Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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EARTH MOVEMENT AND DEFECTIVE WORK EXCLUSIONS PRECLUDE DEFENSE AND INDEMNITY FOR HOMEBUILDER – SUMMARY JUDGMENT GRANTED

The United States District Court in the Southern District of Texas recently granted summary judgment in favor of an insurer after a homebuilder sought coverage from a homebuyer's construction defect claims. In *Mid-Continent Casualty Company v. McCollum Custom Homes, Inc.*, No. 4:18-CV-4132 (S.D. Tex. May 20, 2020), a suit arose for various construction defects including but not limited to the foundation on a custom home in Houston that sold for over $2,000,000. The homebuyer sued the builder, McCullum, seeking damages for the defects in the home. The builder turned to their commercial general liability insurance policy with Mid-Continent to defend and indemnify them from the homeowner's suit. Concurrently, while providing a defense to the builder, the insurer sought a declaration that their Insurance Agreement did not impose a duty to defend or indemnify the builder under the policy's "Earth Movement" or "Defective Work" exclusions.

The Federal District Court analyzed the policy exclusions against three categories of allegations that purportedly triggered the insurer's duty to defend. The three categories analyzed were: (1) purported damages to the flooring from the builder's alleged mishandling of the materials; (2) alleged pool damages which the builder claimed were due to the actions of a third-party; and (3) a laundry list of other alleged damages mostly tied to the home's foundation. The Court found the Defective Work exclusion covered the damages to the flooring based on improper handling and installation on the builder's part. For the damages to the pool, the builder tried to point to the actions of a third-party installer. However, the Court could not look at the third-party's actions and ruled it was constrained by the eight-corners rule to only consider the Petition and the Insurance Agreement, which did not cover the actions of the third-party or alternatively excluded the damage under the Earth Movement exclusion. The Court then analyzed the laundry list of remaining damages and found the insurance did not apply to the builder's defective work, deficient soil moisture foundation investigation and analysis, or improper foundation design. Since the remaining laundry list construction defects could all be linked back to naturally occurring earth movement causing shifting in the foundation, which was within the scope of the policy's Earth Movement exclusion, the Court found there was no duty to defend the builder by the clear language in the policy. The Court granted summary judgment for the insurer on the duty to defend.

Additionally, the Court found that there was no duty for the insurer to indemnify the builder because the builder failed to implement the home's drainage system as designed. The Court granted summary judgment holding the builder did not meet its burden in showing a duty to indemnify the builder to the homebuyer, and noted had indemnification coverage been triggered it would have fallen plainly within the Defective Work exclusion in the insurer's policy.

REASONABLENESS AFFIDAVITS DO NOT GUARANTEE PAST MEDICAL EXPENSE AMOUNTS

A few days ago, a Texas appeals court in Corpus Christi affirmed a trial court's ruling to not issue a judgment notwithstanding the verdict for claimants seeking additional past medical expenses based upon their medical record affidavits. In *Vicent Espinoza and San Juana Espinoza v. Monica Lizette Ruiz*, No. 13-18-00273-CV, 2020 WL 2776716, at *1 (Tex. App.—Corpus Christi May 28, 2020, no pet. h.), after an automobile accident the driver and passenger received a verdict against an insured driver for $500 each for past medical care expenses. The driver and passenger at trial presented $14,156 and $1,368 in past medical expenses, respectively, proven up by medical affidavits. After the verdict, the claimants immediately appealed to the trial court judge because their affidavits had been uncontroverted. The trial court denied the motion for judgment notwithstanding the verdict, and claimants appealed.

The claimants argued on appeal that the evidence of medical expenses provided by their affidavits conclusively proved that they were owed additional compensation for past medical expenses and that no reasonable jury could find otherwise. After review, the appellate court found that while affidavits of medical expenses do support findings of fact as to reasonableness and necessity, they do not conclusively establish the amount of recoverable damages for past medical expenses. Further, the evidence of the passenger's twenty-two delay in seeking treatment after her initial checkup paired with an x-ray confirming she had no serious injuries made the $500 award a reasonable amount to cover her initial checkup expenses. The Court also reviewed and the record showed that the claimant driver presented evidence of herniation but failed to definitively establish whether the herniation was caused by the accident or was degenerative. Not to mention, the driver also had a twenty-three gap in treatment before he had his first medical treatment for the accident. The Court felt that this evidence would allow a rational juror to infer that part of the claimant driver's treatment was necessitated by his own inaction. The Court held that the jury's award of past medical expenses of only $500 to each claimant, did not go against the great weight of evidence, and the claimants' medical affidavits established reasonableness but did not guarantee that the jury could not award a lesser amount.

