Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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DALLAS FEDERAL JUDGE FINDS NO COVERAGE FOR PHISHING SCHEME LOSSES UNDER COMMERCIAL CRIME POLICY

Last week, a federal district court in Dallas granted primary and excess insurers' motions for summary judgment under commercial crime policies. In *RealPage, Inc. v. National Union Fire Insurance Co, et al*., No. 3:19-CV-1350-B, 2020 WL 718366, (N.D. Tex.—Dallas, February 24, 2021) RealPage sought coverage under commercial-crime policies issued by National Union and Beazley when it fell victim to a phishing scheme. In May 2018, bad actors used a phishing scheme to obtain the account credentials of a RealPage employee. They then used those credentials to access a third-party payment processor and alter fund-disbursement instructions. Ultimately, the bad actors diverted over $10,000,000 that had not yet been disbursed to RealPage’s clients. RealPage reimbursed its clients for the lost funds. Prior to the phishing scheme, RealPage obtained a Commercial Crime Policy and an Excess Fidelity and Crime Policy. RealPage sought coverage for its losses and National Union denied coverage for any funds that were owed to clients. RealPage filed suit seeking a declaration under the policies and asserting insurance code violations. The parties filed cross motions for summary judgment.

The Court first examined whether RealPage suffered a loss of property covered by the Policy by determining whether RealPage held the client funds. Based on a plain language reading of the term “hold” in the Policy, the Court concluded that RealPage did not hold the funds that were to be disbursed to their clients, and therefore did not suffer a direct loss as required under the Policy. Based on this finding, the court granted summary judgment in favor of the insurers on the declaratory-judgment, breach-of-contract, and anticipatory breach-of-contract claims. Based on the finding that RealPage was not entitled to coverage of the claim, the court also dismissed all remaining insurance code claims.

HOUSTON FEDERAL COURT DENIES REMAND AFTER FIFTH CIRCUIT AFFIRMED DISMISSAL OF CLAIMS RELATED TO FEDERAL FLOOD-INSURANCE POLICY AND A TIMELY ELECTION UNDER TEXAS INSURANCE CODE § 542A.006

Judge Lee H. Rosenthal in Houston recently denied a motion to remand based on an election to accept liability under Section 542A.006 of the Texas Insurance Code. In *Younas Chaudhary, et al., v. Chubb & Son, Inc., et al*., 2021 WL 707645, (S.D.Tex., February 23, 2021) the court examined an insurer’s election of responsibility under Section 542A.006 related to a dispute over damage from Hurricane Harvey. The Chaudhary’s filed suit after their federal flood-insurance policy’s limits were inadequate to cover damages to their home. They filed suit against their insurer; their insurance broker; and the broker’s employee, Chris Bettina, for the inadequate policy amount. The defendants timely removed, and simultaneously the broker filed an election of responsibility for Bettina's actions under Texas Insurance Code § 542A.006. The Chaudharys moved for remand, which the court denied because the claims related to handling of a federal flood-insurance policy and were preempted by federal law. The trial court dismissed the claims based on federal preemption grounds. On appeal, the Fifth Circuit affirmed the dismissal of the claims against the insurer, as well as the claims-handling claims against the broker and Bettina. The Fifth Circuit remanded the case for the trial court to determine if a portion of the claims were related to “private excess flood insurance,” which is not preempted by federal law.

The court first noted that the parties agreed the court had discretion to exercise supplemental jurisdiction because it had federal-question jurisdiction when the case was first removed. The court then reasoned that, because an election was made under Section 542A.006 of the Texas Insurance Code, remanding to state court would likely result in the state court dismissing the claims against Bettina, making the case removable and sending the parties back to federal court. In conclusion, the court found that judicial economy favors retaining jurisdiction to avoid the “ping-pong effect” of remand and removal. The court denied the motion for remand and granted the Chaudhary’s motion to file an amended complaint.