Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

APR 28, 2021

INSURED'S CLAIM THAT INSURER BREACHED ITS CONTRACTUAL OBLIGATION TO INDEMNIFY INSURED FOR HER CONTRIBUTION TO THIRD-PARTY SETTLEMENT SURVIVES RULE 91A MOTION TO DISMISS

Last week, the Supreme Court of Texas concluded that the insured could pursue a claim for the insurer's alleged breach of its contractual obligation to indemnify for the insured's monetary contribution to third-party settlement, where the insurer opted to settle the third-party claim by paying an amount less than policy limits and required the insured to contribute to the settlement in order to obtain a release. In *In Re Farmers Texas. Cnty. Mutual Ins. Co..,* No. 19-0701, 2021 WL 1583878 (Tex., April 23, 2021, mem. op.), Farmers' insured was involved in an automobile accident and was subsequently sued by the other motorists, who sought damages of $1 million, which was more than the insured's $500,000 policy limit. After the mediator proposed that the case settle for $350,000, the plaintiff accepted the proposal, but Farmers made a counteroffer of $250,000 and refused to contribute more. The insured, concerned about her potential liability for damages above her policy limits, paid the additional $100,000, without waiving her right to seek recovery of that payment from Farmers.

The insured then filed suit against Farmer's seeking reimbursement, alleging claims of negligent failure to settle and breach of contract. The insured claimed that Farmers demanded that she contribute personal funds to settle a potential claim of gross negligence that had not been raised. She further claimed that the insurance policy provided that Farmers "will pay damages . . . for which any covered person becomes 'legally responsible' because of an auto accident." In response, Farmers filed a Rule 91a motion to dismiss (no basis in law or fact), asserting that it had no contractual duty to pay damages because the insured had not been held "legally responsible" for any damages.

The issue before the Supreme Court of Texas was "whether an insured who contributes to a within-limits settlement in response to a solicitation or demand by her insurer can bring a claim for reimbursement under *Stowers* or the insurance policy." The court declined to extend the *Stowers* doctrine to cases in which there is no liability in excess of policy limits. However, the court concluded that the *Stowers* doctrine does not preclude a claim against the insurer for breach of contract when the insured alleges that she suffered damages within policy limits. The court reasoned that "a judgment against an insured is not the only manner by which an insured can become legally obligated to pay a claim; a legal obligation can also arise out of a contract, such as a settlement." To that end, the release agreement between the plaintiff and insured provided that the claims against the insured would be released for consideration of $350,000: $250,000 to be paid by Farmers and $100,000 to be paid by the insured. Thus, the court concluded that the "settlement establishe[d] that [the insured] was 'legally responsible' for damages because of the auto accident." In the end, the insured could assert a claim against Farmers for breaching its promise to pay the damages for which the settlement made her legally responsible.

Notably, the court stated that its conclusion that the insured alleged facts sufficient to survive Farmers' Rule 91a motion to dismiss did not mean the insured would succeed in proving Farmers was liable for breach of the policy, as evidence could establish that Farmers' reasons for non-payment implicated other policy provisions or legal doctrines that would prevent liability for breach of contract. Additionally, the court stated that "we do not hold that insureds who settle third-party claims unilaterally—without the consent or participation of their insurers—are entitled to reimbursement under their policies." To further clarify its ruling, the court stated: "Farmers structured a within-limits settlement but did not pay it fully, giving rise to a claim whether its consent to settle contingent on the insured's payment breached its duty to indemnify her."

SUPREME COURT OF TEXAS FINDS FOR INSURER IN LONG RUNNING CLASS ACTION REGARDING NONRENEWAL OF HO-B POLICIES

The Supreme Court of Texas recently ruled that Farmers Group Inc. did nothing wrong in replacing more comprehensive homeowners' policies with narrower ones, reversing an intermediate appellate court's ruling in favor of the class action plaintiffs. In *Farmers Group, Inc. v. Geter*, 2021 WL 1323407 (Tex., April 9, 2021), the court examined a trial court's judgment that Farmers breached an insurance contract when it decided not to renew certain homeowners policies.

Beginning in 2000, the Texas homeowners insurance market experienced a large increase in mold claims. Farmers and other insurers decided to stop offering HO-B policies and begin offering a "named peril" policy, known as the HO-A policy. The Texas Department of Insurance approved an enhanced HO-A policy, which Farmers intended to offer as a substitute for the HO-B policy. In 2002, Farmers sent a notice of non-renewal to its HO-B policyholders, including Geter. The notice stated that the policyholders' existing policies would not be renewed and that Farmers would no longer offer the HO-B policy.

Geter brought the suit in 2002 on behalf of the more than 400,000 HO-B policyholders in Texas. She claimed that Farmers did not

have the right to non-renew HO-B policies. She sought and received class certification from the trial court. Geter argued that the mold claims that prompted Farmers to non-renew the HO-B policy were "claims for losses resulting from natural causes" which would have prohibited Farmers from refusing to renew the HO-B policy. The trial court granted summary judgment to Geter and the class holding that Farmers breached the insurance contract by not renewing the policies. The court held that each class member was entitled to renew his HO-B policy. The court later ordered Farmers to issue HO-B policies to class members wishing to renew them at a premium set by the trial court. The trial court rendered a final judgment in 2017. On appeal, the court of appeals affirmed the trial court's judgment insofar as the trial court held that Farmers breached the insurance contract when it refused to renew the HO-B policies. However, the court of appeals reversed the portion of the trial court's judgment ordering Farmers to issue the policies at a determined premium. The court of appeals remanded the case for a decision on the proper remedy, if any, for the class's breach-of-contract claim.