LINGERING CLAIM FROM HURRICANE HARVEY WASHED AWAY BY FIFTH CIRCUIT

Last week, the Fifth Circuit affirmed a district court's summary judgment ruling holding an insurer's anti-stacking clause results in no recovery for commercial building owner. In *Pan Am Equities, Inc. v. Lexington Ins. Co.*, No. 1920363, 2020 WL 2709351 (5th Cir. May 26, 2020), the owner of two office buildings damaged by flooding from Hurricane Harvey sought a determination about which deductible was owed to its insurer to cover losses from the flood. The insurer's policy had an Anti-Stacking clause, so after analysis the largest applicable deductible would be owed. The "Flood" deductible was much smaller and would allow the owner to recover monetary funds while the "Windstorm" deductible was larger and would not. The district court held that the clear language of the "Windstorm" deductible controls, and the owner appealed.

The Fifth Circuit looked at the interplay of various provisions of the insurance contract. The Fifth Circuit found the "Windstorm" deductible applied to all "loss due to Windstorm" and the deductible was enlarged to include the policy's "Named Storm" provision. The "Named Storm" provision of the insurer's policy specifically contemplated flood damage. The owner tried to argue that since there was no wind damage from Hurricane Harvey the "Windstorm" deductible did not apply, meaning the "Named Storm" provision did not apply. However, the Court noted the policy's express inclusion of flood damage within the "Named Storm" provision compelled them to hold "loss due to Windstorm" broadly included all loss or damage including "Flood" arising out of a "Named Storm." Additionally, since this policy had an Anti-Stacking clause, even if both the "Named Storm" and "Flood" provisions both applied, the owner would still be stuck owing the higher deductible and receive nothing. The Court affirmed the district court's summary judgment in favor of the insurer, holding "Flood" damage caused by a "Named Storm" did fall under the higher "Windstorm" deductible section.

NORTHERN DISTRICT DENIES INSURER'S SUMMARY JUDGMENT ON DUTY TO DEFEND BECAUSE NO EXTRINSIC EVIDENCE EXCEPTION APPLIED

Recently, Federal District Court Judge Hendrix from San Angelo denied an insurer's summary judgment motion on the duty to defend on the basis that there was no exception to the eight-corners rule that would allow the Court to consider extrinsic evidence. In *National Liability & Fire Ins. Co. v. John Young*, 6:19-CV-031-H, (N.D. Tex. May 12, 2020) (slip op.), National Liability filed a motion for summary judgment seeking a declaration on their duty to defend a lawsuit stemming from a fatal auto accident. The vehicle involved in the accident was being rented by Enterprise Rent-A-Car to John Young d/b/a Rio Restaurant Group. National Liability filed a declaratory judgment action and argued it had no duty to defend because there was coverage for rental autos unless it was being rented because a covered auto was out of service.

National Liability moved for summary judgment arguing that the rented vehicle was not covered under the terms of the policy because Young rented the vehicle continuously between August 2018 and February 2079 and because "none of Defendant Rio Restaurant's Specifically Described 'Autos' under the Policy were being repaired." Young argued that the Plaintiff's First Amended Petition specifically alleged that the that the vehicle being driven at the time of the accident was a temporary substitute auto within the meaning of the insurance policy. The district court found that the insurer failed to establish that the Northfield exception to the "eight corners" rule applied where the underlying pleading sufficiently established that a duty to defend was owed.

Editor's Note: This decision is one of the first to address the recent Supreme Court of Texas decisions regarding the "policy language" exception that was rejected and the "collusive fraud" exception that was adopted. The Court found that no recognized exception applied in this case, and it may not consider extrinsic evidence. Accordingly, the summary judgment motion was denied.