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FEDERAL JUDGE RULES COVID-19 IS NOT A "FORCE OF NATURE," NOT SUBJECT TO 542A ADJUSTER ESCAPE CLAUSE

In what may be a first decision of this type, a San Antonio federal district court recently granted a policyholder's motion to remand a COVID-19 business interruption case to state court because the policyholder had joined an in-state adjuster, preventing complete diversity of citizenship. In *Jada Restaurant Group, LLC, v. Acadia Ins. Co.*, No. SA-20-CV-00807-XR, 2020 WL 5362071 (W.D. Tex. Sept. 8, 2020), a group of restaurants sued their insurer, alleging Acadia improperly rejected their claims for business interruption coverage resulting from the March 2020 shutdown of all dine-in restaurant service in Texas.

Jada also sued Acadia's adjuster, a Texas citizen. On receipt of Jada's pre-suit notice, Acadia promptly elected to accept responsibility for the adjuster. When Acadia was later sued, it removed the suit to federal court, arguing the adjuster must be dismissed under Texas Insurance Code §542A.006 because of its pre-suit election to accept responsibility for the adjuster.

Chapter 542A on its face applies to claims "caused, wholly or partly, by forces of nature, including an earthquake or earth tremor, a wildfire, a flood, a tornado, lightning, a hurricane, hail, wind, a snowstorm, or a rainstorm." The question, then, was whether a worldwide pandemic caused by a highly infectious virus is a "force of nature." Jada argued the statute was referring solely to weather.

Acadia argued a force of nature is equivalent to an act of God, meaning "an operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it." Acadia also argued against applying the interpretive doctrine of *ejusdem generis*, because the list of specific weather phenomena mentioned in the statute was not followed by a broader catch-all phrase, but rather preceded by it.

The court chose to apply a similar but more general doctrine, *noscitur a sociis*, or "a word may be known by the company it keeps." Thus, it concluded that because all the examples given in the list were weather events, the statute must have intended weather to be the limit of its scope, regardless of where the catch-all phrase "forces of nature" appeared. The court also noted that the legislative history of Chapter 542A shows the legislature was concerned with weather-related claims when it enacted 542A, not infectious disease claims.

Under this ruling, Acadia had to win a traditional improper joinder argument to beat remand, and the court found Jada's pleading alleged specific wrongful claim handling acts by the adjuster that were sufficient to support a facially plausible Insurance Code claim against him. Thus, he was not improperly joined, diversity was not complete, and the case was remanded to state court.

Editor's Note: A ruling by a single district court is not the last word on this important issue, and we have seen the federal courts of Texas widely diverge on the interpretation and operation of Chapter 542A before. Because remand orders are not subject to interlocutory appeal, this question of statutory interpretation is not likely to be resolved soon. But the flood of litigation and large business interruption claims resulting from the COVID-19 shutdown likely means it will eventually make its way either to the Supreme Court of Texas or to the Fifth Circuit. Meanwhile, the legislative history that showed the Texas Legislature was not considering a possible pandemic when enacting Chapter 542A might demonstrate the very lack of foreseeability that is the hallmark of an act of God. This issue will have a significant effect on COVID-19 coverage litigation in Texas, and we will watch it closely for further developments.

FEDERAL JUDGE GRANTS SUMMARY JUDGMENT FOR MANAGING GENERAL AGENCY, CONFIRMING MGAS ARE NOT INSURERS, NOT SUBJECT TO STOWERS AND SORIANO CLAIMS

Last week, a federal district court in Austin granted summary judgment for a managing general agency (MGA) who issued policies and handled claims for an insurer, after a set of claimants attempted to hold the MGA liable for a $300,000 judgment on a minimum limits auto policy. In *Galindo v. Empower Managing Gen. Agency Inc.*, No. 1:19-CV-00904-SH, 2020 WL 5409162 (W.D. Tex. Sept. 8, 2020) (slip op.), a driver insured by Old American with a minimum limits auto policy hit and killed another driver. Empower, acting as Old American's MGA, had issued the policy in Old American's name and handled the claim on behalf of Old American.

