Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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INSURER PREVAILS ON SUMMARY JUDGMENT BASED ON INSURED'S FAILURE TO SEGREGATE COVERED FROM NON-COVERED PROPERTY DAMAGES

Last week, the United States District Court, Southern District of Texas, granted summary judgment on all causes of action against Acadia related to a storm damage claim. *Advanced Indicator and Manufacturing, Inc. Acadia Insurance Company*, No. 4:18-CV-03059, 2021 WL 199617 (S.D. Tex., Jan. 19, 2021.

In the lawsuit, Indicator submitted a claim for its roof that was damaged by Hurricane Harvey. After an investigation, Acadia found that the damage to the building was not exclusive to Harvey and denied the claim. Indicator sued Acadia for breach of contract, breach of the duty of faith and fair dealing, violating the Texas Insurance Code, and violating the Deceptive Trade Practices Act. Acadia moved for summary judgment.

In response to the summary judgement, the insured filed a response that included unsworn declarations by their expert Peter De La Mora and an unsworn report from expert Art Boutin. The court struck De La Mora's declaration because it was unsworn and struck Boutin's report because it was unsworn and not produced until after his deposition, in violation of the federal rules.

The court found Acadia's investigation of the claim was thorough. The court then turned its analysis to the concurrent causation doctrine and noted that a "failure to segregate covered and non-covered causes of loss is fatal to the whole claim." The court noted that even if Plaintiff's expert De La Mora's unsworn declaration were admissible, it still did not differentiate between damage caused by Harvey versus prior damage. Further, in regard to his testimony, the court found: "At best, de la Mora contradicts himself - at worst he ultimately admits there is more than one cause of damage to the property."

Because there was no competent evidence to apportion covered and non-covered damages to the property, the breach of contract claim failed. And because there was no breach of the policy contract, the extra-contractual claims also failed as a matter of law.

U.S. DISTRICT COURT DISMISSES EXCESS INSURER'S DECLARATORY JUDGMENT SUIT ASSERTING POLICY AUTO EXCLUSION

Last week, the United States District Court for the Southern District of Texas concluded that an insurer's declaratory judgment suit seeking a declaration that an excess liability policy did not provide coverage for an auto accident should be dismissed because there was not yet a justiciable controversy. In *AIG Property Casualty Company v. Schultz, 2021 WL 185239, at (S.D.Tex., 2021)* (S.D. Texas, Jan. 19, 2021, mem. op.), Schultz was involved in an automobile accident that allegedly injured the Garcias. Suit was filed against Schulz in the District Court of Harris County, Texas seeking over $1 million in damages. No judgment had yet been rendered in the case, and liability had not been established. AIG filed a suit in federal court seeking a declaration that it owed neither a duty to defend nor a duty to indemnify Schultz.

Shultz argued the duty to indemnify is not yet a subject of justiciable controversy because Defendant has not-yet been held legally liable in the underlying state court lawsuit. AIG argued that a justiciable controversy exists between the parties because "Schultz tendered the Garcia Lawsuit to AIG and requested indemnity coverage for at least two large settlement demands, although the AIG Policy does not cover the loss."

The court found that although under Texas law the duty to indemnify typically cannot be adjudicated until there has been a judgment in the underlying suit, a narrow exception does exist where there is no possibility for coverage. Using the "eight corners" rule, the court found that even though the policy contained an auto exclusion, the possibility remained that facts could be developed that could trigger coverage. Additionally, the court found that because no judgment had been rendered in the underlying lawsuit, any ruling addressing the duty to indemnify would constitute an advisory opinion. Ultimately, the court found that the facts are not sufficiently developed for any meaningful decision to be reached regarding the duty to defend or indemnify. Defendant's motion to dismiss was granted without prejudice.

DALLAS FEDERAL COURT DISMISSES COVID-19 BUSINESS CLOSURE CASE DUE TO LACK OF DIRECT PHYSICAL LOSS

A federal district judge in Dallas recently dismissed another lawsuit by a business forced to close as a result of COVID-19 shutdown orders in the spring of 2020. *Berkseth-Rojas v. Aspen Am. Ins. Co.*, 3:20-CV-0948-D, 2021 WL 101479 (N.D. Tex. Jan. 12, 2021) (slip op.) involved a dentist's office which was forced to shut down all non-essential procedures in 2020. While many insureds took a "fomite" approach, alleging the presence of disease-causing particles in or on their premises, this insured took a different approach,

alleging her property suffered a direct physical loss because it became dangerous to human health, and the property could not be used in the same way that it previously had been used.

