Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME COURT REAFFIRMS POLICYHOLDER HAS NO STANDING TO SUE AUTO INSURER OVER RATES NEGOTIATED WITH MEDICAL PROVIDERS

Last Friday, the Supreme Court of Texas addressed the question of whether the holder of an auto insurance policy with Personal Injury Protection (PIP) benefits may complain because his medical providers were paid based on rates negotiated with his health insurance rather than their list rates. In *Farmers Texas County Mut. Ins. Co. v. Beasley*, No. 18-0469, --- S.W.3d --- (Tex. Mar. 27 2020) (slip op.), Beasley was injured in a car accident and received medical treatment with a list rate total of about $2,600. His health insurer paid the providers approximately $1,000 based on negotiated discounts, and the medical providers did not seek to recover the difference from Beasley.

Beasley made a PIP claim with Farmers, and when Farmers issued him a check for the $1,000 his medical providers had accepted in full satisfaction of their bills, Beasley demanded that his PIP check be based on the list rates, not the negotiated discount his health insurer had obtained. The trial court granted Farmers' plea to the jurisdiction and dismissed the case, setting the stage for a battle through the appellate courts and to the supreme court.

The supreme court agreed with the trial court that Farmer's plea to the jurisdiction was properly granted because Beasley had not alleged any out-of-pocket unreimbursed medical expenses, nor had he alleged that medical treatment had been withheld. Thus, he had not alleged any actual or threatened injury and had no standing to sue.

SOUTHERN DISTRICT DISALLOWS POST-SUIT ADJUSTER ELECTIONS UNDER INSURANCE CODE 542A

Last week, the Southern District of Texas joined the Eastern District of Texas in holding that if an insurer elects to accept responsibility for its adjuster and wishes to use that election as the basis for removal to federal court on diversity grounds, it must make the election ***before*** a lawsuit is filed. In *Shenavari v. Allstate Veh. & Prop. Ins. Co.*, No. 4:19-CV-4159, 2020 WL 1430529 (S.D. Tex. Mar. 23, 2020) (slip op.), the policyholder sued Allstate and its adjuster for damages arising out of a Hurricane Harvey claim. After being served with the lawsuit, Allstate filed an Election of Legal Responsibility for its adjuster and removed the case to federal court, arguing that because of its election, the adjuster was improperly joined.

Considering the motion to remand, the court acknowledged that while the Fifth Circuit has not yet addressed this vexing issue, two distinct lines of case law have developed among the federal district courts of Texas. One, led primarily by the Western District, holds that a post-suit election is a valid basis for removal because it precludes any recovery against the adjuster, and thus passes the improper joinder test. The other, led by the Southern and Eastern Districts, holds the potential for recovery against the adjuster must be determined at the time the suit is filed, and therefore, a later-filed election is not effective to prevent remand.

Unsurprisingly, the court followed the lead set by existing opinions out of the Southern District, holding Allstate's election came too late. Allstate also attempted a traditional improper joinder approach, arguing the pleadings were too generic and vague to state a viable claim against the adjuster, which was also rebuffed.

Editor's Note: The split among the districts on this issue continues to become starker, setting the stage for the right case to allow the issue to go before the Fifth Circuit for resolution. However, because remand orders are not immediately appealable, that hypothetical test case will probably have to proceed to trial in state court before the Fifth Circuit can weigh in.

It is not clear from the court's opinion whether Allstate received the mandatory pre-suit notice to which it was legally entitled under the Insurance Code and DTPA. If it did receive notice, that would have been Allstate's only opportunity to make the election prior to being suit. But policyholder attorneys often do not comply with the notice provisions, and if the Southern District's view prevails, that trend will only increase.

FEDERAL JUDGE EXAMINES AUTO EXCLUSION AND EXCEPTIONS IN A CGL POLICY

In a tragic case involving a fascinating question of insurance policy interpretation, a federal district judge in Sherman held a CGL insurer was required to cover a loss that took place in a van despite its auto exclusion. In *Markel Ins. Co., v. 2 RJP Ventures, LLC*, No. 4:19-CV-41-ALM-KPJ, 2020 WL 1465893 (E.D. Tex. Mar. 26, 2020) (slip op.), two people died of carbon monoxide poisoning after a generator was left running inside a van. The Markel CGL policy contained an Auto Exclusion, which also contained certain

exceptions. The heart of the battle was whether the generator was a piece of machinery or equipment excepted from the exclusion if it was not also permanently attached to a self-propelled vehicle. It was undisputed that the generator was not permanently attached to the van.

In a fine analysis of the contract provisions, the court concluded that the "machinery or equipment" exception to the Auto Exclusion directs the reader to two specific sub-paragraphs of the definition of "mobile equipment." The list of equipment found there expressly includes generators. Importantly, the two specific sub-paragraphs the reader is directed to do not contain the additional requirement that the equipment be permanently attached to a self-propelled vehicle. It is found in an earlier part of the definition of "mobile equipment" which is not referred to by the exception to the Auto Exclusion.

Therefore, because the injury arose out of the operation of a generator, which is equipment expressly referred to by the exception, the policy's Auto Exclusion did not apply, and the CGL policy was required to cover the loss.

Editor's Note: The court's logic here is reminiscent of, and consistent with, the Texas Supreme Court's logic in *In re Deepwater Horizon*. Reading an insurance policy is not unlike reading a road map, and one must follow the directions precisely. If the policy tells the reader to look elsewhere, whether to another section of the policy or to an external document, then one must look where one is told to look and must look ***exactly*** where one is told to look.

HOUSTON COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT FOR LIABILITY INSURER AFTER INSURED'S BANKRUPTCY

In an interesting intersection of bankruptcy law and insurance law, a Houston court of appeals recently affirmed summary judgment for a liability insurer for a claim against a bankrupt insured. In *Valentine v. Federal Ins. Co.*, No. 14-18-00438-CV, 2020 WL 1467352 (Tex. App.—Houston [14th Dist.] Mar. 26, 2020) (slip op.), a hospital had a claims-made-and-reported liability policy with Federal. During the policy period, Valentine sued the hospital for employment discrimination, but before reporting the claim, the hospital declared bankruptcy. All claims against the hospital, including Valentine's, were immediately subject to an automatic stay. Valentine's case was later exempted from the stay and allowed to proceed on the condition that any judgment or settlement be paid from insurance proceeds alone.

Valentine proceeded against the hospital, obtained a judgment, and sought to recover it from Federal. Federal denied the claim on the ground that the claim had not been reported to it within the mandatory reporting period. In the ensuing coverage lawsuit, Valentine argued, among other things, that the automatic stay had tolled the reporting period. The court reasoned that while the automatic stay broadly prohibits affirmative pursuit of claims, it does not stop the passage of time, nor does it toll mandatory notice periods. For example, the automatic stay cannot prevent an insurance policy from expiring under its own terms. While certain parts of the Bankruptcy Code govern when an action may be commenced, providing the required notice of a claim to a liability insurer is not "commencing an action" and is not tolled by any part of the Bankruptcy Code.