Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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FEDERAL JUDGE DENIES MOTION FOR SUMMARY JUDGEMENT BASED ON FAILURE TO SUIFFICIENTLY PLEAD LIMITATIONS DEFENSE

A Houston federal judge recently denied an insurer's motion for summary judgment because of a failure to sufficiently plead a statute of limitations defense. In *Flores v. Allstate Texas Lloyds*, No. 4:18-CV-003302019, 2019 WL 3565103, (S.D.Tex., August 7, 2019), an insurer filed suit over alleged storm damage to their house. Their insurer denied the claim on January 28, 2016 and the insured subsequently filed suit in state court on August 16, 2017. However, the insurer was not served with a summons and complaint at that time, but were eventually served on February 12, 2018, after the insured filed an amended petition. The insurer then filed a Motion for Summary Judgment based on the affirmative defense of limitations. The insured disputed the date that the statute of limitations began accruing and also argued the insurer did not sufficiently plead the affirmative defense in its answer so the issue was not fairly before the court.

The Court began its analysis by noting that Federal Rule of Civil Procedure 8(c) requires a defendant to plead an affirmative defense with enough specificity or factual particularity to give the plaintiff fair notice of the defense that is being advanced and that in Texas, the statute of limitations defense is an affirmative defense. The Court noted that although absolute specificity in pleading is not required, fair notice of the affirmative defense is, and in some cases, merely pleading the name of the affirmative defense will suffice as fair notice.

The insured argued that the affirmative defense was not sufficiently pleaded because they did not have fair notice of the statute of limitations affirmative defense and were unfairly surprised. The insurer did not specifically raise the statute of limitations in its answer. Instead, the answer included the response that broadly incorporated all the terms of the Policy, including limitations. The Court concluded that this broad inclusion of any defenses that could possibly be contained in the insurance policy is not sufficient to provide fair notice of a statute of limitations affirmative defense. Accordingly, the motion was denied because the insurer did not sufficiently plead the affirmative defense of statute of limitations in its answer.

EASTERN DISTRICT JUDGE WEIGHS IN ON DISPUTE BETWEEN INSURERS INVOLVING ADDITIONAL INSURED STATUS AND CONTRACTUAL INDEMNITY

Federal District Court Judge Amos Mazzant recently ruled on competing motions for summary judgment from two insurers over the duties owed to an additional insured. In *Employers Mutual Casualty Company v. Amerisure Insurance Company*, No. 4:18-CV-00330, 2019 WL 3565103, (E.D.Tex., August 7, 2019), two insurers disputed who must assume the defense of an underlying personal injury lawsuit.

As part of the construction of a church, a general contractor hired a subcontractor to perform drywall work. The subcontractor entered into an agreement that required them to defend and indemnify the general contractor against certain claims and procure liability insurance that named the general contractor as an "additional insured."

The subcontractor's insurer based its arguments on the general contractor's status as an additional insured. The Policy contained a Texas Contractor's Blanket Additional Insured Endorsement that enabled the subcontractor to add additional insured parties to its policy. There was no dispute that the general contractor was an additional insured. However, the subcontractor's insurer noted that its duty to defend an additional insured is limited and, in this case, was not primary because of the other insurance provisions of the Policy. Further, because both policies contained other insurance provisions that were mutually repugnant, the subcontractor's insurer argued defense costs should be split on a pro-rata basis. The general contractor's insurer argued that the indemnity provision shifted exposure for the underlying suit wholly to the subcontractor, making the subcontractor's insurer liable for all defense costs. The subcontractor's insurer argued that the underlying suit did not trigger the indemnity provision.

The court decided it must first determine whether the underlying suit triggered the indemnity provision. After examining the language of the indemnity provision, the court concluded that the indemnity provision was not triggered because the injury did not arise or result from the subcontractor's work and was not caused in whole or in part by the subcontractor or its employees. Having determined that the indemnity obligations were not triggered, the court granted the subcontractor insurer's motion and that both insurers were obligated to split the defense costs on a pro-rata basis.