

TEXAS INSURANCE LAW NEWSBRIEF

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FEDERAL DISTRICT COURT APPLIES "PRIMARY JURISDICTION DOCTRINE" – STAYS CASE AND REFERS PUTATIVE CLASS ACTION DISPUTE OVER VEHICLE TOTAL LOSS EVALUATION METHODOLOGY TO TEXAS DEPARTMENT OF INSURANCE

Last Wednesday, a federal district court applied the Primary Jurisdiction Doctrine in a dispute over an insurer's use of Work Center Total Loss's (WCTL) methodology and reports to determine the pre-cash value of insured's total loss vehicle. The court concluded that the Texas Department of Insurance (TDI) was the proper entity to make a threshold determination and issued a stay in the case pending the TDI's determination. In *Mian v. Progressive County Mutual Ins. Co.*, 2020 WL 6158645 (S.D. Tex. Oct. 21, 2020), Progressive used a WCTL report to determine the pre-crash value of the insured's total loss vehicle. Dissatisfied with the amount, the insured filed suit on behalf of himself and others similarly situated claiming the WCTL reports were "statistically invalid and do[] not result in a proper valuation for total loss vehicles in Texas." The insured also alleged contractual and extra-contractual claims against Progressive, joined the valuation companies in the lawsuit and asserted tortious interference and civil conspiracy claims against all defendants.

The court dismissed the claims against the valuation defendants without prejudice and granted Progressive's motion to stay the case under the Primary Jurisdiction Doctrine, finding that the valuation methodology dispute falls within the scope of the TDI's jurisdiction. The court noted that a primary jurisdiction referral is appropriate when referral will promote "even-handed treatment and uniformity in a highly regulated area." And, when the agency possesses specialized expertise in areas "which the courts are relatively unfamiliar." The court also noted that WCTL reports are used by multiple insurers in Texas and the TDI has the necessary expertise and resources to develop uniform rules to apply on a larger scale to the methodology used in generating the reports. In this case, the court determined referral to the TDI was appropriate.

Lastly, the court considered the two exceptions to the Primary Jurisdiction Doctrine raised by the insured and recognized by the Texas Supreme Court. First, it rejected the argument that the issues are inherently judicial in nature, observing that the "complex statistical analyses that are not 'inherently judicial' and are better assessed by the TDI." Second, the court observed that the TDI is not "powerless to grant the relief sought." And the insured "may proceed with his common law claims once the TDI has answered the threshold question of whether the WCTL methodology is valid." Accordingly, the court ordered the insured to file an administrative complaint against Progressive with the TDI before November 19, 2020, and aside from filing notice of filing the administrative complaint with the court and quarterly status reports, the case was stayed.

COURT FINDS NO DIRECT PHYSICAL LOSS CAUSED BY COVERED PERIL – GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER ON HURRICANE HARVEY BUSINESS INTERRUPTION CLAIM BASED ON PORT CLOSURE

Last Tuesday, a Houston federal district court granted summary judgment in favor of an insurer finding that a port closure due to approaching hurricane conditions did not satisfy the insurance policy's direct physical loss requirement necessary to trigger the business interruption coverage. In *Evanston Insurance Co. v. AmSpec Holding Corp.*, 2020 WL 6152190 (S.D. Tex. Oct. 20, 2020), AmSpec inspectors travel to ports, refineries, terminal and barges and vessels to inspect and test samples for quality testing. In August 2017, the Coast Guard closed ports as Hurricane Harvey approached the Gulf Coast. AmSpec submitted a business interruption claim under its insurance policy claiming loss of income and expenses due to the port closures. Evanston denied the claim, concluding that "there was no loss as a result of denial of access by an order of civil authority as a result of physical loss or damage." This lawsuit followed.

Evanston filed a motion for summary judgment contending in part that there must be "a causal link between any prior direct physical damage and the civil authority order for AmSpec to recover." The court carefully considered Texas case law interpreting similar insurance policy provisions and policy language with "due to" and "a result of" physical damage requirements. The court then observed that under the facts presented, "There is no evidence in the record that Hurricane Harvey damaged any property *before* the Coast Guard began issuing port closures." "Stated as plainly as the Policy, there is no evidence in the record that the civil authority order was issued "as a result of direct physical loss of or damage to property." Accordingly, the court granted summary judgment in favor of Evanston on all contractual and extra-contractual claims.

