Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JUL 2, 2019

COURT OF APPEALS POTENTIALLY EXPANDS STOWERS DOCTRINE TO ELIMINATE THE REQUIREMENT OF A JUDGMENT IN EXCESS OF THE POLICY LIMITS

Last week, the Court of Appeals of Texas, San Antonio concluded that it is not clearly established law that the Stowers Doctrine applies only when there is a judgment in excess of policy limits. With this conclusion, the court denied mandamus relief to insurer seeking dismissal of insured's (Stowers) claim that she paid the portion of the below-policy-limit settlement demand which the insurer declined to pay. In *In Re Farmers Texas. County Mutual Ins. Co.*, No. 04-19-00180-CV, 2019 WL 2605630, (Tex. App.—San Antonio June 26, 2019, mem. op.), Gibson sued Longoria for injuries he allegedly suffered in a motor vehicle accident. Gibson sought damages in the amount of $1 million, which exceeded Longoria's $500,000 policy limits with Farmers. Gibson designated experts, but Farmer's attorney, who represented Longoria, did not.

After mediation, the mediator proposed that the parties settle for $350,000. Subsequently, Gibson sent a *Stowers* demand to Farmers advising that he would accept the mediator's proposal, but Farmers rejected the proposal and offered $250,000. However, Longoria offered to pay the $100,000 balance and the parties settled. After paying the $100,000, Longoria sued Farmers based on a Stowers cause of action and breach of contract. She contended that the existence of an excess judgment against her was not a required element of a Stowers claim. She also contended that Famers breached its contract by failing to defend the suit by not timely designating an expert and by failing to accept the offer to settle the lawsuit.

In response, Farmers filed two Rule 91a motions to dismiss (allowing a party to move to dismiss a cause of action on the grounds that it has no basis in law or fact"). Farmers asserted that Longoria had no Stowers cause of action because such a claim required that a negligent failure to settle result in an excess judgment. Farmers asserted that it had no contractual obligation to pay damages until it was determined Longoria was legally responsible for any damages, which would not occur because the lawsuit settled. Farmers further asserted that it was relieved of its duty to defend or settle because the insurance policy expressly gave it the right to defend or settle claims "as [it] consider[ed] appropriate", and Farmers chose to settle.

The trial court denied both of Farmers' Rule 91a motions. Farmers subsequently filed a petition for writ of mandamus asserting that the trial court abused its discretion by denying Farmers' motions to dismiss.

On mandamus, the court recognized case precedent that the denial of a Rule 91a motion to dismiss is subject to mandamus review. Despite this, the court conducted a separate and arguably unnecessary analysis into whether Longoria's Stowers cause of action qualified for mandamus review as an issue of first impression. Under Texas law, "an issue of first impression can qualify for mandamus review when the factual scenario has never been precisely addressed but the principle of law has been clearly established." The court proclaimed that the issue in this case—whether an insured has a Stowers cause of action against her insurance company when the case settles pre-trial and the insured has paid a portion of the settlement because the insurer refused to pay the entirety of the settlement demand—was an issue of first impression. However, the court concluded that the principal of law on which Farmers' relied—that a Stowers claim always requires an excess judgment—was "not so clearly established as to be free from doubt." The court reasoned that although Stowers damages originally arose from a judgment in excess of policy limits, that the Texas Supreme Court has since extended *Stowers* to include settlements in excess of policy limits in the context of an excess carrier's cause of action against a primary carrier. The court then noted that dismissals pursuant to Rule 91a are appropriate when the pleaded cause of action has been previously rejected by Texas courts or when the circumstances pleaded by the plaintiff have been previously rejected as viable under an accepted cause of action. In the end, the court held that the viability of Longoria's claim had not been clearly rejected by Texas law and that Farmers was not entitled to mandamus relief on Longoria's Stowers claim.

In dissent, Chief Justice Sandee Bryan Marion declared that although the precise fact pattern at issue in this case had not previously been before any Texas court, it did not present an issue of first impression. Chief Justice Marion further declared that the law is settled that there can be no Stowers liability absent a judgment in excess of policy limits, even under the circumstances of this case. Chief Justice Marion reasoned that "the Stowers doctrine does not protect an insured against potential liability, nor does it protect an insured from incurring an excess judgment in the first place; rather, it affords an insured a remedy in the event of an excess judgment." Because Longoria did not plead the existence of a judgment in excess of policy limits, Chief Justice Marion would have concluded that she failed to plead a viable Stowers claim and would have held that the trial court clearly abused its discretion by denying Farmers' motion to dismiss.

n regard to Longoria's breach of contract claims, the Court of Appeals held that the trial court abused its discretion by denying Farmer's motion to dismiss. To that end, the court concluded that Longoria's claim that Farmer's failed to designate experts had no

basis in fact because she did not allege she suffered any damages for which she became "legally responsible" due to the alleged failure. As to Farmer's alleged breach of contract in failing to settle, the court concluded that this claim also had no basis in fact because the policy did not contractually obligate Farmers to pay any specific amount towards a settlement, and instead only obligated Farmers to "settle or defend" "as [it] consider[ed] appropriate."

