Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME COURT TOLLS STATUTES OF LIMITATIONS FOR ALL CIVIL CASES

Last week, the Texas Supreme Court issued an order tolling the statute of limitations on civil cases following Texas Governor Greg Abbott's declaration of a state of disaster for all Texas counties due to the ongoing COVID-19 Pandemic. On April 1, 2020, the Texas Supreme Court issued its Eighth Emergency Order. The Order tolled all deadlines for the filing or service of all civil cases from March 13, 2020 until June 1, 2020 unless extended by the Chief Justice of the Texas Supreme Court. The Order specifically states that it does not impact deadlines for perfecting an appeal or other appellate proceedings. Instead, it provides that requests for relief from those deadlines should be directed to the court involved and that such requests "should be generously granted."

The Eighth Emergency Order clarifies the previous deadline in the First Emergency Order, which originally extended the statute of limitations in Texas civil cases until thirty days after the Governor's state of disaster had been lifted. The Court had received letter request from a coalition of bar associations and plaintiffs and defense attorneys who wanted to avoid facing a different statute of limitations in each of Texas' 254 counties.

Editor's note: The Texas Supreme Court's new Order provides potential plaintiffs additional time to consider their legal options in light of the COVID-19 Pandemic and could lead to a flurry of new civil filings after June 1, 2020.

SUPREME COURT OF TEXAS ORDER

INSURER MAY BE NEGLIGENT FOR INSTRUCTING INSURED TO TAKE PICTURES AT THE SCENE OF AN AUTO ACCIDENT

Recently, the San Antonio Court of Appeals held that an automobile insurer failed to prove it had no duty to its insureds after it instructed them to take pictures at the scene of an accident. In *Kenyon v. Elephant Insurance Company*, 2020 WL 1540392 (Tex.App.—San Antonio, 2020), the court withdrew its prior opinions and judgment, after an *en banc* reconsideration, and held that an insurer failed to establish as a matter of law, it "owed no duty" as to claims of common law negligence, negligent undertaking, negligent training, and gross negligence.

The Kenyons had an auto insurance policy with Elephant. Lorraine Kenyon was involved in a one-car accident. She first called her husband, who arrived at the scene. She then called Elephant to report the accident and described the incident in detail to a representative. The representative encouraged Kenyon to take pictures of the accident. While her husband, Theodore was taking pictures, another car struck him and he died as a result.

Kenyon filed a wrongful death and survival action in district court. In addition to suing the driver who struck Theodore for negligence, Kenyon sued Elephant. Kenyon alleged claims against Elephant based on several different negligence theories, misrepresentation under the Insurance Code and DTPA, and failure to timely settle and pay her uninsured/underinsured motorist claim.

Elephant moved for summary judgment, presenting various traditional and no-evidence grounds. The trial court rendered summary judgment on all claims except an untimely settlement claim. The order specified the sole basis for rendering partial summary judgment was Elephant "owed no duty" to the Kenyons. The trial court granted Kenyon permission to appeal the order. The permission was limited to the negligence claims. And the appeal was limited to the sole issue of duty. The appellate court initially court dismissed the appeal in part and affirmed in part, then the Kenyon's filed a motion to have the appellate court reconsider, *en banc* (by all the judges and not just a panel).

During the *en banc* reconsideration, the court first found that Elephant's motion acknowledged "the insurer-insured relationship imposes a duty on the insurer to investigate claims thoroughly and in good faith." Further, under Texas law "a duty is imposed" on an insurance company to exercise that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business. The court found Elephant had not met its traditional or no-evidence summary judgment burdens and that the summary judgment evidence was sufficient to create a fact question on the duty element of the negligence claim. The court went on to find Elephant had also not met its summary judgment burden as to the duty element of the negligent undertaking, negligent training or gross negligence claims.

The opinion made clear it is limited to the narrow facts of the case. After examining the various elements of duty, the court found the "general risk of harm in this case is foreseeable and unreasonable given the probability of death or serious bodily injury to insureds and first responders and the relatively low burden on insurance companies to exercise ordinary care under the narrow facts of this

case." The court also held that "significant public policy considerations also weigh in favor of recognizing the existing duties that Kenyon alleged." The court held that Elephant had failed to establish as a matter of law it "owed no duty" as to the claims of common law negligence, negligent undertaking, negligent training, and gross negligence and reversed the trial court's summary judgment as to those claims.

Editor's note: MDJW will continue to monitor this case for what could be a broad expansion of an insurer's legal duties when a claim is reported.

FORT WORTH FEDERAL COURT DISMISSES ANOTHER GENERIC WIND/HAIL SUIT

Recently, Federal District Court Judge McBryde from Ft. Worth summarily dismissed all claims pled against an insurer in a typically vague lawsuit alleging severe but unspecified damage to a Fort Worth home as a result of a hailstorm and nonpayment of uncovered damages after an appraisal award. In *Ripley v. State Farm Lloyds*, 2020 WL 1643400 (Apr. 1, 2020), State Farm filed a motion to dismiss all causes of action as inadequately pleaded under Federal Rules 8 and 9(b). The court agreed with State Farm, pointing out that the plaintiffs' complaint did not allege facts to support their breach of contract or bad faith claims, but only stated legal conclusions. The court went on to observe: "the complaint never explains how or why the allegedly "material misrepresentations of fact and law" were fraudulent." As to the prompt payment claims, the court noted that there can be no prompt payment claim without a plausible breach of contract claims. The court went on to note that even if they had a valid breach of contract claim, they had failed to allege sufficient facts that could support a prompt payment claim.

The court also denied plaintiffs motion for leave to file an amended complaint. The court first noted that the motion was not in proper form as it failed to follow Judge McBryde's clear and specific local rules as it was signed by a law firm and contained a simulated signature. The court also noted plaintiffs had been given an opportunity to amend with "the specific warning that their amended pleading must comply with the requirements of the Federal Rules of Civil Procedure." Instead, the court found plaintiffs "chose to file an amended complaint that mirrored their inadequate state court petition."

Editor's note: This case is a reminder to consider early opportunities for success in federal courts, especially in cases with formulaic and generic allegations of bad faith. Early motions for dismissal under Rules 8, 9, and 12 can be powerful tools