Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MAY 28, 2019

FEDERAL JUDGE DENIES MOTION TO REMAND AFTER A TIMELY SECTION 542A.006 ELECTION BY THE INSURER

Last week, a Houston federal judge denied a motion to remand because the insurer properly made an election to accept responsibility for the in-state adjuster under Section 542A.006 of the Texas Insurance Code before suit was filed. *Vyas v. Atain Specialty Insurance Company*, No. 4:19-CV-00960, 2019 WL 2119733, (S. D. Tex, May 5, 2019) involved insurance coverage for alleged storm damage to hotels. Vyas alleged that Atain Insurance "overlooked or ignored" the property damage and paid too little. In an attempt to avoid removal, Vyas filed a state court suit against its insurance company, Atain, along with the Texas resident independent adjusting firm that handled the claim. Atain availed itself of the new statutory right under Tex. Ins. Code Section 542A.006 to elect responsibility for the adjuster prior to the filing of the suit. Atain promptly removed the case alleging improper joinder. 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 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. The Court then noted the authority relied on by Vyas found that when the election is made after the adjuster is joined, removal is improper. The court noted the focus must remain on whether the nondiverse party was properly joined when joined. Based on that analysis, the Court found that because the election was made before the adjuster had been joined, it was improper at the time. The motion to remand was denied and the claims against the adjusting firm were dismissed with prejudice.

TEXAS WINDSTORM INSURANCE ASSOCIATION WINS WIND/HAIL JURY TRIAL IN NUECES COUNTY

The Texas Insurance Windstorm Association (TWIA) insured a hotel in Nueces County, Texas which had suffered wind/hail damage. Plaintiff alleged that separate wind and hail events had occurred on two specific days during the policy period in 2015. The parties agreed there was some storm damage to the structure, but disagreed as to whether it occurred during the policy period.

In Cause Number 2017DCV-4203-A in the 28th District Court, the insured was a California company that owned a hotel in Texas. On cross-examination the owner of the Hotel testified that they did not have any maintenance records for the hotel. Plaintiff called a roofing expert that testified he was paid $10,000 for only four hours of work. Further, Plaintiff's experts relied on photographs taken three years after the alleged storm events and after Hurricane Harvey. During trial, Plaintiff's counsel attempted to change his theory of the case and put the burden on TWIA to show that the damage did not occur in the policy period. The Court rejected this new theory and submitted proper questions and instructions to the jury regarding the insured's burden to prove when the damage occurred. Todd Lipscomb of Loree and Lipscomb represented Plaintiff and tried the case. David Salyer of McLeod, Alexander, Powel & Apffel, PC represented TWIA. After a week of trial, the jury deliberated less than two hours and returned a defense verdict in TWIA's favor on all issues. Congratulations to TWIA and David Salyer for the win in what can be a difficult venue.