Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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U.S. DISTRICT COURT MAGISTRATE JUDGE RECOMMENDS DISMISSAL OF RESTAURANT'S COVID-19 BUSINESS-INTERUPTION CLAIM

Last week, the Magistrate Judge for the United States District Court for the Western District of Texas recommended dismissal of restaurant's COVID-19 business-interruption claim, after concluding the claim was not covered under various policy provisions. In *Terry Black's Barbecue, LLC v. State Automobile Mutual Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Texas [Austin Division], Dec. 14, 2020), Plaintiffs Terry Black's Barbecue, LLC and Terry Black's Barbecue Dallas, LLC ("Terry Black's BBQ"), which own and operate restaurants in Austin and Dallas, filed suit against their insurer, State Automobile Mutual Insurance Company ("State Auto"), alleging that the shut-down orders issued in connection with COVID-19 forced them to cease their operations, resulting in business interruption and loss of business income. Terry Black's BBQ alleged that such losses were covered under their policies with State Auto, and that State Auto's denial of their claim was a breach of contract.

In response, State Auto filed a motion for judgment on the pleadings, arguing that the claim for business interruption losses was not covered because the loss was purely economic and the policies covered only "direct physical loss of or direct physical damage to property."

The court began its analysis by rejecting Terry Black's BBQ's argument that the term "direct physical loss" was ambiguous and, consequently, should be construed in favor of Terry Black's BBQ to encompass its inability to have its restaurants operational. The court concluded that Terry Black's BBQ's interpretation was "unreasonable because it focus[d] on the word 'loss' while ignoring the Policy's unambiguous requirement that there must be a 'direct physical loss of or damage to property' in order to trigger coverage."

Next, the court concluded that COVID-19 and related civil authority orders do not qualify as a "physical loss of or damage to property" under property insurance policies, because a "physical loss" requires some distinct, demonstrable, physical alteration of the property."

Next, the court concluded that the civil authority provision of the policies –i.e. coverage when there is damage to a property within one mile of the insured property and an order of civil authority prohibiting access to the neighboring property– was not applicable. "Just as COVID-19 did not cause direct physical loss to [Terry Black's BBQ's] property, [Terry Black's BBQ] did not allege that the pandemic caused direct physical loss to other property."

Lastly, the court concluded that the Restaurant Extension Endorsement was inapplicable. That endorsement provided coverage for the suspension of operations due to the order of a civil authority resulting from the actual or alleged exposure of the described premises to a contagious or infectious disease. The court reasoned that the civil authority orders were not issued as a result of actual or alleged exposure to COVID-19 at Terry Black's restaurants; instead, the civil authority orders were issued in response to the global pandemic.

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.

INSURED HAD NO POSSIBILITY OF RECOVERY ON CLAIMS AGAINST BROKERS, U.S. DISTRICT COURT DISMISSES CLAIMS AND DENIES REMAND TO STATE COURT

Last week, the United States District Court for the Northern District of Texas concluded that the insured had no possibility of recovery on its claims against the insurance brokers and, therefore, the court dismissed the insured's claims and denied remand. In *PSG-Mid Cities Med. Cntr. v. Jarrell et. al*, No. 3:20-CV-02477-E, 2020 WL 7398782 (N.D. Texas [Dallas Division], Dec. 17, 2020), Plaintiff Saint Camillus, a private hospital, ceased performing elective surgical procedures in compliance with the COVID-19 shut-down orders. Consequently, Saint Camillus made an insurance claim for the pandemic-related business interruption with its insurer, Continental Casualty Company ("Continental"), via email to the brokerage firm and its vice president (the "brokers"). In response, the brokers advised Saint Camillus that its "insurance policy excluded coverage for a business interruption by a virus that causes infection or disease." Nevertheless, Saint Camillus further pursued its claim, which was ultimately denied by Continental based upon the lack of "physical loss."

Saint Camillus subsequently filed suit in state court against Continental and the brokers. Saint Camillus asserted claims for violation

of the Texas Insurance Code, negligent misrepresentation, negligence, breach of the duty of good faith and fair dealing, and violation of the Texas Prompt Pay Act against the brokers. According to Saint Camillus, the brokers' response contained a material misrepresentation because the Continental policy had no virus exclusion and the word "virus" appeared in the policy only with reference to computer viruses.

