

TEXAS INSURANCE LAW NEWSBRIEF

DEC 31, 2019

COURT OF APPEALS HOLDS THAT PROFESSIONAL LIABILITY INSURER HAD DUTY TO DEFEND ALLEGATIONS IN CONNECTION WITH ALLEGED RAPE

Recently, the Dallas Court of Appeals held that a professional liability insurer had a duty to defend its insured in lawsuit alleging the insured participated in a gang rape. In *AIX Specialty Ins. Co. v. Raj Shiwach, MD*, No. 05-18-01050-CV, 2019 WL 6888515 (Tex. App.—Dallas, December 18, 2019, mem. op.), a patient under Shiwach's psychiatric care at Hickory Trail LP (“HT”) sued Shiwach and HT in connection with the patient's alleged gang rape. Shiwach was sued in his individual capacity as well as his capacity as a medical professional and employee or manager of HT. The patient's petition specified that Shiwach participated in the gang rape. The petition also specified that HT failed to take action to correct the problems with rape, suicide, and over drugging of patients at its facility.

Shiwach was insured under a professional liability policy from AIX, which required AIX to defend and indemnify Shiwach against a claim for damages only if “the injury is caused by a ‘medical incident’ and . . . the injury arises out of the individual insured's profession as a physician” The policy defined a “medical incident” as “any act or omission arising out of the providing of or failure to provide professional medical services” Shiwach demanded that AIX defend and indemnify him, but AIX refused, contending the patient's petition did not assert any covered allegation. Shiwach paid for his own defense and prevailed. Subsequently, he sued AIX asserting claims for breach of contract and violations of chapter 542 of the Insurance Code. The trial court granted summary judgment in favor of Shiwach, and AIX appealed.

On appeal, AIX contended that the patient's injuries from an alleged gang rape were not “medical incidents” that triggered its duty to defend, and that the sexual, criminal, and willful acts exclusion precluded any defense obligation.

Relying on the eight-corners rule –which requires the court to look to the four corners of the petition for allegations potentially within the scope of coverage in the four corners of the insurance policy– the court held that Shiwach carried his burden in demonstrating potentially covered claims. Although the only specific claim against Shiwach was his alleged participation in the gang rape (an act for which AIX would have no duty to defend), the court concluded it was reasonably inferred that when the patient alleged that “HT” failed to take action to correct the problems with rape, suicide, and over drugging of patients at their facilities (acts for which AIX would have a duty to defend), she also meant Shiwach. To that end, the court noted that “the eight-corners rule does not require courts to ignore logical inferences that flow from the facts alleged in the petition.”

The court further held that the sexual, criminal, and willful acts exclusion did not excuse AIX's duty to defend. The court reasoned that Shiwach's potential liability could have rested on the rape allegation or the reasonably-inferred covered allegations and, thus, the petition alleged conduct that could have caused the patient's injuries separate and independent from any conduct that would qualify as sexual, criminal, or willful.

UNITED STATES DISTRICT COURT DENIES PLAINTIFF'S MOTION TO REMAND DESPITE PLAINTIFF SEEKING LESS THAN \$75,000 IN DAMAGES

Recently, the Southern District of Texas, Houston Division, concluded that it had diversity jurisdiction despite the plaintiff seeking less than \$75,000 in damages. In *Martinez v. Liberty Ins. Corp.*, No. H-19-3956, 2019 WL 6894497 (S.D. Texas, Houston Division, December 18, 2019, mem. op.), Martinez sued Liberty Insurance Corporation (“Liberty”) in state court. Liberty removed the suit to federal court based on diversity jurisdiction (civil actions between citizens of different states where the amount in controversy exceeds \$75,000, exclusive of interest and costs). Martinez subsequently filed a motion to remand, arguing the action should be remanded because (1) his state court petition alleged that he sought a maximum of \$74,000, (2) his pre-suit demand letter to Liberty (\$29,460.55 for damages, plus \$3,850 for attorney's fees and other expenses) showed that the amount in controversy was less than \$75,000, and (3) he filed a binding stipulation that he and his attorney would not seek or recover more than \$75,000. Liberty responded that Martinez's allegations and stipulation did not effectively defeat federal jurisdiction and that the preponderance of the evidence supported an amount in controversy over \$75,000.

The court concluded that Martinez's allegation in his Texas state court petition that his claim did not exceed \$75,000 (1) contravened Texas Rule of Civil Procedure 47 (requiring plaintiffs to state in an original petition the range of monetary relief sought among five pre-defined ranges, the lowest range being monetary relief of \$100,000 or less), (2) would not have bound Martinez to recover less than \$75,000, and (3) was an improper attempt to circumvent federal diversity jurisdiction. The court further concluded that the alleged maximum of \$74,000 was not made in good faith and therefore did not control the action's amount in controversy. The court reasoned that damages alleged in Texas state court petitions cannot prove that the amount in controversy does not exceed that amount

as a legal certainty because plaintiffs may supersede those allegations with amended pleadings. Further, the demand letter included a claim for treble damages plus attorney's fees, which exceed \$75,000. Further, Martinez's signed stipulation that he was not seeking an award exceeding \$75,000 was filed after removal, when it should have been filed in state court before removal because federal courts determine removal jurisdiction on the basis of the claims in state court as they existed at the time of removal. Lastly, a subsequent event that would reduce the amount in controversy to less than \$75,000, such as a binding stipulation executed after removal, generally does not divest the court of diversity jurisdiction.

In sum, the court held that it had diversity jurisdiction over the action because the parties were diverse and the amount in controversy exceeded \$75,000 at the time of removal.