Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF

NOV 12, 2020

## INSURED'S COVID-19 RELATED CLAIM OF NEGLIGENCE AGAINST BROKER IS NOT RIPE, MAGISTRATE JUDGE RECOMMENDS DISMISSAL OF THE CLAIM AND DENIAL OF REMAND TO STATE COURT

Last week, the Magistrate Judge for the United States District Court for the Western District of Texas concluded that the insured's claim of negligence against his insurance broker was not ripe, and recommended dismissal of the claim and denial of remand. In *Terry Black's Barbecue, LLC v. State Automobile Mutual Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 6537230 (W.D. Texas [Austin Division], Nov. 5, 2020), Plaintiffs Terry Black's Barbecue, LLC and Terry Black's Barbecue Dallas, LLC ("Terry Black's BBQ"), Texas limited liability companies that own and operate restaurants in Austin and Dallas, filed suit in state court against their insurer, State Automobile Mutual Insurance Company ("State Auto"), an Ohio corporation, and the insurance broker who sold Terry Black's BBQ the policies, a Texas citizen.

Terry Black's BBQ alleged that the shut-down orders issued in connection with COVID-19 forced them to cease their full service operations, resulting in business interruption and loss of business income, and that such losses were covered under their policies with State Auto. Terry Black's BBQ asserted contractual and extra-contractual causes of action against State Auto. Terry Black's BBQ asserted a claim of negligence against the broker, alleging that if it was determined that the policies did not cover business income loss due to the COVID-19 shut-downs, then the broker was negligent in failing to recommend or procure such coverage.

In response to the suit, State Auto filed a notice of removal based on diversity jurisdiction. Terry Black's BBQ subsequently sought remand, arguing that complete diversity did not exist because both the broker and Terry Black's BBQ were citizens of Texas. In support of removal, State Auto contended that the court should ignore the non-diverse citizenship of the broker because (1) Terry Black's BBQ's negligence claim against the broker was not ripe, and (2) Texas law does not recognize a general duty of insurance agents to obtain coverage or ensure that such coverage is adequate.

The Magistrate Judge for the Western District agreed with State Auto and recommended that the negligence claim against the broker be dismissed and that Terry Black's BBQ's motion to remand be denied. Noting that a claim is not ripe for review if "it rests upon contingent future events that may not occur as anticipated or not occur at all", the court concluded that the negligence claim was not ripe. The court reasoned that the "viability of [the] negligence claim against [the broker] was entirely contingent on the resolution of [the] claims against State Auto." That is, the broker could be liable for negligence only if a court finds that the policies do not provide coverage for business income loss due to COVID-19 shut-downs.

Because the court concluded that the claim of negligence was not ripe, it did not reach State Auto's argument that the broker did not have a duty to obtain coverage or ensure that such coverage was adequate.

**Editor's note:** MDJW had the privilege of representing State Automobile Mutual Insurance Company in this matter and we take this opportunity to congratulate them, along with our attorneys Christopher Martin, Melinda Burke, and Clinton Wolbert, in securing this victory.

## 124 SEPARATE CASES OF FOOD POISONING CAUSED BY SINGLE RESTAURANT OVER FOUR-DAY PERIOD DEEMED A SINGLE "OCCURRENCE" UNDER THE INSURANCE POLICY

Last week, the United States District Court for the Western District of Texas concluded that 124 separate cases of food poisoning caused by single restaurant over a four-day period was a single "occurrence" under the insurance policy. In *Travelers Casualty Ins. Co. of America v. Mediterranean Grill & Kabob Inc.*, No. SA-20-CA-0040-FB, 2020 WL 6536163 (W.D. Texas [San Antonio Division], Nov. 4, 2020, mem. op.), Mediterranean Grill & Kabob Inc. d/b/a Pasha Mediterranean Grill ("Pasha") operated a restaurant in San Antonio, Texas. Between August 29 and September 1, 2018, nearly 200 of Pasha's customers contracted food poisoning from salmonella bacteria. The food poisonings gave rise to multiple lawsuits, each of which alleged that Pasha was negligent in the manufacture and preparation of the food.

Travelers Casualty Insurance Company of America ("Travelers") was Pasha's insurer at the time of the food poisonings. The policy contained a $1 million "per occurrence" coverage limit. The policy defined the term "occurrence" as "an accident, including continuous or repeated exposure to the same general harmful conditions."

Travelers paid approximately $450,000 of its $1 million "per occurrence" limit to settle some of the claims. However, Travelers' offer

to settle the remaining 124 claims for the remainder of the $1 million limit was rejected. Therefore, Travelers filed a declaratory judgment action against Pasha and the remaining 124 claimants to establish that the food poisoning cases were all a single "occurrence."

The Western District concluded that the food poisonings were a single "occurrence" under the policy. The court began its analysis by noting that "the proper focus in interpreting 'occurrence' is on the events that cause the injuries and give rise to the insured's liability, rather than on the number of injurious effects." The court reasoned that although Pasha's closures each night and preparation of new batches of food paused or interrupted the poisonings, "only one cause gave rise to Pasha's liability, and that was Pasha's allegedly contaminated food." The court further reasoned that "there was no allegation or evidence that Pasha returned to preparing food safely, allowed the food to become contaminated again, and then, because of Pasha's negligence, exposed more patrons to contaminated food." Lastly, the court reasoned that the conclusion that there was only one "occurrence" was consistent with Texas case law, citing *Evanston Insurance Co. v. Mid-Continent Casualty Co.*, 909 F.3d 143, 150 (5th Cir. 2018) (finding single "occurrence" when ongoing negligence of a runaway Mack truck was uninterrupted, continuing cause of a multi-vehicle accident, with no indication the driver regained control of the truck or that his negligence was otherwise interrupted between collisions) and *Foust v. Ranger Insurance Company*, 975 S.W.2d 329, 331 (Tex. App.–San Antonio 1998, writ denied) (finding single "occurrence" when a pilot dusting a farmer's fields with herbicide caused some of the herbicide to drift onto neighboring tracts of land, despite the fact that the dusting procedure required the plane to land for refueling on several occasions or change altitude).