Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MAR 16, 2020

U.S. DISTRICT COURT DISMISSES THIRD-PARTY PLAINTIFFS' COVERAGE SUIT FOR LACK OF STANDING

Last week, the United States District Court for the Western District of Texas concluded that third-party plaintiffs lacked standing to bring a coverage suit against an insurer and, thus, dismissed the plaintiffs' suit. In *Blakeley Turner et. al. v The Cincinatti Ins. Co.*, No. 6-19-CV-00642-ADA, 2020 WL 1216419 (W.D. Texas, March 12, 2020, mem. op.), Plaintiffs were students of a Waco trade school operated by ATI Acquisition Company ("ATI"). Plaintiffs sued ATI alleging violations of the Texas Deceptive Trade Practices Act, breach of contract, and breach of warranty, complaining that ATI misrepresented the quality of its program. ATI was insured by the Cincinnati Insurance Company ("CIC"), but CIC denied ATI a defense and indemnity. Soon thereafter, ATI filed for Chapter 7 Bankruptcy. As ATI was defunct by the date of trial, it provided no defense and a default judgment was entered against it, in favor of Plaintiffs.

Subsequently, Plaintiffs sued CIC asserting that CIC wrongfully denied coverage to ATI. CIC responded with a motion for summary judgment asserting that Plaintiffs had no standing to bring the coverage suit.

On appeal, the United States District Court, relying on *Great American Ins. Co. v. Hamel*, 525 S.W.3d 655 (Tex. 2017), concluded that Plaintiffs had no standing to sue CIC. "The *Hamel* opinion expressed that a claimant against an insurer obtains standing to litigate a coverage trial through either a judgment resulting from a fully adversarial trial or a valid assignment." Because Plaintiffs were "not the recipients of a valid assignment and the judgment upon which they rel[ied] [was] not the result of a fully adversarial trial", the United States District Court dismissed Plaintiffs' claims for lack of standing.

COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT IN FAVOR OF EMPLOYER, DISMISSING GROSS-NEGLIGENCE CLAIM BASED ON DEATH DUE TO ELECTROCUTION

Last week, the Amarillo Court of Appeals affirmed the trial court's grant of summary judgment in favor of an employer sued for gross negligence in connection with its employee's death, caused by the employee's contact with an energized light pole. In *Isabel De La Hoya Moreno v. K-Bar Texas Electric, Inc.*, No. 07-18-00377-CV, 2020 WL 1161097 (Tex. App.—Amarillo, March 10, 2020, mem. op.), K-Bar was tasked with replacing fifteen light poles on a school playground. Employees of K-Bar were attempting to loosen the bolts on the concrete bases of the light poles to determine whether the bolts could be removed or whether it would be necessary to remove the entire base. While leaning to push on the wrench to loosen a second bolt, employee Anthony Moreno fell toward the pole. Upon contact with the pole, he was electrocuted and died. It was later determined that the light pole was improperly energized due to initial improper installation and subsequent improper modification and repair, none of which was performed by K-Bar, that allowed a live current to come in contact with the frame of the light pole itself.

At the time of the tragic incident, K-Bar was a workers' compensation subscriber. In accordance with Texas law governing wrongful-death claims against employers who subscribe to workers' compensation insurance –which requires that the legal representative of a deceased employee prove that the employer was *grossly* negligent in causing the employee's death– Anthony's family filed suit against K-Bar alleging Anthony's death was caused by the gross negligence of K-Bar.

Subsequently, K-Bar filed a no-evidence motion for summary judgment. K-Bar argued there was no evidence that (1) the job of loosening the bolts involved an extreme degree of risk, because no electrical work was being performed and (2) it did not have actual, subjective awareness that the light pole was energized.

The trial court granted K-Bar's motion and the court of appeals affirmed. The court of appeals concluded that "there was no evidence of a well-known risk of electrocution when loosening bolts on the base of a light pole or any evidence of K-Bar's subjective awareness of the risk of electrocution in performing that particular task." The court of appeals reasoned that "nothing about what Anthony was doing . . . was considered to be electrical work which would have required electrical standards and safety protocols to be followed." Further, "K-Bar was not aware of any electrical danger inherent in the performance of loosening bolts in preparation for the removal of light poles."

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WESTERN DISTRICT COURT FINDS BONA FIDE COVERAGE DISPUTE PRECLUDES EXTRA-CONTRACTUAL CLAIMS

Recently, a San Antonio federal judge granted a motion for summary judgment in favor of an insurer and dismissed an insured's extra-contractual claims. In *Alvarez v. State Farm Lloyds*, SA-18-CV-01191-XR, 2020 WL 1033657 (W.D. Tex. Mar. 2, 2020), Plaintiff Alvarez filed a suit against State Farm, alleging breach of contract and extra-contractual claims arising out of an insurance coverage dispute involving storm damage to a tile roof.

Alvarez claimed that the clay tile roof of his home in San Antonio was damaged by hail and wind. After inspecting the roof, State Farm did not identify any storm damage but did identify "damage to the tile is not consistent with wind or hail." The claim denial letter stated that the inspection revealed no accidental direct physical damage to the clay tile roof. Other than a check to replace a tile that was damaged by a State Farm representative during the inspection, no payments were made on the claim. After the initial inspection and denial letter, the Alvarezes hired a public adjuster. The public adjuster subsequently emailed State Farm an estimate for a complete replacement of the roof. State Farm then hired an engineer for an additional inspection of the roof. The engineer concluded that the cracked and broken roof tiles were the result of deficient installation means and methods, corroded tile nails, expansion and contraction of the tiles, and foot traffic. The engineer also noted dents on the roof vent caps and concluded that the dents were caused by hail but were cosmetic. State Farm issued a second denial letter. The letter included an estimate to replace the four roof vent caps. That estimate fell below the deductible, so no payment was made. Alvarez then sent State Farm a demand letter and covered damages estimate totaling $264,080. State Farm still made no payment and Alvarez filed this lawsuit.

State Farm moved for summary judgment on all of Plaintiff's extra-contractual claims including: (1) violations of the Texas Deceptive Trade Practices Act, (2) violations of the Texas Insurance Code, and (3) breach of the common law duty of good faith and fair dealing. The court began its analysis by noting that all the extra-contractual claims share the same predicate for recovery: a common law showing of bad faith. The court went on to note that under controlling Texas authority an insurer is not liable for the tort of bad faith if the insurer had a reasonable basis to deny the claim. The court concluded that the evidence provided by Alvarez did nothing more than show there was a disagreement over the coverage decision. Because there was no evidence of anything other than a bona-fide coverage dispute the court granted summary judgment as to all extra-contractual claims.

MDJW & COVID-19 ISSUES

Our Firm remains open although we have 20% of our lawyers and staff working from home each day starting this week and continuing through April 1st. Everyone in our Firm family remains healthy and we are employing measures to keep everyone healthy.

We have been fielding calls for more than two weeks now from clients with questions and issues about COVID-19. The questions and issues involve employment, insurance coverage, health care and commercial contract matters. In the next week, we will sending a more detailed update to all clients about a host of COVID-19 legal issues which we have already tackled for clients and issue which we believe will be raised in the weeks and months to come. As always, if anyone has any questions or issues about virus-related claims or issues, call either of our senior Insurance Partners, Chris Martin or David Disiere at 713-632-1700.