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TEXAS INSURANCE LAW NEWSBRIEF

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FEDERAL JUDGE APPLIES PROFESSIONAL SERVICES EXCLUSION - FINDS CGL INSURER HAS NO DUTY-TO-DEFEND

Last week, a Houston federal judge granted a 12(b)(6) motion in favor of a CGL insurer, holding the face of the pleadings and attached documents showed the insurer had no duty to defend its insured. In *Project Surveillance, Inc. v. The Travelers Indem. Co.*, 4:19-CV-03324, 2020 WL 292247 (S.D. Tex. Jan. 21, 2020) (slip op.), Project Surveillance had been retained to provide safety supervision services for a construction project. When a worker was killed on the project site, Project Surveillance was sued, with the petition alleging it "was retained to provide safety supervision ***or other services for the Project***." The petition went on to allege Project Surveillance had been negligent in six ways, which all involved site supervision, safety inspections, and ensuring trenching and excavations were adequately shored or sloped to prevent collapse.

The CGL policy contained a Professional Services exclusion which excluded "any service requiring specialized skill or training, including… supervision, inspection… job site safety… construction administration… or... monitoring… necessary to perform any of the[se] services."

Travelers filed a 12(b)(6) motion to dismiss, arguing that every single allegation in the petition fell squarely within the exclusion, and thus the pleadings showed on its face there was no duty to defend and the case should be immediately dismissed. Project Surveillance admitted the six allegations of negligence all fell within the exclusion, but argued the allegation, "…***or other services for the Project***," left open the possibility that Project Surveillance had been doing something else that fell outside the exclusion.

The court found that the vague allegation of "or other services," read in conjunction with the six allegations of negligence which all plainly related to site safety supervision, could not create a reasonable inference that a potentially covered claim was being alleged, even when construed liberally as required by the eight-corners rule.

Editor's Note: Although the court did not expressly say so, this appears to be a clear application of the rule that while the pleadings are construed liberally, and the court considers reasonable inferences drawn from the alleged facts, the court may not read facts into the pleadings or imagine factual scenarios which might trigger coverage. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139 (Tex. 1997). As a point of federal practice, this case also demonstrates that when the pleadings in a duty-to-defend case are this clear-cut, there is not necessarily any need to wait until the summary-judgment stage to win. With the right pleadings, a well-crafted 12(b)(6) motion to dismiss can potentially dispose of the entire case quite early.

CORPUS CHRISTI COURT OF APPEALS ALLOWS DEC ACTION TO DETERMINE UIM BENEFITS

It is well-established Texas law that a policyholder who is in an auto accident must prove he is entitled to recover damages from an adverse driver before he can recover underinsured motorist benefits from his own auto insurer. *Brainard v. Trinity Universal Ins.*, 216 S.W.3d 809 (Tex. 2006). However, a Corpus Christi court of appeals recently became the third Texas court to expressly allow that determination to be made in a declaratory judgment action directly against the insurer, rather than a tort suit resulting in a money judgment against the adverse driver. In *Allstate Ins. Co. v. Inclan*, 13-19-00026-CV, 2020 WL 373061 (Tex. App.—Corpus Christi Jan. 23, 2020, no pet. h.) (slip op.), a legal scenario played out which has occurred in two previous Allstate cases in San Antonio and Texarkana: rather than proceeding against the adverse driver, the insured files a declaratory judgment against his own auto insurer seeking to declare that his damages recoverable from the other driver are such that he is entitled to UIM benefits from his own carrier.

Twice before, Allstate argued that the plaintiff's decision to use a declaratory judgment was merely a stratagem to add attorney fees to the final award, which would not be recoverable in a tort suit against the driver but are recoverable under the Texas Declaratory Judgment Act. And that a declaratory judgment is not a proper vehicle to try what is essentially an auto accident case involving issues of the alleged tortfeasor's liability and the plaintiff's damages.

These arguments failed in Texarkana and San Antonio, and last week they also failed in Corpus Christi. The court expressly relied on the two prior cases and observed that while *Brainard* sets out the prerequisites for recovery of UIM benefits, it does not specify ***how*** the insured must arrive at them. The court agreed with the prior two appellate courts who that thought a declaratory judgment establishing the amount of recoverable damages is as good as a money judgment against the adverse driver, for purposes of complying with *Brainard* and establishing the right to UIM benefits. The court also enforced the Texas Declaratory Judgment Act's fee provision, affirming the award of attorney fees.

Editor's Note: This result, which has now occurred in three appellate courts across the state, likely signals the beginning of a trend of

declaratory judgment suits to recover UIM benefits with added attorney fees. It remains to be seen whether other Texas appellate courts, or the Supreme Court of Texas, will ultimately agree with this novel approach to UIM claims.

FEDERAL JUDGE STRICTLY CONSTRUES FLOOD POLICY PROMPT NOTICE REQUIREMENTS - DISMISSES LATE-REPORTED HARVEY CLAIM

In a Hurricane Harvey case, a Galveston federal judge dismissed a suit against a property insurer because the insureds had not reported their claim for more than five months. In *Ibarra v. Texas Farmers Ins. Co.*, 3:18-CV-00358, 2020 WL 359903 (S.D. Tex. Jan. 22, 2020) (slip op.), the Ibarras reported their flood claim to Farmers about five months after the storm. Their flood policy, a Standard Flood Insurance Policy promulgated by the National Flood Insurance Program, required "prompt written notice" of claims, and required a sworn proof of loss to be submitted within 60 days after the loss.

In granting Farmers' motion for summary judgment, the court noted that Fifth Circuit precedent is not clear on exactly what does or does not constitute "prompt" notice under the strictly construed flood policy, but observed that precedent from Florida suggests a delay of as little as 36 days could be considered enough to violate the requirement. The court concluded that a five-month delay was clearly too long and observed that it was also clear the Ibarras had not submitted their sworn proof of loss within the required 60 days of loss.