After Empower paid out the policy limits to a set of claimants who alleged they were the decedent's wife and child, Galindo appeared, alleged she was the decedent's true wife, and accused Empower of wrongfully paying the limits to imposters. Galindo sued the insured driver, and Empower/Old American refused to defend the driver because the policy limits were exhausted. Galindo collected a $300,000 judgment and a turnover order granting her all of the insured's rights against his insurer, then sued Empower, alleging

Stowers and Soriano claims. Notably, she did not sue Old American.

The district court granted Empower's motion for summary judgment on Galindo's Stowers/Soriano claims, relying on existing case law holding that the Stowers and Soriano duties apply only to insurers, and an MGA is not an insurer. The policy declarations page showed the insurer was Old American, and Empower was merely the administrator.

The evidence was less conclusive as to whether there was a contract between Empower and Old American's insured, and therefore the court denied summary judgment on Galindo's breach of contract claim.

Editor's note: It remains unclear why Galindo did not sue Old American, which presumably would have allowed the Stowers/Soriano claim concerning the alleged improper payment of the policy limits to the wrong claimants to proceed to its merits.

FEDERAL JUDGE GRANTS SUMMARY JUDGMENT FOR INSURER DUE TO LATE NOTICE ON CLAIMS-MADE POLICY

Last Thursday, a federal district court in Dallas granted summary judgment for an insurer who issued a claims-made-and-reported professional liability insurance policy, holding the insured's notice to its retail insurance broker did not constitute timely notice to the insurer, and notice of the claim was not timely given during the reporting period.

In *Vela Wood PC v. Associated Indus. Ins. Co., Inc.*, 3:19-CV-1140-N, 2020 WL 5440496 (N.D. Tex. Sept. 10, 2020) (slip op.), the insured was sued near the end of the initial policy period, and immediately gave notice to its retail insurance broker, although the insured disputed whether the suit filed against it truly stated a "claim" as defined under the policy. The agent apparently did not give notice to the insurer at that time. After the first policy period expired and the next policy period began, the claimant amended its petition, and there was no dispute that the amended petition stated a "claim." The insured gave notice to the insurer during the second policy period.

After the insurer denied the claim for late notice, the insured brought this suit, arguing the original suit against it during the first policy period did not state a "claim" because there were no facts alleged to inform the insured of the wrongful act or error that was committed. The court disagreed and observed the policy defined a "claim" as simply a written demand for monetary damages which alleges a Wrongful Act. The court pointed out that while conclusory legal allegations are not enough to withstand a federal 12(b)(6) motion to dismiss, they are enough to allege a "claim" under the policy terms.

The court also rejected the insured's claims that its report to the retail broker during the first policy period was sufficient notice to the insurer, relying on well-established Texas law holding that a retail broker is generally the agent of the insured, and giving notice to the retail broker does not relieve the insured of its duty to ensure the notice reaches the insurer. The court examined various circumstances under the Insurance Code in which a retail broker may be legally deemed the agent of the insurer, and concluded that absent evidence of a course of dealing in which the insurer had authorized the broker to act as its legal agent for purposes of receiving notice of a claim, it was not the insurer's legal agent.

Editor's Note: This case highlights the hazards that can occur with claims-made-and-reported policies, particularly when a suit is filed against the insured near the end of the reporting period and later amended. However, most claims-made policies allow the insured to lock in coverage by promptly reporting circumstances that may be reasonably expected to lead to a claim, such as a questionable and poorly pleaded lawsuit. For purchasers of claims-made policies, the best practice to avoid late notice problems may be, "when in doubt, report." Although this fact scenario suggests the insured may have had a valid claim against its retail insurance broker for failing to transmit the original report to the insurer, the insured apparently chose not to bring the broker into this suit, for reasons unknown.