[Editor's Note: although this case involved hurricane closure decisions, the parallels to covid-19 closures might make this case applicable to certain virus business interruption claims now being filed across Texas.]

TRIAL COURT'S FAILURE TO SEVER AND ABATE UIM EXTRA-CONTRACTUAL CLAIMS DEEMED IMPROPER – MANDAMUS CONDITIONALLY GRANTED

Last Tuesday, the 14th Court of Appeals in Houston considered a trial court's refusal to sever and abate extra-contractual claims asserted in a declaratory judgment action seeking underinsured motorist (UIM) benefits and determined that the trial court abused its discretion in denying the insurer's motion. In *In re James River Insurance Company*, 2020 WL 6143163 (Tex. App. - Houston [14th Dist.] Oct. 20, 2020), the insured sued for injuries arising from a rear-end motor vehicle accident and included a declaratory judgment action against her own insurer for UIM benefits and claiming both contractual and extra-contractual damages. The insured claimed that based on her medical expenses her insurer's liability was reasonably clear, but they failed to make a settlement offer. So, she also alleged extra-contractual / unfair settlement practice claims against her insurer.

The insured served discovery on her insurer related to their UIM claims handling, including requests for claims handling history on unrelated accidents. The insurer moved to sever and abate the extra-contractual claims and related discovery until coverage could be determined by the declaratory judgment action. The trial court denied the motion and this mandamus action followed seeking to set aside the trial court's discovery order.

The Court of Appeals in Houston (14th Dist.) noted that under Texas law, an "insured's claim for breach of an insurance contract is distinct and independent from claims an insurer violated its extra-contractual common law and statutory duties." And, that a "UIM insurer has no contractual duty to pay benefits until the liability of the other driver and amount of damages sustained by the insured are determined." Further, an "insured first must establish that the insurer is liable on the contract before the insured can recover on extra-contractual claims against an insurer for failure to pay or settle a UIM insurance claim." The court noted that the insured's extra-contractual claims were based on a contractual duty to pay UIM benefits that has not yet been determined. And, that the discovery sought is irrelevant to the contractual determination. Accordingly, the Court of Appeals found that the trial court abused its discretion by not severing and abating the insured's extra-contractual claims. The insurer's petition for writ of mandamus was conditionally granted directing the court to vacate its discovery order and to sever and abate the extra-contractual claims.

UIM INSURER'S CORPORATE REPRESENTATIVE'S DEPOSITION LIMITED - MANDAMUS GRANTED IN PART

Lastly Wednesday, the Tyler Court of Appeals considered a trial court's order allowing a UIM insurer's corporate representative's deposition to proceed and conditionally granted mandamus relief to the insurer allowing the deposition to proceed with a narrow focus on damages and defenses in the pending action, but not as to irrelevant and inadmissible extra-contractual and claim handling matters. In *In re Garrison Property & Casualty Insurance Company*, 2020 WL 6164982 (Tex. App. - Tyler, Oct. 21, 2020), the insured suffered injuries in an automobile accident and settled with the responsible driver. In the pending declaratory judgment lawsuit seeking UIM benefits under her own policy, the insured requested a deposition from her insurer's corporate representative on thirteen topics. The insurer did not agree to produce them and filed a motion to quash. They also filed "unilateral stipulations" addressing the topics, essentially confirming coverage, available benefits, consent to settle, the other driver's negligence, liability and other contractual issues except, the amount of damages the insured is legally entitled to recover. Nevertheless, the trial court denied the insurer's motion to quash and ordered the deposition to proceed. This mandamus action followed.

The Tyler Court of Appeals considered the insurer's argument that any discovery on its defenses and legal theories is not relevant until the amount of damages the insured is legally entitled to recover has been determined. The court observed that "as long as the scope is limited to the issues in dispute, a deposition of a corporate representative is relevant and permissible discovery." And, "[t]his is especially true in cases such as this one in which the claimant has settled with the alleged underinsured motorist and is proceeding directly against the insurer in a case that does not involve extra-contractual matters." Accordingly, the court concluded the deposition may proceed to discover the "nature and extent of Garrison's defenses concerning damages." But that other topics, such as the nature of the insured's injuries, irrelevant matters such as "inadmissible extracontractual and claim handling matters" exceed the scope of matters relevant to damages and should not be allowed. The insurer's petition for writ of mandamus was conditionally granted in part and denied in part, allowing the corporate representatives deposition to proceed but to be limited in scope to issues relevant in the pending lawsuit.