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TEXAS INSURANCE LAW NEWSBRIEF

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FAILURE TO GIVE TIMELY NOTICE BARS COVERAGE FOR ALL RELATED CLAIMS

The Fifth Circuit recently examined coverage for multiple related claims under a claims-made directors and officers policy. *ADI Worldlink, L.L.C., v. RSUI Indem. Co., No* 17-41050, 2019 WL 3521815, (5th Cir. Aug. 2, 2019) (slip op.). The policy contained language deeming all claims based on the same or related facts to be one claim, all first made at the time of the earliest such claim. The policy also required that all claims first made during the policy period must be reported no later than the end of that policy period.

During 2014 and 2015, a number of Worldlink's employees made claims for failure to pay overtime wages. While the first such claim was made in August 2014, Worldlink did not report it to the carrier until September 2015, by which time numerous other employees had also brought similar claims. Worldlink admitted the initial claim was not timely reported during the 2014 policy period, but argued the later claims were timely reported during the 2015 policy period.

Worldlink did not dispute that all the claims were related, but nevertheless argued the policy was ambiguous when applied to the later claims which were made in 2015 and reported during the 2015 policy period. After examining existing Texas law on the subject, the court concluded the policy unambiguously required all claims must be reported by the end of the policy period during which they were first made, and the later claims related back to the first claim. Therefore, Worldlink's failure to timely report the first claim – a failure which is prejudicial as a matter of law under a claims-made-and-reported policy – barred coverage for all the claims.

COURT REJECTS NOTICE PREJUDICE ARGUMENT AND ENFORCES SPECIFIC, ONE-YEAR PROMPT NOTICE REQUIREMENT TO REPORT WINDSTORM OR HAIL DAMAGE CLAIMS

The Fifth Circuit recently affirmed summary judgment in favor of an insurer after the insured failed to report hail damage to a commercial roof within one year, as required by the policy. In *Blanco West Properties, L.L.C. v. Arch Specialty Ins. Co.,* No. 18-20745, 2019 WL 3296973 (5th Cir. July 22, 2019), the roof on a commercial property in San Antonio was damaged in an April 2016 hail storm. The owner, who lives in Houston, did not discover the damage until October 2017 and then filed a claim the following month. Arch denied the claim based on an endorsement that required hail-related damage claims to be brought within one year of the loss or damage. On appeal, Blanco West argued that Arch must show that it was prejudiced by late notice before it can deny coverage.

The Fifth Circuit analyzed the policy terms in a Windstorm or Hail Loss Conditions Amendment that required in part that "In addition to your obligation to provide us with prompt notice of loss or damage, with respect to any claim wherein notice of the claim is reported to us more than one year after the reported date of loss or damage, *this policy shall not provide coverage for such claims.*" And in response to Blanco West's argument that Texas insurers must establish prejudice to enforce prompt notice requirements, the court observed that the policy language here, was very specific and that no Texas Supreme Court opinion addressed the specific facts of this case. The Fifth Circuit agreed with the district court's findings made after a thorough review of Texas cases, that "Unlike provisions requiring "prompt notice" or "notice as soon as practicable," the Endorsement's one-year notice provision establishes a specific deadline for notice." And in this case, because the deadline was not met, summary judgment in favor of the insurer was affirmed.

INSURER SEEKS AND WINS MANDAMUS TO PROTECT $0 APPRAISAL AWARD

An insurer recently filed a petition for writ of mandamus after a favorable appraisal award was set aside with no explanation, and the appellate court stepped in to reinstate the award. *In re Auto Club Indem. Co.*, 14-19-00490-CV, 2019 WL 3432144 (Tex. App.—Houston [14th Dist.] July 30, 2019, no pet. h.) (orig. proc.) involved a residential wind/hail dispute. The insurer participated in an appraisal invoked by the insured. The appraisal panel issued an award of $0, documented by 84 photos showing no storm damage was present. The homeowners moved to set aside the award, arguing the appraiser and umpire had improperly gone beyond determining the amount of loss and attempted make coverage decisions. Without explanation, the trial court set aside the appraisal award, over the insurer's objection.

