Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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FEDERAL COURT DENIES INSURER'S MSJ IN DISPUTE FROM SETTLEMENT OF CONSTRUCTION DEFECT SUIT

Last week, a federal judge in Houston denied a motion for summary judgment filed by a general contractor's excess insurer against another excess insurer following a dispute arising from the settlement of a construction defects suit by an apartment complex against the general contractor. *Colony Ins. Co. v. First Mercury Ins. Co.*, No. H-18-3429, 2020 WL 5658662 (S.D. Tex., Sept. 22, 2020) involved a dispute between two of the general contractor's excess insurers regarding whether one insurer, Colony Insurance Company ("Colony"), was entitled to recovery of part of the settlement that it alleged the other excess insurer, First Mercury Insurance Company ("First Mercury") should have paid.

In 2015, an apartment complex sued a general contractor for alleged construction defects. First Mercury was one of the general contractor's primary insurers and also served as an excess insurer. The general contractor's attorneys tendered the claim to First Mercury and Colony as the general contractor's excess insurers.

In August 2017, the parties mediated the claims. The general contractor's own experts calculated that the general contractor was liable for over $2.7 million in repair costs. First Mercury and the other primary insurer contributed $500,000 each to the settlement out of the primary layer. Colony therefore determined an additional $1.7 million was needed to settle the case, requested First Mercury contribute to that part of the settlement from the excess policies in effect, and told First Mercury that if it was forced to fund the remainder of the settlement alone it would seek reimbursement in a separate lawsuit. First Mercury denied coverage and refused to contribute arguing no one presented it any evidence that the policy applied.

Colony argued it was entitled to subrogation because First Mercury breached its duty to indemnify the general contractor in the underlying suit. Conversely, First Mercury claimed Colony had no right to reimbursement simply because Colony was "unhappy with the amount it chose to pay," classifying the payment as a voluntary business decision.

Based on a review of the applicable law and facts, and in addition to distinguishing *Mid-Continent v. Liberty Mut. Ins. Co.* from the facts of this case, U.S. Magistrate Judge Peter Bray found fact issues existed as to whether First Mercury was obligated to pay under the excess policies and whether any exclusion in the policies applied.

BEAUMONT APPEALS COURT REJECTS MANDAMUS REQUEST IN APPRAISAL DISPUTE

A panel for the Court of Appeals in Beaumont recently denied a petition for mandamus filed by Mountain Valley Indemnity Company ("Mountain Valley") and Prostar Adjusting ("Prostar") contending the trial court abused its discretion by granting the insured's motion to quash depositions on written questions and motion for a protective order. *In re Mountain Valley Indemnity Co. and Prostar Adjusting*, No. 09-20-00156-CV, 2020 WL 5666569 (Tex. App.—Beaumont Sept. 24, 2020).

In late 2017, a pipe burst in the attic of the insured's home and caused damage to his residence and personal property. He made a claim with Mountain Valley, who hired Prostar to investigate the claim. For over two years, the parties disagreed over the reasonable value of the damages caused by the water that damaged the insured's home.

The insured invoked the appraisal process in the policy and requested that the trial court appoint an umpire based on such provisions. In March 2020, the umpire issued a ruling appraising the losses at $225,302. The award made clear that it did not account for any applicable deductibles or whether the policy covered the appraised loss.

Soon after, Mountain Valley served discovery requests to the insured and notified him that they intended to take deposition by written questions of nonparties they claimed had knowledge of the repairs, damages, delays, and renovations performed on the insured's home. In response, the insured moved to quash the deposition notices and sought protection from discovery requests seeking information related to the valuation of any losses valued in the appraisal process—arguing that Mountain Valley could no longer dispute the value set by the umpire per the appraisal provision in the policy. In response, Mountain Valley and Prostar argued that there were substantial coverage issues and the discovery was relevant to the affirmative defense they planned to advance in a forthcoming motion to set aside the appraisal award due to fraud, mistake, or accident.

The trial court found Mountain Valley and Prostar did not have the right to challenge the validity of the appraisal award without a pleading raising affirmative defense to avoid the legal effect of the award. Because Mountain Valley and Prostar did not include their answers in the appellate record, the appellate court held it could not tell if the trial court abused its discretion. It therefore denied the

petition and remanded the case to the trail court, stating “we are confident the trial court will permit Mountain Valley and Prostar to pursue more discovery on claims raised by the pleadings should they amend their pleadings and raise new defenses before serving [the insured] with more discovery.