Continental subsequently removed the action to federal court based upon alleged improper joinder of the brokers. Then, Saint Camillus file a motion to remand.

The Northern District concluded that Saint Camillus had "no possibility of recovery" on its claims against the brokers. Regarding the claims of violation of the Texas Insurance Code (misrepresentation) and negligent misrepresentation, the court concluded that Saint Camillus alleged "no facts to show that the misrepresentation resulted in reliance or was a producing cause of harm to Saint Camillus." The court reasoned that Saint Camillus continued to pursue its claim for coverage despite the alleged misrepresentation by the brokers.

Regarding the claim of negligence, the Northern District began its analysis by noting that insurance agents owe common law duties to a client for whom the agent "undertakes to procure insurance: (1) to use reasonable diligence in attempting to place the requested insurance; and (2) to inform the client promptly if unable to do so." However, because Saint Camillus did not allege any facts related to *procuring* the insurance, Saint Camillus did not allege facts to show that the brokers breached any duty owed to Saint Camillus (other than a duty not to misrepresent the terms of the policy, which the court dismissed as discussed above).

Regarding the claim of breach of the duty of good faith and fair dealing, the Northern District recognized that there is no basis for such a claim by an insured against an agent unless there is a contractual relationship between the insured and agent, which was not the case with Saint Camillus and the brokers.

Lastly, regarding the claim of violation of the Texas Prompt Pay Act, the Northern District recognized that such a claim was not viable against the brokers because the Act applies only to insurers.

COURT OF APPEALS FINDS LATENT AMBIGUITY IN RELEASE AGREEMENT AND REVERSES SUMMARY-JUDGMENT AGAINST RELEASING PARTY

Last week, the Court of Appeals of Texas, Houston concluded that a release agreement between the insurer and third-party claimant had a latent ambiguity and, thus, summary-judgment based on the release was improper. In *Lowe v Watson*, 2020 WL 7349506, No. 01-20-00251-CV (Tex. App.–Houston [1st Dist], Dec. 15, 2020), Lowe was driving with his wife, Tricia, and their two children, when Watson rear-ended Lowe's car. Lowe subsequently filed injury claims for him and his family with Progressive Insurance Company. Shortly thereafter, Lowe and his wife signed three release agreements, two agreements releasing their claims as legal guardians of their children, and the following release agreement:

This Release is given by Juan Lowe Sr. and Tricia Lowe (hereinafter "Releasing Party/Parties"), who for and in consideration of payment of Five Hundred Dollars ($500.00), … hereby RELEASE, ACQUIT, AND FOREVER DISCHARGE Matthew Watson … from any and all claims liabilities, obligations, demands or actions which the Releasing Party/Parties has/have now, or may have in the future, or for damages, costs, interest, fees or compensation of any kind on account of or in any way growing out of an accident which occurred on or about …

Lowe contended that the release agreement released his claims in his capacity as Tricia's husband to settle his derivative loss-of-consortium claims, not his own separate personal injury claims in his individual capacity. In support thereof, Lowe relied on the facts that (1) the check for $500 only identified Tricia, (2) the three separate releases were issued under the same claim number, (3) the various checks paid pursuant to the releases all listed the same claim number, and (4) the check issued to Lowe for $951.26 (which he rejected) did not have an associated release with that amount listed as consideration.

The Court of Appeals began its analysis by noting that there was no express waiver of negligence or loss-of-consortium claims in the release agreement. Then, relying on the parol evidence described above, the court concluded that a latent ambiguity existed as to which claims Lowe intended to release or discharge. The court reasoned that the "release was susceptible to two reasonable interpretations: (1) a release of only Lowe's loss-of-consortium claim and (2) a release both of his claims for loss of consortium and negligence. In sum, because the release agreement was ambiguous, a genuine issue of material fact on Lowe's intent existed, and the Court of Appeals reversed the trial court's grant of summary-judgment against Lowe.