On mandamus, the court of appeals relied directly on *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009), in which the Supreme Court of Texas held that while the scope of appraisal is damages, not liability, an appraisal nevertheless typically involves determining causation at some level. The scope of the appraisal is the damage caused by a specific occurrence, not every repair a home might need, and therefore the appraisal panel must have some latitude to determine what the scope of the loss is. If appraisers and umpires have no discretion to separate storm damage from the pre-existing condition of the roof, then no roof claim can ever be

appraised unless the roof is brand new. The court of appeals noted that the mandamus record showed no evidence the appraisal award was the result of fraud made without authority, and therefore, the trial court's order was an abuse of discretion.

Editor's note: The flip side of this outcome, of course, is the appraisal panel that awards the cost to replace the entire roof. If the appraisal panel has discretion to determine there is no storm damage, does it also have discretion to determine that everything wrong with a given 15-year-old roof ***is*** storm damage? Arguably, at some level the answer must be no, because most policies expressly reserve the right to deny all or part of a claim after appraisal.

IMPROPERLY DRILLED WELL IS "PROPERTY DAMAGE" AND CREATES DUTY TO DEFEND, NO EXTRINSIC EVIDENCE CONSIDERED TO DETERMINE DATE DAMAGE OCCURRED

A San Antonio federal magistrate judge recently examined the duty to defend and the limits of the eight-corners rule when it comes to pleading an occurrence potentially within the policy period. *Bitco Gen. Ins. Corp. v. Monroe Guar. Ins. Co.*, SA18CV00325FBESC, 2019 WL 3459248 (W.D. Tex. July 31, 2019) (slip op.) involved allegations that an irrigation well drilled into the Edwards Aquifer was improperly drilled and became useless. The pleading against the insured mentioned the date the parties initially contracted to drill the well and the date the insured invoiced the claimant for its services, but no other dates of any of the events complained of. In this coverage suit, the insurer argued it had no duty to defend, and sought to introduce extrinsic evidence proving the property damage complained of occurred before its policy period.

The insurer sought to pierce the eight-corners rule and introduce additional evidence showing the parties had stipulated the drill bit became stuck on a date before the insurer's policy inception date. The magistrate judge recognized the limited exception to the eight-corners rule that has been hinted at by the Supreme Court of Texas and openly acknowledged by some other courts, but concluded that in this case, the extrinsic evidence could not be considered because it only established the date the drill bit became stuck and was not dispositive of the coverage issue. There were other allegations of wrongdoing by the insured that resulted in property damage, and the extrinsic evidence offered did not resolve when those occurred. Therefore, the court rejected the extrinsic evidence and worked solely from the dates mentioned in the petition and the date suit was filed against the insured. The magistrate judge concluded the property damage could have occurred at any time in that interval, and the interval included the insurer's policy period, triggering a duty to defend.

The magistrate judge then went on to reject the insurer's contention that the improperly drilled well was excluded by Exclusion J. Because there were allegations the insured's actions had damaged not only the well, but also the Edwards Aquifer itself, the allegations went beyond any exclusion pertaining to the insured's work or damage to property the insured had worked on.

Editor's Note: This result is consistent with existing Texas law suggesting that as a general rule, "less is more" when drafting a pleading that will trigger an insurer's duty to defend, at least when it comes to pleading dates. Savvy attorneys looking for coverage to fund their clients' claims generally include few or no dates in their pleadings, in the hope of triggering multiple insurers to join the defense. However, pleading gamesmanship cannot create a duty to indemnify, and the parties in this case recognized that point of law. But sometimes, the gamesmanship can bite you…

COURT APPLIES LIMITED EXCEPTION TO USE OF EXTRINSIC EVIDENCE IN FINDING BUSINESS USE EXCLUSION PRECLUDES COVERAGE – NO DUTY TO DEFEND OR INDEMNIFY

