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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

NOV 3, 2020

COURT DISMISSES ONE INSURER'S CLAIMS AGAINST ANOTHER SEEKING DEFENSE AND INDEMNITY FOR AN ADDITIONAL INSURED IN AN UNDERLYING TORT ACTION

Last week, The Corpus Christi Court of Appeals affirmed a trial court's judgment granting Farmers Insurance Exchange's (FIE) and Wasp Construction, LLC's (Wasp) motions for summary judgment on United Specialty Insurance Company's (USIC) claims that its insured, Cantu Construction, Inc. (Cantu), was an additional insured under the FIE policy, that the policy therefore imposed a duty on FIE to defend and indemnify Cantu, and that Wasp breached its subcontract with Cantu by failing to defend and indemnify him against claims in an underlying tort action. *United Specialty Ins. Co. v. Farmers Ins. Exchange v. Wasp Constr. Co.*, Nos. 13-19-00127CV, 13-19-00128-CV, 2020 WL 6343341 (Tex. App.—Corpus Christi, Oct. 29, 2020) involved a consolidated appeal from cross-motions for summary judgment arising from a dispute between the insurers and one of the alleged underlying tortfeasors, Cantu.

Cantu was a general contractor and accepted a bid from Wasp on August 26, 2014 to perform water and sewer improvement on a project. Wasp held a "business owners policy" with FIE and Cantu carried a liability policy with USIC. Wasp's FIE policy contained an additional insured provision that extended coverage to any person or organization Wasp was performing operations for, if Wasp and such person/organization agreed in a written contract that such person/organization would be included as an additional insured.

At the time Wasp began working on the project, Cantu was not named as an additional insured. On August 30, 2014, just four days after the bid was accepted, a Wasp employee was severely injured on the job and filed suit against Wasp and Cantu in addition to seeking workers' compensation benefits.

The formal subcontract between Wasp and Cantu was not signed until October 9, 2014 and stipulated that it was entered into on September 12, 2014—two weeks after the accident. While working to settle the Wasp employee's tort action, a dispute arose between USIC, FIE, and Wasp. USIC, as assignee and subrogees of Cantu, alleged that FIE was responsible for defending Cantu as an additional insured under Wasp's policy, that Wasp wrongfully failed to defend and indemnify Cantu in the underlying suit, and Wasp failed to provide additional insured coverage under its FIE policy to Cantu. In response, FIE argued that Cantu was not an additional insured under Wasp's insurance because the parties' subcontract was not in effect until *after* the date of Wasp's employee's on-the-job accident. FIE further argued that it therefore did not breach the subcontract and did not owe a duty to defend and indemnify Cantu.

The Court agreed with FIE, disapproving of USIC's argument that the two parties had entered into an oral agreement prior to the Wasp Employee's accident and the subcontract was simply a memorialization of the agreement. Instead, the Court concluded that the plain, unambiguous language contained in the FIE policy required the parties to enter a written contract calling for Cantu to be named as an additional insured on the policy.

USIC further argued that, even if the parties entered into a subcontract after the date of the Wasp employee's accident, the additional policy did not state that the written agreement naming an additional insured had to be executed prior to the event requiring coverage. However, the Court cited multiple cases in which it was held that, even if the policy "did not plainly dictate that the written agreements for additional insureds be executed prior to the vent requiring coverage . . . the courts nonetheless held the policies required the insured and prospective additional insured to have entered into a written contract *prior* to an incident for the additional insured status to attach."

Thus, the Court concluded that, for Cantu to become an additional insured, Wasp and Cantu must have agreed via a written contract prior to the reported loss. As such, the Court affirmed the trial court's order granting FIE's motion for summary judgment.

USIC also claimed Wasp breached the subcontract with Cantu by failing to defend or indemnify Cantu for claims asserted against it in the underlying suit by Wasp's employee. Wasp argued—and the Court agreed—that USIC's claim was barred by *res judicata* because the trial court in the underlying suit granted Wasp's motion to dismiss Cantu's claims against it with prejudice. And, although USIC was not named in the underlying lawsuit, privity between USIC and Wasp existed because USIC was involved the settlement negotiations in the underlying suit, was present when the trial court granted Wasp's motion to dismiss Cantu's claims, had control of the action even if they were not parties to it, had interests represented by a party to the action, and were now deriving their claims through a party to the prior action. Consequently, the Court affirmed the trial court's order granting Wasp's motion for summary judgment.