The court distinguished between a condition that might actually contaminate the property, such as smoke or asbestos, and the mere inability to use the premises to provide services to customers. The court further noted that the dentist had not alleged the actual presence of virus particles damaged the premises, but merely that she had to shut down to prevent the spread of the virus. The court concluded the loss being alleged was not to the insured property, but solely to the dentist's business, which was insufficient to trigger the policy's business income and extra expense coverage.

TEXAS COURT RE-EXAMINES WHAT IS AN ACCIDENT UNDER CGL POLICIES

Recently, an Amarillo court of appeals revisited the meaning of an "accident" under a liability insurance policy and concluded that when the insured did exactly what he meant to do, there is no accident. *LaTray v. Colony Ins. Co.*, 07-19-00350-CV, 2021 WL 97204 (Tex. App.—Amarillo Jan. 11, 2021, no pet. h.) (slip op.) involved a reprise of the facts of a well-known Texas insurance case exploring the line between accidents and intentional acts, *Argonaut Sw. Ins. Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973). Both cases involved the intentional removal or placement of fill material from or to a piece of land, where the insured had obtained permission from a tenant rather than the true property owner. Here, the insured was induced to place 40 tons of construction debris and other fill material onto a piece of property for "erosion control." The insured learned too late that the occupant of the property, who had requested the fill material, was not actually the owner but only a long-term tenant, having leased the property for 20 years. When the property owner discovered the mountains of construction debris, a lawsuit against the insured ensued.

The court examined the two longstanding lines of "accident" cases growing out of *Maupin* and its sister case, *Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396 (Tex. 1967). The *Maupin* court in 1973 highlighted the fine distinction between a non-covered mistake (the insured's misunderstanding as to whether he had obtained permission from the correct person) and a covered accident (what would happen if the removal or placement of the fill created some additional damage outside the realm of the natural and probable). On the other hand, *Orkin* held that a deliberate act, performed negligently and which leads to an unexpected, unforeseen, or undesigned injury because of the negligence, is an accident.

Here, the court continued this distinction, and also noted that an allegation of negligence cannot create an accident out of an intentional act, because coverage depends on facts, not legal theories of recovery. The court concluded that, like *Maupin* and other cases where an intentional act led to an unexpected effect, the unexpected effect did not convert the intentional act into an accident. Because the insured clearly intended to move the debris and leave it where he left it, and the claimed injury was the natural and probable consequence of that action, the insured's bare mistake as to whether he had permission from the true owner of the property did not convert his intentional placement of the fill material into an accident.

Editor's note: The court chose not to directly address *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), which famously renewed, in a construction defect context, *Orkin's* original holding that a deliberate act, performed negligently, can be an accident. *Lamar Homes* opened the door to a new era of insurance-funded construction defect litigation in Texas. This case thus could be said to stand for the proposition that *Lamar Homes* has not killed the *Maupin* line of cases, and there are still some acts that cannot be converted into covered accidents even when they are alleged to have been negligently performed.

UPDATE ON TEXAS JURY TRIALS

On January 14, 2021, the Supreme Court of Texas issued its 33rd Emergency Order generally authorizing postponement of in-person jury trials and pre-trial deadlines through April 1, 2021, and requiring all courts to use reasonable efforts to conduct proceedings remotely. While the order continues to grant latitude to most individual courts to determine what safety measures are adequate to allow normal business, including jury trials, to proceed, recent weeks have seen additional courts in major cities announce that no in-person jury trials will be attempted in the immediate future.

Meanwhile, some federal courts in Texas have also extended similar measures. Federal courts in Houston and most of the rest of the Southern District have postponed their plan to resume jury trials until March 15, 2021. The Western District has also postponed all jury trials, but only until February 28, 2021. The Eastern District is currently allowing criminal proceedings to be conducted remotely until April 30, 2021, but has issued no new guidance on civil proceedings. The Northern District has not issued any new guidance since its last order in November 2020 postponing all trials to a date after January 1, 2021.