Recently, the U.S. District Court in San Antonio examined the impact of a business-use exclusion in a Non-Trucking Liability Policy, and after considering extrinsic evidence, concluded that there was no duty to defend or indemnify the insured in a lawsuit following an auto accident. In *Hudson Ins. Co. v. Alamo Crude Oil, LLC*, 2019 WL 3322867 (W.D. Tex. July 24, 2019), the driver, Michael Johnson was driving a truck owned by Alamo and hit a pedestrian who filed suit. The policy provided coverage only when the truck was used for "non-commercial operations" i.e., "when driven without a trailer and without any intent to perform business related activity for the motor carrier that leased the Truck." And the policy excludes coverage for "bodily injury or property damage arising from the use of a covered auto…while used to carry property in any business or en route for such purpose." It was undisputed that Johnson was on his way to pick up a load when the accident occurred. Hudson filed a declaratory judgment action and a motion for summary judgement seeking a declaration that they had no duty to defend the underlying state court lawsuit.

The court examined Texas law addressing the duty to defend and indemnify, as well as the limited exception to the rule precluding consideration of extrinsic evidence in conducting an eight-corners analysis to determine an insurer's duty to defend. The exception can be applied "when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case." *"See Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523,521 (5th Cir. 2004). The court then observed that the petition only alleges in conclusory terms that Johnson was acting within the course and scope of employment. But the court also considered the stipulated facts in the parties' joint Rule 26 Report which brought the claims within the business use exclusion. And, it also found "that the extrinsic evidence - the parties stipulated facts - does not overlap with the underlying petition's merits." Accordingly, the court found that Johnson was en route to carry property and that the business-use exclusion applied. Lastly, the court determined that the same reasons that precluded a duty to defend also precluded a duty to indemnify and issued a declaration that the insurer had no duty to defend or indemnify the insured in the underlying lawsuit.

COURT FINDS NO PIP COVERAGE FOR INSURED WHO WAS INJURED WHILE TRYING TO FREE DRIVER TRAPPED WHILE UNLOADING TRUCK

The Texarkana Court of Appeals recently affirmed summary judgment in favor of an insurer which denied Personal Injury Protection (PIP) coverage to an insured who injured his back while trying to free a delivery driver who got pinned beneath the load while unloading the truck. In *Keily v. Texas Farm Bureau Casualty Ins. Co.*, 2019 WL 3269626 (Tex.App. – Texarkana July 22, 2019), the insured had a load of roofing metal sheets delivered to his home to repair his roof. The insured, who walked with a cane due to a previous knee surgery, was unable to help unload the truck. But when the driver got pinned beneath the first bundle of metal sheets that slid off the truck on top of him, and answering the driver's screams for help, the insured fractured two vertebrae in his lower back while lifting the metal sheets off of the delivery driver. The insured submitted a PIP claim under his own auto policy, his insurer denied the claim and this lawsuit followed.

The parties stipulated in part that the insured did not come in contact with the delivery truck or the truck lift before or during the incident. "At no time was Kiely ever occupying or struck by the truck." Both parties moved for summary judgment and the court granted the insurer's and denied the insured's. On appeal, the court examined the policy language providing PIP coverage "resulting from a motor vehicle accident" and applicable Texas case law. And the court found that the insured was not injured while exiting the vehicle or unloading the truck, but instead, the "injury-producing event" was the insured's intentional act – lifting metal sheets of the driver. Accordingly, the insured was not injured as a result of a "motor vehicle accident."

The court also examined whether the injuries occurred while a covered person was "occupying" a motor vehicle. The policy defines "covered person" in part as the named insured "… while occupying … or … when struck by … a motor vehicle …." And the policy defines "occupying" in part as "in, upon, getting in, out or off." But here, the parties stipulated that the insured "never touched the outside of the truck, including the bed of the truck", neither entered or exited the truck during the incident and was not struck by the truck. And for these reasons, the court found that the insured was not a covered person entitled to PIP benefits. Lastly, the court summarily rejected the insured's claim for extra-contractual damages and affirmed summary judgment in favor of the insurer.