2013 date of loss." Hall further commented that the insurer did not properly investigate and identify the damage. He then issued a supplemental report prepared on November 24, 2016—when the Seims amended their complaint for the third time to remove all claims with the exception of those related to the August 2013 storm. In the supplemental report, Hall changed his opinion, indicating that the damage observed was solely from the August 2013 storm and omitted important facts from his previous report including his determination that some of the damage occurred from previous storm events. The supplemental report further concluded that the interior damage observed was from the August 2013 storm, but offered no explanation of how it happened from a covered peril (without roof damage). Based on these statements, the court concluded that the report and the supplement were merely "bare, baseless (and contradictory) opinions that fail to link conclusions to the facts" and the Seims provided no evidence that the damage was caused bv or solely attributable to a covered peril.

The second summary judgment issue (alternatively) centered on the segregation of damages between the claimed storms. At the outset, the court concluded that the doctrine of concurrent causation was triggered. However, the Seims failed to provide any evidence segregating the damage attributable to the 2013 storm with that sustained in prior storms or other uncovered perils. Specifically, the court found "there is no evidence that the Seims' roof was visibly damaged after the August 2013 storm in a way that it was not before." Although Mrs. Seims commented that she "noticed new leaks" after the August 2013 storm, the court concluded that a report of new leaks did not establish new damage. Accordingly, court upheld the trial court's granting of summary judgment to Allstate and Scott finding the breach of contract claims failed on no-evidence grounds, and as a result, summary judgment on the extra-contractual claims was also proper.

Editor's Notes: Prior to remand, the Texas Supreme Court addressed the Seims' appellate points as to Allstate's objection to the Seims' summary judgment evidence as well as Allstate's issue preservation. The Court concluded that, because Allstate failed to obtain a ruling from the trial court on certain objections to the Seims' affidavits, the lower courts erred in failing to rule on the objections as they relate to form versus substantive deficiencies. The court therefore remanded the case back to the appellate court for consideration—giving rise to the foregoing decision.

TEXAS COURT OF APPEALS CONCLUDES THAT INSURER WAIVED RIGHT TO ENFORCE ANTI-ASSIGNMENT CLAUSE

Last week, the Court of Appeals of Texas, Houston Division, concluded that Safeco Insurance Company waived its right to enforce policy's anti-assignment clause. In *Safeco Insurance Co. v. Clear Vision Windshield Repair, LLC*, No. 14-17-00103-CV, 2018 WL 6175914, (Tex. App.—Houston [14th Dist.] November 27, 2018, mem. op.), Clear Vision repaired chips in the windshields of automobiles owned by four of Safeco's insureds. Each of the insureds' policies contained an anti-assignment clause which provided that their "rights and duties under the policy may not be assigned without [Safeco's] written consent." Without Safeco's written consent, all four of the insureds signed documents assigning to Clear Vision their right to payment for the windshield repairs, as well as their causes of action in the event Safeco failed to pay for the repairs. After Clear Vision completed the repairs, it submitted invoices to Safeco seeking payment for the repairs. However, Safeco failed to timely pay three of the invoices and rejected the fourth invoice. Consequently, Clear Vision sued Safeco for breach of contract. A bench trial was held and the trial court entered a final judgment in favor of Clear Vision, finding that Safeco waived enforcement of the anti-assignment clauses.

On appeal, Safeco unsuccessfully challenged the legal and factual sufficiency of the evidence supporting the trial court's waiver finding. The Court of Appeals held that there was legally and factually sufficient evidence of waiver because (1) Safeco paid three of the invoices; (2) Safeco rejected the fourth invoice based on the fact it did not include sales tax, not based on a lack of written consent by Safeco to the assignment; (3) Safeco did not inform Clear Vision or the insureds that it considered the signed assignments to be void until it made such arguments during litigation; (4) Clear Vision had previously billed Safeco for approximately 2,500 windshield repairs and Safeco paid eighty-five percent of the invoices, and for the fifteen percent of invoices that were not paid, Safeco never gave the anti-assignment clause as the reason for non-payment; and (5) Safeco never informed Clear Vision that it

needed Safeco’s written consent for any assignments of insureds' claims. The court reasoned that Safeco’s intentional conduct in paying Clear Vision for three of the invoices was inconsistent with Safeco’s later claim that it owed Clear Vision nothing because it had not consented to any assignment. The court further reasoned that Safeco’s delay in asserting its anti-assignment right, and failure to previously assert the right, showed Safeco’s intention to waive that right.