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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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INSURER DISCOVERS ANOTHER WRONG WAY TO ELECT RESPONSIBILITY FOR AN ADJUSTER TO PERMIT REMOVAL UNDER TEXAS INSURANCE CODE

Last week, a federal judge in El Paso remanded a case back to state court after the property insurer timely elected to assume responsibility for its claim adjuster under Texas Insurance Code § 542A.006. *Project Vida v. Philadelphia Indem. Ins. Co.*, EP-20-CV-00082-DCG, 2020 WL 2220193 (W.D. Tex. May 7, 2020) (slip op.) involved two wind/hail claims made for two properties owned by the insured, and the court's decision demonstrates the hazards of accepting adjuster liability when multiple claims are involved.

The insured owned multiple properties around El Paso and made claims for wind/hail damage to two of them (Pera and Maxwell), claiming dates of loss during two different policy periods. These claims were assigned two different claim numbers in the insurer's system. Prior to filing suit, the insured sent separate pre-suit demands to the insurer for each of the two claims and sent a pre-suit demand to the claim adjuster for one of them. The insurer responded and elected to assume responsibility for the adjuster under 542A.006, listing the Maxwell claim number on its letter, although the letter listed the Pera address and discussed the handling of the Pera claim.

The policyholder then filed suit on the Pera claim and named the adjuster as a defendant. The carrier removed the case to federal court based on its previously attempted 542A.006 election, and the policyholder moved to remand. Examining the remand question, the Court concluded the language of §542A.006 refers to specific claims and held an election of responsibility is only effective as to a specific claim and cannot be general. The Court held that in light of the ambiguities in the carrier's election letter and the questions they raised about which claim was intended to be the subject of the election letter, it would resolve the question in favor of remand.

The Court openly acknowledged the current split among federal courts in Texas as to the effect of a post-suit election, with the Western and Southern Districts subscribing to the view that an election may be effective after filing suit because it precludes recovery against the adjuster, and the Northern and Eastern Districts holding improper joinder must be judged at the time of joinder, rendering a post-filing election ineffective. The Court characterized the latter as the emerging majority view but declined to actively take sides by either following its sister courts in the Western District *or* openly adopting the majority view. Instead, it took a "when in doubt, remand" view and remanded the case because it could not clearly support retaining jurisdiction.

Editor's Note: This outcome continues to highlight the hazards of the adjuster election process under §542A.006 and continues to demonstrate that carriers will have at most *one* chance to get it right in a given case. Here, the carrier's removal effort was defeated by a typographical error which placed the wrong claim number on the letter, even though the text of the letter was clearly about the claim in question. To prevent such problems in the future when multiple claims and properties are involved will require extra diligence to ensure all claim information on letters is correct and consistent. One possible prophylactic action may be to write an intentionally broad election letter that expressly elects responsibility for *every* claim a specific adjuster has handled for the particular insured, listing the claim number, property address, and date of loss for each claim to which the election applies.

FEDERAL COURT PONDERS WHETHER FLOOD DEATH AROSE OUT OF USE OF AUTOMOBILE

A federal judge in Dallas recently denied an insurer's motion for summary judgment, potentially opening up this issue for further litigation. Covington Specialty Ins. Co. v. USAI LP, 3:18-CV-3271-N, 2020 WL 2132598 (N.D. Tex. May 4, 2020) (slip op.) involved a wrongful death suit wherein a private security guard patrolling a property in a vehicle drowned when rapidly rising waters swept both him and his vehicle away. The defendant's general liability carrier contended the claim was excluded by the policy's automobile exclusion.

The underlying petition alleged, "…floodwaters engulfed Decedent's vehicle. As the Decedent escaped the vehicle, floodwaters swept the vehicle and Decedent over the embarkment and into Turtle Creek." The petition went on to allege the guard's body was later found separately from the vehicle.

The Court noted that for an auto exclusion to apply, the automobile must be more than the mere situs of the accident, but instead must be a substantial factor in bringing about the injury. Examining these allegations under the eight-corners rule, the court held it was not clear that the automobile was even the situs of the accident, let alone a substantial factor in bringing it about. Thus, the insurer could not achieve summary judgment on its claim that it owed no duty to defend the insured.