Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MAR 4, 2020

HOUSTON COURT OF APPEALS HOLDS MENTAL ANGUISH CAN BE AN "INDEPENDENT INJURY" UNDER MENCHACA

After being appealed to the Supreme Court of Texas, this Hurricane Ike case was remanded to a Houston court of appeals for further consideration in light of *USAA Texas Lloyds v. Menchaca* (Tex. 2018). In *State Farm Lloyds v. Fuentes*, 14-14-00824-CV, 2020 WL 897401 (Tex. App.—Houston [14th Dist.] Feb. 25, 2020, no pet. h.) (slip op.), much of the court's opinion is devoted to a legal sufficiency challenge to the trial court's decision to disregard the jury's finding that the policyholder committed a prior material breach of the policy. The court again concluded the district court had been correct to disregard that finding from the jury because it was not supported by sufficient evidence.

The court also concluded the policyholders alleged and were awarded damages for an independent injury in the form of their mental anguish claim, under *Menchaca's* "independent injury" rule:

"The *Menchaca* court stated that it had "yet to encounter" a successful independent-injury claim and it did not "have ... occasion to speculate what would constitute a recoverable independent injury"; however, it noted its previous decision in *Twin City Fire Insurance* "identif[ied] mental anguish as an example" of actual, separate damages that an insured could recover when caused by the insurer's tortious conduct. … In other words, *Menchaca* did not foreclose the possibility of recovery for mental-anguish damages as an independent injury. Nor does any provision within the Insurance Code preclude recovery for mental-anguish damages. At least one Texas appellate court has since indicated that mental-anguish damages could qualify as an independent injury in an Insurance Code claim under the right circumstances." [internal citations omitted]

The court went on to conduct a legal sufficiency analysis of the mental anguish claim and concluded the policyholders could keep their mental anguish damage award and their Insurance Code enhanced damages.

Editor's note: Because the jury found State Farm had breached the contract and had violated the Insurance Code, this opinion may not be as legally significant as it seems**.** It does ***not*** represent a scenario where the carrier was liable for mental anguish and statutory damages in the absence of a breach. Thus, while it appears to make sweeping statements about the recoverability of mental anguish damages as an independent injury, it may ultimately be limited to its facts.

The jury awarded the policyholders approximately $19,000 in actual damages, approximately $27,000 in mental anguish damages, and approximately $7,500 in enhanced statutory damages. The much larger portion of the award, which was not at issue in this appeal, was for attorney fees - nearly $325,000.

MAN SUES HIS OWN CGL INSURER FOR HIS OWN INJURIES; DISTRICT COURT HITS BACK

In a scenario that only a lawyer could invent, a law office owner recently tried to recover benefits from his own businessowners policy for his own injuries after he fell 30 feet off a ramp at his law office and incurred over $100,000 in medical expenses. In *Pease v. State Farm Lloyds*, EP-19-CV-00296-DCG, 2020 WL 905541 (W.D. Tex. Feb. 25, 2020) (slip op.), Pease argued he, the insured, had become legally obligated to pay his medical providers for his treatment, and therefore those sums were payable under the policy. State Farm responded that he did not owe the medical providers damages because he had injured them, but owed them fees for services because he had become voluntarily indebted to them for their services.

The court relied on a well-developed body of Texas case law to conclude the phrase in the standard CGL insuring agreement, "…sums that the insured becomes legally obligated to pay as damages…" contemplates ***tort*** liability and not ***contractual*** liability. The court also rejected Pease's alternative argument that his financial obligations to the medical providers were really tort obligations because they were imposed by law regardless of whether an actual contract existed. The court reasoned that a contract implied by law still sounds in contract, not tort.

Editor's Note: Although the court did not reach it and decided the case on the phrase, "legally obligated to pay as damages," State Farm probably could have also prevailed by focusing on the "bodily injury" angle and pointing out that even if the medical providers sued Pease to recover their bills, they had not suffered either bodily injury or property damage and their claims, even if they are claims for "damages," were not claims for bodily injury and thus would be outside the insuring agreement.