APPEALS COURT DENIES INSURER'S PETITION FOR WRIT OF MANDAMUS SEEKING TO SET ASIDE TRIAL COURT'S ORDER STRIKING ITS CONTROVERTING AFFIDAVITS

Recently, a Houston court of appeals joined a growing list of appellate courts refusing to order trial courts to set aside orders striking defendants' controverting affidavits in personal injury lawsuits. *In re Liberty Co. Mutual Ins. Co.*, No. 14-20-00579-CV, 2020 WL 6278398 (Tex. App.—Houston [14th Dist.], Oct. 27, 2020) involved a petition for writ of mandamus filed by Liberty County Mutual Insurance Company ("Liberty") seeking to compel the trial court judge to set aside his order striking Liberty's controverting affidavits.

Liberty was the uninsured/underinsured ("UM/UIM") carrier for the insured who was involved in a three-car motor vehicle accident and settled with both other drivers involved. When Liberty refused to pay the claimant UIM benefits, the claimant sued Liberty for breach of contract and violations of the Texas Insurance Code.

After filing suit, the claimant filed notice of billing affidavits pursuant to section 18.001 of the Texas Civil Practice and Remedies Code, which provides that a party who files an affidavit stating that the amount he was charged for a service was reasonable and the service was necessary can use the affidavit as evidence to support his claims of reasonableness and necessity of a service at trial, unless a controverting affidavit is filed.

In response, Liberty filed twelve controverting affidavits (a/k/a "counter-affidavits"). The claimant then moved to strike the controverting affidavits, and the trial court granted his motion. As a result, Liberty filed a petition for writ of mandamus with the appeals court, arguing that the trial court abused its discretion by striking its controverting affidavits and that it did not have an adequate remedy on appeal because it would lose the substantial right of presenting evidence at trial to contradict the claimant's affidavits.

The Court noted that only one appellate court has held that a party seeking to compel a trial court to set aside an order striking controverting affidavits did not have an adequate remedy on appeal. Instead, the Court pointed to numerous courts of appeals who have since declined to follow that ruling and instead reached the opposite conclusion: that an adequate remedy on appeal does exist.

In support of its conclusion, the Court stressed that nothing in the rules of civil or appellate procedure precluded an appellate court from curing a trial court's erroneous exclusion of controverting affidavits because striking a controverting affidavit does not impair the presentation of a viable claim or defense. That is, because the section 18.001 affidavits are explicitly not considered conclusive evidence of reasonableness and necessity of the charges or causation of the corresponding injuries, a defendant can still present evidence that the injuries for which a claimant was treated were not caused by the accident. Moreover, a defendant can contest the affidavits in opening and closing statements, cross-examine the claimant about his injuries and prior medical conditions, and may introduce the corresponding medical records into evidence. Finally, if the ruling excluding the controverting affidavit is made part of the trial record, an appellate court can correct any error and reverse the trial court's ruling. Accordingly, the Court denied Liberty's petition for writ of mandamus.

APPEALS COURT AGREES TRIAL COURT ERRONEOUSLY DENIED INSURER'S MOTION TO COMPEL APPRAISAL IN HURRICANE HARVEY CLAIM

A Houston appeals court recently directed a trial court to vacate its ruling denying an insurer's motion to compel an appraisal in a claim arising from damages to the claimant's residence and personal property allegedly resulting from Hurricane Harvey. *In re QBE Specialty Ins. Co.*, No. 01-19-00164, 2020 WL 6140180 (Tex. App.—Houston [1st Dist.] Oct. 20, 2020). The central dispute in *in re QBE* involved whether the insurer had waived its right to invoke appraisal and, if not, whether the claimant had established he would nevertheless be prejudiced by the appraisal process. After a visiting judge granted the insurer's motion to compel, the presiding judge granted the claimant's motion to reconsider and denied the insurer's motion to compel.

On appeal, the Court first noted that the party challenging an appraisal on the basis of waiver must show the parties reached an impasse. Due to the fact that the insurer, in prior correspondence to the claimant, repeatedly asked for additional information to evaluate the claim, and the carrier never denied the claim nor ignored the claimant or his attorney, the appellate court held no such impasse was reached in this case. Therefore, the carrier did not waive its right to invoke appraisal.

With regard to the claimant's argument that he would nevertheless be prejudiced by the appraisal process, the Court emphasized that the policy allowed either party to invoke appraisal, both parties still had the opportunity to do so, and, although the carrier advised the claimant it was closing the claim because the estimate provided by its engineer was less than the claimant's deductible, the carrier never denied the claim or failed to make a coverage decision. The Court therefore held that the claimant would not be prejudiced by the appraisal process.