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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MAY 2, 2019

JURY AWARDS DAMAGES LESS THAN INSURER'S SETTLEMENT OFFER, AND WHEN OFFSET BY INSURER'S LITIGATION COSTS - PLAINTIFFS TAKE NOTHING

The Corpus Christi Court of Appeals recently affirmed a take nothing judgment against an insurer after applying an offset for the insurer's litigation costs which exceeded the damages awarded by the jury. In *Salinas v. State Farm Lloyds,* 2019 WL 1561998 (Tex.App. – Corpus Christi April 11, 2019), Salinas sued State Farm alleging breach of contract and asserting extra-contractual claims arising from State Farm's handling of a claim for hail damage to their residence. State Farm made a $25,900 settlement offer under Texas Rule of Civil Procedure 167 back in June 2014. Then in June 2017, the jury awarded $38,163.87, which included $10,500 for breach of contract and an identical amount, $10,500 was also awarded under the Texas Deceptive Trade Practices Act (DTPA). And the balance consisted of interest, attorney fees and costs. State Farm filed a motion to modify arguing that DTPA damages were duplicative of the contract damages and that the settlement offer, made three years before under Rule 167, required the court to enter a take-nothing judgment. Following a hearing for which plaintiff's counsel was not present, the trial court agreed.

The Corpus Christi Court of Appeals conducted a two part analysis and in the first part, found that the hearing conducted without plaintiff's counsel was error. But in the second part of its analysis, the court determined that the error did not result in harm to Salinas because the trial court correctly applied the one-satisfaction rule to the damage award, disallowing the duplicate award of $10,500 under the DTPA. And, Salinas's attorney fees were $3,150 at the time the settlement offer expired in 2014. So with interest, the adjusted award was $15,345.45. And because the amount is significantly less than 80% State Farm's June 2014 Offer of Settlement made under Rule 167, State Farm was entitled to offset its own attorney fees and litigation costs totaling $31,254.35 against the jury award resulting in a take-nothing judgment. Accordingly, the court of appeals found no harm and affirmed the take-nothing judgment in favor of State Farm.

FEDERAL JUDGE REMANDS INSURANCE CASE DESPITE A PROPER SECTION 542A.006 ELECTION BY THE INSURER

Recently, an Austin federal judge remanded a case back to state court even though the insurer made an election to accept responsibility for the in-state adjuster under Section 542A.006 of the Texas Insurance Code. *River of Life Assembly of God v. Church Mutual Ins. Co*., No. 1:19-CV-49-RP, 2019 WL 1767339, (W. D. Tex. April 22, 2019), involved insurance coverage for storm damage to a church. In an attempt to avoid removal, the church filed a state court suit against its insurance company, Church Mutual, along with the adjuster that handled the claim. The individual adjuster was a Texas resident. Church Mutual availed itself of the new statutory right under Tex. Ins. Code Section 542A.006 to accept responsibility for the adjuster and removed the case. The Court addressed whether to remand the case or to keep it because the adjuster was improperly joined.

The Court noted that several cases in its circuit have found that removal is proper in these circumstances as there can be no individual liability for the adjuster if the insurance company has made an election under 542A.006. However, the Court then noted two cases that found that when the election is made after the adjuster is joined, removal is improper. The Court began its analysis by noting that the "possibility-of-recovery inquiry" is only a means to discerning whether the joinder was improper, not an end in itself. Further, the court noted the focus must remain on whether the non-diverse party was properly joined when joined. Based on that analysis, the Court found that because the election was made after the adjuster had been joined, joinder was proper at the time. Accordingly, the case was remanded back to the state court.

Editor's Note: This case illustrates the need for insurers who wish to remove cases filed in state court against them and an in-state adjuster, to: 1) make a prompt election under Tex. Ins. Code Section 542A.006 to accept responsibility for the adjuster and, 2) to get the adjuster dismissed before seeking removal to federal court. Otherwise, depending on the allegations against the adjuster, insurers may be unable to successfully remove the case based on diversity jurisdiction.

HOUSE BILL 1739 MOVES FORWARD – SET TO OVERTURN TEXAS LAW ON UM/UIM LAWSUITS

The Texas Legislature is moving forward with a new law that will have the effect of overturning *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006), which holds that an uninsured / underinsured motorist (UM/UIM) insurer has no obligation to pay policy benefits until the insured establishes legal liability and the uninsured / underinsured status of the other driver. H.B. 1739 was voted out of the House Insurance Committee on April 9, 2019, and is moving through the legislative process.

If passed, the Bill will establish that statutory notice under Texas Insurance Code 541 (Unfair Claims) and 542 (Prompt Payment of

Claims Act) for the purpose of triggering interest and attorney fees, is given when the facts of the claim are reported to the insurer. The Bill will also prohibit an insurer from requiring, as a prerequisite to asserting a claim, a judgment or other legal determination establishing the other motorist's liability or UM/UIM status. It will also bar an insurer from requiring, as a prerequisite to paying benefits under UM/UIM coverage, a judgment or legal determination of the other motorist's liability or the insured's damages before benefits are paid under the policy.

The Bill provides that prejudgment interest accrues on a UM/UIM claim on the earlier of the 180th day after the date the claimant notifies the insurer of the claim or the date on which suit is filed against the insurer. For purposes of the recovery of attorney's fees, a UM/UIM claim is presented when the insurer receives notice of the claim (defined as written notification to the insurer that reasonably informs the insurer of the facts of the claim). Lastly, after removing the prerequisites above, the Bill imposes on insurers the duty of good faith and fair dealing "once liability and damages have become reasonably clear."

Editor's Note: Currently, under *Brainard*, there is a clear line for determining when liability and damages are reasonably clear, i.e. once legal liability and damages are determined by judgment or settlement. And, under *Brainard*, insurers may abate all extra-contractual and insurance code based claims until legal liability and damages are proven. And then, insurers may avoid penalties, interest and extra-contractual liability by promptly paying policy benefits. But under HB 1739, insurers face an award of attorney fees, penalties and interest if they simply choose to defend a UM/UIM lawsuit after HB 1739 becomes law. A full copy of HB 1739 is attached. We will continue to monitor this significant Bill and report on further developments.