Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

OCT 13, 2020

U.S. DISTRICT COURT GRANTS MOTION TO EXCLUDE TESTIMONY OF DEFENDANT'S EXPERT ON REASONABLENESS OF PAST MEDICAL EXPENSES

Last week, the United States District Court for the Western District of Texas concluded that the Defendant's medical billing and coding expert was not qualified to render opinions on the reasonableness of medical charges, and the Court granted the Plaintiff's motion to exclude the expert's testimony. In *Cantu v. Wayne Wilkens Trucking, LLC, et. al*, No. 5:19-CV-1067-XR, 2020 WL 5948267 (W.D. Texas [San Antonio Division], Oct. 7, 2020, mem. op.), the Plaintiff brought suit arising from a motor vehicle collision. After the collision, Plaintiff visited an orthopedic surgeon and underwent multiple procedures, including two lumbar spine epidural steroid injections and a spinal surgery. Plaintiff designated the surgeon as an expert who would opine on the reasonableness of her medical bills. In response, the Defendant, pursuant to Texas Civil Practice & Remedies Code § 18.001, filed a controverting affidavit from medical business administrator, Paul Marcus Murphy, challenging the reasonableness of Plaintiff's medical expenses. Plaintiff subsequently filed a motion to exclude the testimony of Mr. Murphy, claiming that Mr. Murphy was not qualified to testify as an expert on medical charges.

The Western District initially noted that it surveyed the split between Western District courts on the issue of whether § 18.001 is applicable in federal court cases, and concluded that "§ 18.001 is purely procedural and not applicable in Federal Court." Consequently, the Western District treated the Defendant's controverting affidavit as an expert disclosure under the Federal Rules of Evidence.

Next, the Western District analyzed whether Mr. Murphy was qualified to testify as an expert under Federal Rule of Evidence 702. After reviewing Mr. Murphy's background (Bachelor of Business Administration, work helping providers get paid for the work they did, extensive expertise in CPT Codes, certification as a coding specialist, experience negotiating contracts between providers and insurance companies, etc.), the court concluded that Mr. Murphy was qualified to opine on the *payments that providers receive* from insurance companies, but he was not qualified to opine on whether a price chosen by a medical provider to *charge* a patient is reasonable. The court reasoned that although Mr. Murphy had extensive experience in collecting payments from insurance companies, his only experience dealing with patient billing was negotiating payment agreements with uninsured patients. Moreover, "absent from [Mr. Murphy's statements about his experience] was an affirmative statement that he was responsible for charging patients for the services rendered by a physician." "Mr. Murphy does not need to be a doctor to opine on the reasonableness of Plaintiff's charges, but he must have an expertise in charging or billing patients."

Therefore, the Western District granted the Plaintiff's motion to exclude the opinion testimony of Mr. Murphy.

U.S. DISTRICT COURT CONCLUDES INSURED'S CLAIM AGAINST ADJUSTER FOR UNFAIR SETTLEMENT PRACTICES IS VIABLE AND REMANDS INSURED'S CLAIM TO STATE COURT

Last week, the United States District Court for the Western District of Texas concluded that the Insured stated a plausible claim against the adjuster for unfair settlement practices under Chapter 541 of the Texas Insurance Code. In *Orsatti DDS, P.C. v. Allstate Ins. Co.*., No. 5-20-CV-00840-FB-RFP, 2020 WL 5948269 (W.D. Texas [San Antonio Division], Oct. 7, 2020, mem. op.), Plaintiff Orsatti, DDS, P.C. ("Orsatti"), a dental office, could not conduct its business as usual due to the "shelter-in-place" orders issued in connection with COVID-19. Consequently, Orsatti reported a claim to its insurer, Allstate, contending that Orsatti suffered a physical loss of the property and loss of business income. Allstate denied Orsattti's claim based on the policy's virus exclusion and that there was no showing of physical damage to the property. Orsatti subsequently filed suit against Allstate and the claims adjuster, alleging various contractual and extra-contractual causes of action. Orsatti's claim against the adjuster was for alleged unfair-settlement practices under Section 541.060(a)(2)(A) of the Texas Insurance Code.

Allstate filed a notice of removal based on diversity jurisdiction, followed by Orsatti's motion to remand arguing that complete diversity did not exist because both the adjuster and Orsatti were citizens of Texas. In response, Allstate contended that the Court should ignore the non-diverse citizenship of the adjuster because he was improperly joined. The Western District disagreed with Allstate and remanded the case to state court.

The Western District began its analysis by noting the "somewhat varied" decisions addressing the topic of alleged improper joinder in the context of claims of unfair-settlement practices against insurance adjusters. That is, some courts have found § 541.060(a)(2) inapplicable because adjustors lack settlement authority, but other courts have disagreed with that interpretation on grounds that "such a reading unduly narrows the scope of the provision." The Western District further noted that "one theme that emerges from reading

judicial decisions in this area is that . . . a plaintiff's allegations of misconduct directed against an adjuster that are distinct from alleged misconduct attributable to the insurance company can reflect a viable Section 541.060 claim against the individual adjuster." The Western District concluded that Orsatti properly stated a claim against the adjuster. The Western District reasoned that Orsatti alleged that the adjuster made no request for documentation, and did not ask Orsatti any questions upon learning it had to close business, but instead immediately sent Orsatti a denial letter stating that there was no coverage. Although Allstate contended that the plain language and virus exclusion of the policy mandated denial of the claim and, therefore, no investigation would have been necessary, the Western District concluded that such a contention was "more properly an attack on the merits of the claim, rather than an inquiry into the propriety of the joinder of the local party."

Allstate alternatively argued that even if the adjuster was properly joined when Orsatti initiated the action, because Allstate subsequently elected to accept liability for the adjuster pursuant to Section 542A.006, the adjuster's joinder became improper. The Western District, noting that "decisions are split regarding whether an insurer's post-suit election renders a nondiverse adjuster improperly joined", joined the decisions finding that Chapter 542A only applies to weather-related events (i.e. does not apply to government-mandated business closures and viruses). Thus, the Western District concluded that Allstate could not invoke the procedure set forth in 542A.006 to obtain dismissal of the adjuster.

In the end, because Orsatti properly stated a claim against the adjuster, complete diversity of citizenship was defeated, and the case was remanded to state court.