SUPREME COURT OF TEXAS HOLDS THAT A TIMELY PAYMENT OF APPRAISAL AWARD, IN THE ABSENCE OF ESTABLISHED LIABILITY, PRECLUDES RECOVERY OF DAMAGES UNDER TPPCA'S SIXTY-DAY PROMPT PAYMENT RULE

Last week, the Supreme Court of Texas held that insurers are liable for damages under Section 542.060 of the Texas Prompt Payment of Claims Act ("TPPCA") only when the insurer (1) accepts liability or is adjudicated liable under the policy, and (2) violated a TPPCA deadline or requirement. In *Barbara Technologies Corporation v. State Farm Lloyds*, No. 17-0640, 2019 WL 2710089, (Tex., June 25, 2019, mem. op.)**,** Barbara Technologies Corporation ("Barbara Tech") contracted with State Farm Lloyds for property insurance covering Barbara Tech's commercial property, including wind and hail coverage. After a wind and hail storm damaged Barbara Tech's property, it filed a claim with State Farm. State Farm inspected the property and denied Barbara Tech's claim stating that the property sustained $3,153.57 in damages, which was less than Barbara Tech's $5,000 deductible. Consequently, Barbara Tech filed suit against State Farm, alleging violations of the TPPCA, among other claims. In response to the suit, State Farm invoked the appraisal provision under the policy. Approximately seven months later, the appraisers agreed to an appraisal value of $195,345.63, which State Farm paid, less depreciation and the deductible, six days after receipt of the appraisal award.

Barbara Tech accepted the payment but continued with its lawsuit, contending that State Farm still owed damages (18% interest and attorney fees) pursuant to section 542.060 of the Texas Insurance Code because State Farm allegedly violated Section 542.058(a) by failing to pay the claim within sixty days of receiving the information required to secure final proof of Barbara Tech's loss (i.e. over one year earlier when State Farm initially denied the claim). State Farm filed a motion for summary judgment asserting that its timely payment of the appraisal award precluded Barbara Tech from recovering damages pursuant to TPPCA's sixty-day requirement.

The Supreme Court of Texas concluded that a full and timely payment of an appraisal award under the policy precludes an insured from recovering damages under the TPPCA when acceptance or adjudication of liability is absent. In the court's words: "until an insurer is determined to owe the claimant benefits and thus is liable under the policy—either by accepting the claim and notifying the insured that it will pay, or through an adjudication of liability—the insurer is required to pay nothing, is subject to no payment deadline, and is not subject to TPPCA damages for delayed payment." The court further concluded that State Farm's payment based on the appraisal was neither an acknowledgment of liability under the policy nor an award of actual damages. In sum, the Supreme Court of Texas held that "invocation of the contractual appraisal provision to resolve a rejected claim . . . neither subjects an insurer to TPPCA damages nor insulates the insurer from TPPCA damages. An insurer will become liable for TPPCA damages under section 542.060 only if it (1) accepts liability or is adjudicated liable under the policy, and (2) violated a TPPCA deadline or requirement."

COURT OF APPEALS CONCLUDES RESTAURANT'S WATER FEATURE WAS OPEN AND OBVIOUS AND AFFIRMS SUMMARY JUDGMENT IN FAVOR OF PREMISES OWNER

Last week, the Court of Appeals of Texas, Houston concluded that the premises owner's double-fountain water feature was open and obvious and affirmed dismissal of the customer-plaintiff's premises-liability claim. In *Culotta v. Double Tree Hotels, LLC*, No. 01-18-00267-CV, 2019 WL 2588103, (Tex. App.—Houston June 25, 2019, mem. op.), the restaurant in the Double Tree Hotel ("Double Tree") had two fountains with tiers that allowed water to cascade down the various levels until it reached the matching pools below. The fountains stood more than a couple feet above the height of nearby dining tables and chairs. Between the fountains was a walkway that led to the back dining area of the restaurant. As Culotta was being led through the walkway to the dining area, the restaurant employee turned back to get a menu and then returned, both times passing Culotta and both times Culotta shuffled backward to allow the employee to pass. When beginning to again follow the employee, Culotta turned to his left and "clipped the ledge of the [left] fountain" with his left ankle and fell into the fountain. As a result, Culotta was injured. He subsequently brought a premises-liability suit against Double Tree, arguing that the fountain feature was unreasonably dangerous in that the edging had a low profile and there were no barriers to prevent a person who had tripped from falling into the fountains.

On appeal, the court noted that some Texas Supreme Court cases analyzing premises-liability claims have focused on the invitee's subjective knowledge that a defect exists (i.e. hazards already appreciated by the invitee before the injury-causing incident), while other cases have focused on the objective "open and obvious" nature of the property defect. In this case, although Culotta navigated the walkway during the back-and-forth undertaking of the employee, the court focused more on the second category and concluded that the fountains were "objectively observable to a reasonable person exercising ordinary care in traversing the restaurant." Thus, the court held that the fountains were open and obvious conditions and affirmed summary judgment in favor of Double Tree.