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TEXAS INSURANCE LAW NEWSBRIEF

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INSURER'S MOTION FOR SUMMARY JUDGMENT BASED ON NONRENEWAL OF POLICY DENIED BY U.S. DISTRICT COURT - NO EVIDENCE SHOWING NOTICE OF NONRENEWAL WAS MAILED

Last week, the United States District Court for the Northern District of Texas denied an insurer's motion for summary judgment based on nonrenewal of policy as there was no evidence that notice of nonrenewal was mailed to the insured. In *Smith v. State Farm Lloyds,* No. 2:18-CV-210-Z-BP, 2020 WL 2832393(N.D. Texas [Amarillo Division], June 1, 2020, mem. op.), Plaintiff insured her house with State Farm Lloyds ("State Farm"). In February 2018, State Farm *wrote* a letter to notify the insured it would not renew her insurance policy because they delayed roof repairs after State Farm paid a claim for the damaged roof. The nonrenewal letter stated coverage would expire on March 14, 2018. A fire destroyed insured's house in May 2018, and she subsequently filed a claim to cover the fire loss. State Farm denied the claim on the grounds that the insurance policy had expired prior to the fire.

The insured sued State Farm alleging improper cancellation of the insurance policy, among other causes of action, claiming that she (and her mortgagee bank and insurance agent) never received the nonrenewal notice. In response, State Farm sought summary judgment, submitting its nonrenewal letter as evidence.

The United States District Court, noting that "Texas law requires an insurer to mail a notice of nonrenewal before terminating an insurance policy," denied State Farm's motion for summary judgment. The court reasoned that although State Farm "provided evidence that it *generated* the nonrenewal letter, but nowhere in the hundreds of pages of filings, exhibits, and appendices was there any evidence State Farm *mailed* the nonrenewal letter."

Another issue in this case was whether State Farm's basis for nonrenewal – delay in rebuild after payment of a claim – was proper. To that end, the insurance policy provided: "'[w]e may refuse to renew this policy if you have filed three or more claims under the policy in any three-year period." The insured argued that this language was as an exhaustive list of reasons State Farm could decline to renew her policy. The Court disagreed and concluded that State Farm could non-renew the policy for the reason stated. First, the policy provision "did not purport to offer an exhaustive list of reasons for policy nonrenewal; instead, it illustrated a single scenario." Second, such a narrow reading "ignores an insurer's default right under Texas law to decline to renew a policy for any reason other than the insured's being elected to political office" and "no reasonable interpretation of Plaintiff's policy suggests the parties contracted away State Farm's default right." Nevertheless, based on its finding of no evidence to support mailing of the notice, State Farm's summary judgment was denied.

FIFTH CIRCUIT CONCLUDES THAT POLICY PROVISION REQUESTING POLICYHOLDERS TO "PLEASE" REPORT CLAIMS TO CLAIMS DEPARTMENT IS AN IMMATERIAL NOTICE CONDITION, THUS PLEASING THE INSURED.

Last week, the United States Court of Appeals for the Fifth Circuit concluded that insurance policy provision requesting policyholders to "please" report claims to the claims department was an immaterial notice condition and, therefore, the insurer must show it was prejudiced by any breach to relieve itself of its duty to defend and indemnify. In *Landmark American Ins. Co. v. Lonergan Law Firm, P.L.L.C.,* No. 19-10385, 2020 WL 3024842 (5th Cir., June 4, 2020, mem. op.), attorney Gaylene Lonergan was hired by a group of Investors to help close a real estate deal. The deal turned out to be a scam and the Investors sued Lonergan for malpractice. At the time, Lonergan held a professional liability insurance policy with Landmark. The "Notice of Claim" provision in Landmark's policy obligated Lonergan to "Please send all claim information to: Attention: *Claims Dept.* [address]." As part of her application to renew her policy with Landmark, Lonergan sent a "Claim Supplement" to Landmark's *underwriting department* stating the date of suit, the claims, and the status of discovery and settlement negotiations.

Landmark sought a declaration in federal court that it did not have a duty to defend Lonergan under the policy because she failed to "report" the Investors' claim. The district court agreed and awarded summary judgment to Landmark. Lonergan appealed.

On appeal, Landmark argued that the plain meaning of "reported" must be informed by the policy's "Notice of Claim" provision, which requested that claim information be sent to the claims department. And because the Claim Supplement was sent to the underwriting department, Lonergan argued that Lonergan did not "report" the claim. The Investors argued that the plain meaning of "reported" is to have provided relevant claim information, and that the Claim Supplement provided the relevant information.

The Fifth Circuit Court of Appeals distinguished Landmark's policy provision requesting policyholders to "please" report claims to the claims department, from policies mandating that policyholders "shall" report claims to the claims department, and concluded that

Landmark's policy provision could not be considered a material condition. Because the court found the notice condition immaterial, it noted that "Landmark may be relieved of its duty to defend and indemnify only upon a showing [that the contract was breached and] Landmark was prejudiced by the breach." The court held that Lonergan reported her claim under the policy. The court remanded the case on the issue of whether Lonergan breached the policy's notice condition and whether any such breach prejudiced Landmark.

U.S. DISTRICT COURT CLARIFIES PREVIOUS OPINION DISMISSING THIRD-PARTY PLAINTIFFS' COVERAGE SUIT FOR LACK OF STANDING

On March 12, 2020, 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.), the United States District Court for the Western District of Texas concluded that the Plaintiffs, who obtained a default judgment against an insured, had no standing to bring suit to enforce coverage against the insurer because they were not the recipients of a valid assignment and the judgment upon which they relied was not the result of a fully adversarial trial. In coming to this conclusion, the court stated that the opinion in *Great American Ins. Co. v. Hamel*, 525 S.W.3d 655 (Tex. 2017) "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 of the lack of standing, the court dismissed the Plaintiffs' claims.

Subsequently, the Plaintiffs' filed a motion to alter judgment, arguing that the *Hamel* case does not stand for the proposition that a claimant must have a judgment resulting from a fully adversarial trial or a valid assignment and, therefore, the Western District erred in its interpretation of *Hamel*.

Last week, in *Blakeley Turner et. al. v The Cincinatti Ins. Co.,* No. 6-19-CV-00642-ADA, 2020 WL 2850231 (W.D. Texas, June 2, 2020, mem. op.), the Western District clarified its March 12, 2020 opinion, stating that although the requirement that a claimant must have a judgment resulting from a fully adversarial trial or a valid assignment does not have any direct textual support within the *Hamel* opinion, the requirement is implicit within the *Hamel* opinion and supported by the cases cited in *Hamel.* As such, the Western District upheld its previous decision dismissing the Third-Party Plaintiffs' claims against the insurer because their judgment was the result of a default judgment, not a fully adversarial trial.