Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JUN 25, 2019

REMOVAL AND DISMISSAL OF ADJUSTERS UNDER 542A CONTINUES TO BE A MINEFIELD

Federal courts are continuing their efforts to interpret Texas Insurance Code Chapter 542A's provisions regarding dismissal of adjusters and determine the impact of those provisions on a carrier's ability to remove a lawsuit naming an adjuster. In the latest iteration, a Houston federal judge recently granted an adjuster's motion to dismiss and denied the policyholder's motion to remand the case to state court.

In *Ewell v. Centauri Specialty Ins. Co.*, CV H-19-1415, 2019 WL 2502016 (S.D. Tex. June 17, 2019) (slip op.), the carrier invoked 542A prior to suit, in response to the plaintiff's statutory pre-suit notice. After the carrier removed the case on improper joinder grounds, the adjuster sought dismissal, and the policyholder sought remand. The court held that because the carrier invoked 542A before suit was filed, there was no possibility of recovery against the adjuster, and the adjuster was improperly joined ***at the time suit was filed***. The court therefore rejected the policyholder's effort to invoke *Massey v. Allstate Vehicle & Prop. Ins. Co.*, 2018 WL 3017431 (S.D. Tex. June 18, 2018) (unpub. op.), and its use of the voluntary-involuntary rule as grounds to remand the suit.

Editor's Note: A consensus among federal courts appears to be building that the surest way to successful dismissal of the adjuster and removal to federal court depends heavily on notifying the claimant of the 542A election as early as possible – ideally, in response to the claimant's statutory pre-suit notice. As we recently reported, at least one federal judge in Austin has held that when no 542A election has been made at the time suit is filed, the adjuster is properly joined and the case is not removable even though the adjuster is subject to immediate and mandatory dismissal under 542A as soon as it is invoked. *See 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). **READ ARTICLE** The *Ewell* court did not discuss *River of Life*, but it is clear from the facts of *Ewell* that because Centauri made its 542A election ***before*** being sued, its removal could have survived the logic of *River of Life*.

However, these cases leave unanswered the question of what happens when there is no pre-suit notice, and the lawsuit naming the adjuster is the carrier's first opportunity to invoke 542A. If *River of Life* proves the dominant logic, it may motivate policyholder attorneys to stop making the required statutory pre-suit notices in an effort to prevent carriers from removing cases to federal court. If *River of Life* and *Massey* together form the prevailing law, the functional result may be that policyholder attorneys can deprive out-of-state carriers of their legal right to litigate in federal court simply by willfully violating the pre-suit notice requirements.

FEDERAL COURT EXAMINES AND ENFORCES ANTI-INDEMNITY STATUTE

Last week, a federal judge in Houston gave a master class in the construction and application of the Texas Anti-Indemnity Statute, Tex. Ins. Code § 151.101, governing indemnity and insurance coverage in construction-related contracts in Texas. In *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, CV H-18-3667, 2019 WL 2524244, at *1 (S.D. Tex. June 19, 2019) (slip op.), Contractor and Equipment Lessor on a construction project were both insured by Zurich. Their contract required Contractor to name Lessor as an additional insured (AI) on Contractor's policy. Lessor's policy included a Deductible Endorsement requiring Lessor to reimburse Zurich the first $3 million of any judgment or settlement paid, and assigned to Zurich the right to recover "sums that are reimbursable and any deductible amount" from any liable third party.

After a loss occurred, Contractor was found 90% responsible and Lessor 10% responsible. Under Lessor's policy, Zurich paid Lessor's 10% share of the judgment and Lessor reimbursed Zurich its $3 million deductible. Lessor then sued Zurich to recover under Contractor's policy the $3 million it had reimbursed Zurich under its own policy, alleging that because it was an AI under Contractor's policy, it could recover from Contractor's policy amounts it had been required to reimburse under its own policy.

First, the court held that the Lessor had standing to recover the amounts it had already reimbursed Zurich from a third party, because the Deductible Endorsement assigned the right to recover "reimbursable" amounts from third parties, but not the right to recover amounts the insured had already reimbursed. The insured retained the right to recover amounts it had paid out of pocket to satisfy its deductible.

But, the court went on to hold that the Texas Anti-Indemnity Statute voided the Lessor's AI status under Contractor's policy. Under the Anti-Indemnity Statute, a party to a construction contract cannot contractually force financial responsibility for its own negligence to be covered by another party's liability insurance. After a detailed examination of the Statute and several exceptions (these included careful analysis of the status of various parties under workers compensation laws), the court concluded that the Lessor had not shown it fell into any exception to the Anti-Indemnity Statute, and the Statute voided its AI coverage under Contractor's policy.

Thus, the Lessor ultimately could not recover its deductible from the very insurance company to which it had paid the deductible, but the circular nature of that arrangement was not, in the end, the reason for the court's holding. The holding would have been just as true if Contractor and Lessor had been insured by two different carriers.