PROFESSIONAL LIABILITY INSURER OBLIGATED TO DEFEND SUIT ARISING OUT OF BOTCHED STOWERS RESPONSE

Last week in *Allied World Specialty Ins. Co. v. McCathern, P.L.L.C.*, 17-10615, -- Fed. Appx. --, 2020 WL 933314 (5th Cir. Feb. 26, 2020), the Fifth Circuit required a legal malpractice insurer to defend a suit against its insured that arose when the attorney orally accepted a Stowers demand in an underlying suit, but did not send a written response accepting the demand until 42 minutes after the deadline. The plaintiff rejected the acceptance as untimely, and the client was ultimately hit with a $5.5 million judgment.

The client sued the attorney, and this coverage suit between the attorney and his PL insurer ensued. The botched Stowers response had occurred four months before the policy inception, and the carrier argued it was not covered as it predated the policy period and violated the policy's Prior Knowledge condition. However, the client had alleged numerous acts of professional negligence, including, "(1) failing to properly monitor the file, (2) failing to work the file, (3) failing to protect [client] from an excess judgment, (4) failing to properly research factual and legal issues, and (5) failing to act as a reasonably prudent attorney under the same or similar circumstances." The client alleged that all of these acts, together and separately, had caused its damages.

While the failure to timely accept the Stowers demand had occurred before the policy inception, the other allegations contained no clues as to when they occurred, and the court was forced to conclude they easily could have occurred during the policy period, and were not subject to the Prior Knowledge condition.

The court also rejected the carrier's argument that the allegations were legal conclusions and not factual allegations, noting that in a legal malpractice case, the facts of the case will necessarily be more legalistic in nature than in other types of cases, and the mere statement that the insured performed the various acts "negligently" would not take the description of what the insured did out of the realm of the factual, for purposes of determining the duty to defend.

Editor's Note: Most often, less is more when a claimant seeks to craft a pleading that will trigger all available liability coverage. Here, we see a counter-example. If the client had ***only*** alleged failure to properly accept the Stowers demand, there is a good chance the carrier would have prevailed on its coverage position. By alleging broader failures to monitor and work the file and do proper legal research, the client created a duty to defend an otherwise non-covered claim.

FEDERAL DISTRICT COURT HOLDS JUDGMENT CREDITOR NOT BOUND BY ADMISSIONS OF INSURED

A recent district court opinion from Laredo highlights the importance of admissible evidence when attempting to enforce policy exclusions. *Cavazos v. Sias*, 5:18-CV-72, 2020 WL 883223 (S.D. Tex. Feb. 24, 2020) (slip op.) is a suit for coverage under an auto liability insurance policy. After obtaining a default judgment against Insured arising out of an auto accident, Claimant sued Carrier to recover the judgment under Insured's auto liability policy.

Carrier's first major defense was that Insured had admitted her husband, a named excluded driver, was driving the car at the time of the accident. Facing an admissibility challenge from Claimant, Carrier argued Insured's statement was both attributable to Claimant and admissible as a statement against interest by a party-opponent under the general rule that a judgment creditor, when suing the carrier to recover the judgment, "steps into the shoes" of the insured. The court disagreed, noting that while the general rule subjects the judgment creditor to the same coverage defenses the carrier would have against the insured, it does not mean, as an evidentiary matter, that statements against interest made by the insured, which would be hearsay as to another party, become admissible against the judgment creditor.

The court went on to grant summary judgment in favor of Carrier because it was able to show, with no evidentiary complications, that Insured had failed to notify Carrier of the accident or the lawsuit until after default judgment was rendered, thus prejudicing Carrier as a matter of law.

Editor's note: The exact context of Insured's statement about the excluded driver is unclear from the opinion, but Carrier's inability to enforce a Named Driver exclusion highlights the importance of a well-documented file. Presumably if this central piece of evidence had been obtained in the form of a recorded statement or a writing from the insured, or proven up during litigation by either interrogatories or requests for admission, Carrier would not have faced this problem laying the foundation for its evidence. In this case, another coverage defense was successful, so the outcome was not affected.