Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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COURT OF APPEALS HOLDS NO MEETING OF THE MINDS = NO CONTRACT DESPITE CLAIMANT'S EXECUTION OF RELEASE AGREEMENT

Last week, the Texas Court of Appeals, Houston, held that State Farm's letter to the claimant's attorney "accepting" the claimant's demand and subsequent release agreement executed by the claimant did not constitute an enforceable contract. In *Bouchra Eid v. Maria Pond*, No. 01-18-00553-CV, 2019 WL 1941348 (Tex. App.—Houston [1st Dist.], May 2, 2019, mem. op.), Bouchra Eid, her husband Maaz, and son Omar were injured when her vehicle was struck by Maria Pond's vehicle. Subsequently, the Eid's brought claims against Pond and entered into settlement negotiations with Pond's liability insurer, State Farm. More particularly, Bouchra Eid's attorney sent State Farm a letter stating:

[W]e hereby request a settlement in the amount of the policy limits . . . . In exchange for a tender of policy limits, [Bouchra] will provide a complete release of your insured, with indemnification for all other claims which might be asserted by, through or under [Bouchra].

In response, State Farm sent Eid's attorney a letter stating that it "concluded the evaluation of your client's claim resulting from this loss [and] State Farm is willing to settle your client's claim for $100,000.00." Three days later, State Farm sent Eid's attorney a release that required Eid and her husband Maaz (who was also involved in the accident and asserting claims through the same attorney) to release all of their claims in exchange for $100,000.

The next day, Bouchra's attorney sent State Farm a copy of the release signed by Mrs. Eid only, with Mr. Eid's signature line removed from the executed release. The correspondence explained that the release excluded Eid's husband's signature because the demand was for Mrs. Eid alone. To which State Farm replied that "[t]he spouse also has to sign the release" and attached another copy of the release that had blank-signature lines for both Mrs. Eid and her husband.

Mrs. Eid's attorney responded by asserting "Our *Stowers* demand was for Mrs. Eid's claims alone. You rejected that demand by adding a new term to the agreement, namely that Mr. Eid also sign the release. As you know, this would have required him to give up his own, personal claims, which had not yet been asserted. In doing so, you've also rejected my client's release." Five days later, Eid filed suit against Pond, alleging negligence and negligence per se.

Ten days later, State Farm notified Eid's attorney that it no longer required Eid's husband's signature and it accepted the executed release previously forwarded. State Farm then mailed Eid's attorney a check for $100,000, but Eid's attorney returned the check.

Consequently, Pond filed a breach-of-contract counterclaim, alleging that a settlement agreement had been reached and that Eid breached the terms of that agreement by filing and maintaining the lawsuit. In response, Eid sought a declaratory judgment that no contract was formed. The parties submitted summary-judgment motions and the trial court granted summary judgment in favor of Pond and issued a declaratory judgment that there was a valid and enforceable settlement agreement between the parties under which Mrs. Eid released all her claims and that she breached that agreement by filing and maintaining the lawsuit.

On appeal, the court held that State Farm and Mrs. Eid did not form a contract and reversed the judgment of the trial court. The court, considering State Farm's initial letter independent of the subsequently sent release, found that the letter was not an acceptance because (1) it "simply announced State Farm's 'willingness to settle for $100,000'" (2) it did not indicate whether $100,000 represented the policy limits, and (3) it did not tender payment. The court further found that the inclusion of Eid's husband in the release materially altered the terms of the demand and, thus, constituted a counteroffer that acted to reject the demand. Additionally, the court found that although Eid signed and returned the release, her redaction of her husband as a releasor, like State Farm's inclusion of her husband as a releasor, was a material change that constituted a counteroffer. Further, State Farm rejected that offer and made a counteroffer when it resent a blank release with signature lines for both Eid and her husband.

U.S. DISTRICT COURT HOLDS THAT INSURED'S CHAPTER 541, DTPA, AND NEGLIGENCE CLAIMS WERE BARRED BY STATUTE OF LIMITATIONS, DENIES MOTION TO REMAND

Last week, the United States District Court for the Eastern District of Texas, Sherman Division, held that the insured's claims of violations of Chapter 541 of the Texas Insurance Code, violations of the Texas Deceptive Trade Practices Act, and negligence claims were barred by the statute of limitations. And, the court concluded that the discovery rule did not toll the statute of limitations because the insured should have discovered the alleged deceptive practices and negligence when it initially received the insurance policy, not

three years later when it was sued and requested a defense and indemnity under the policy. Consequently, claims against the Texas based agent and agencies were barred by limitations and the court found they were improperly joined in finding that the court maintained diversity jurisdiction.

In *Adaptive Modifications, LLC v. Atlantic Casualty Ins. Co. et. al*, No. 4:18-CV-00864, 2019 WL 1904680 (E.D. Texas [Sherman Division]., April 29, 2019, mem. op.), James Boren, the sole member of Adaptive Modifications, procured a commercial general liability policy for Adaptive Modifications from Dan Mitchell, an insurance agent for Trimark Insurance Group ("Trimark"). In the process, Boren explained to Mitchell that Adaptive Modifications performs all types of work, including minor plumbing, attaching faucets and toilets, etc. and told Mitchell that the policy must cover this type of work. Mitchell assured Boren that he would procure a policy that would cover this work and any associated damages.

Mitchell, as agent for the insured Adaptive Modifications, applied to Delta General Agency Corporation ("Delta"). And Delta, acting as a Texas-based managing general agent for a surplus lines insurer Atlantic Casualty Insurance Company ("Atlantic"), issued the policy in March of 2015. However, the policy covered only carpentry work.

Later in 2015, Adaptive Modifications installed a faucet in a home which subsequently leaked and caused damage to the homeowners' property. In March of 2017, the homeowners sued Adaptive Modifications and, in March of 2018, served Adaptive Modifications with notice of the suit. In turn, Adaptive Modification requested a defense and indemnity from Atlantic. Atlantic, however, denied Adaptive Modifications' claim.

Consequently, in November of 2018, Adaptive Modifications brought suit in Texas state court against Mitchell, Trimark, Delta, and Atlantic alleging claims for violations of Chapter 541 of the Texas Insurance Code, violations of the Texas Deceptive Trade Practices Act, and negligence.

Mr. Mitchell, Trimark, and Delta (citizens of Texas) were not diverse from Adaptive Modifications (also a citizen of Texas), but they and Atlantic (a citizen of North Carolina) removed the case to the U.S. District Court for the Eastern District of Texas contending that the Texas Defendants were improperly joined in the suit as the statute of limitations barred the claims against them. In response, Adaptive Modifications filed a motion to remand the cause to Texas state court.

In deciding the issue of improper joinder, the U.S. District Court found that Adaptive Modifications' claims were barred by the two-year statute of limitations and the Discovery Rule did not apply because Adaptive Modifications should have learned of Mr. Mitchell's alleged misrepresentations and the lack of coverage after receiving the policy in 2015. As such, the court held that the Texas Defendants were improperly joined and denied Adaptive Modifications motion to remand and dismissed the Texas Defendants without prejudice.