Referencing testimony from the Commissioner of the Texas Department of Insurance, and an opinion from the Attorney General of Texas, the Texas Supreme Court found that because the individual plaintiff and class members were not entitled to a renewal of their HO-B policies, all the plaintiffs' claims fail, and summary judgment for Farmers was proper. The court concluded that Farmers was entitled to summary judgment on Geter's breach-of-contract claim for non-renewal of the HO-B policies. The court reversed the court of appeals' judgment and rendered judgment that the plaintiff and the class take nothing on this claim. The court also reversed the judgment on the fee request of class counsel and remanded the case to the trial court for requests for attorney fees and costs.

COURT OF APPEALS CONCLUDES THAT DIRTINESS OF LIQUID ON FLOOR DOES NOT CHARGE LANDOWNER WITH KNOWLEDGE OF THE PRESENCE OF THE LIQUID; GRANTS SUMMARY JUDGMENT IN FAVOR OF LANDOWNER

Last week, the Court of Appeals of Texas, Corpus Christi, concluded that dirty liquid on the floor of an HEB grocery store, and the injured party's subjective assertion that it appeared a lot of people had previously been through that area, was no evidence that the liquid had been on the floor long enough to charge HEB with constructive notice of the presence of the liquid. In *Lopez v. HEB Grocery Company.,* No. 13-19-00611-CV, 2021 WL 1567504 (Tex. App.—Corpus Christi [Edinburg Division], April 22, 2021), Lopez was shopping at an HEB grocery store when she stepped in liquid that caused her to slip and fall, causing her injury. Lopez subsequently sued HEB asserting a claim of premises liability. HEB answered and later filed a no-evidence motion for summary judgment, asserting there was no evidence that HEB knew of, was notified of, or had reason to be aware of the liquid on the floor (i.e., the alleged dangerous condition). In Lopez's response, she argued that the liquid was dirty, which meant the water was on the floor long enough to collect dirt, which, in turn, meant that a genuine issue of material fact existed regarding whether HEB had constructive notice of the liquid on the floor. The trial court granted summary judgment, and Lopez subsequently appealed.

On appeal, Lopez relied on *Pay & Save, Inc. v. Martinez*, 452 S.W.3d 923 (Tex. App.—El Paso 2014, pet. denied) for the proposition that "the liquid on the floor being dirty is sufficient to demonstrate that the landowner possessed constructive knowledge." In *Pay & Save*, the court found that the injured party presented some evidence that the hazardous condition existed long enough for the store to have a reasonable opportunity to discover it. The court based its finding on evidence of the store's Sweep Log showing that the floor had been swept less than an hour before the slip and fall occurred, that the floor was very dirty, and that there was another slip mark showing that someone else had already slipped in the same area. Further, the plaintiff presented evidence that there was an employee of the store six or seven feet away from where the incident occurred, who had been in the area for approximately fifteen minutes prior to the incident.

The Court of Appeals found the facts in *Pay & Save* distinguishable and affirmed the trial court's judgment. The court reasoned that Lopez's argument was focused solely on the dirtiness of the liquid. Further, she presented no evidence that any employee was in proximity to the liquid that allegedly caused her fall. Further, although she presented evidence that the floor was cleaned over an hour before her fall, she did not explain how this information amounted to actual or constructive knowledge of any liquid on the floor. The court concluded that the dirtiness of the liquid alone did not demonstrate actual or constructive notice. Moreover, "the liquid on the floor being described as 'dirty' and Lopez's subjective assertion that it 'looked like a lot of people had already been through that area before [her]' was no evidence that the liquid had been on the floor long enough to charge HEB with constructive notice of the alleged hazard.

FEDERAL COURT IN FORT WORTH FINDS PAYMENT TO INSURED AND MORTGAGEE CONSTITUTES CLAIM UNDER CHAPTER 542A AND DISMISSES CLAIMS AGAINST ADJUSTER

Judge Mark T. Pittman in Fort Worth recently granted an insurer's motion to dismiss based on an election to accept liability under Section 542A.006 of the Texas Insurance Code and denied a motion to remand. In *Lewis v. Safeco Ins. Co. of Indiana*, 2021 WL 1250324, (N.D.Tex., April 5, 2021), the insureds filed suit after a disagreement with Safeco on damages, cost of repairs, and coverage for storm damage. They filed suit against Safeco and the individual adjuster. Prior to the filing of the lawsuit, Safeco notified Plaintiffs' counsel that they were accepting liability on behalf of the adjuster pursuant to Section 542A.006 of the Texas Insurance Code. The defendants timely removed the case and moved for dismissal of the adjuster. The insureds moved for remand.

In response to the motion to dismiss the adjuster, the insureds argued that the payment under the insurance policy to the insured and the mortgagee of the home did not qualify as a "claim" under Chapter 542A because the payment was not made directly to the insured. The Court rejected this argument, found the language of 542A to be unambiguous, and granted the adjuster's motion to dismiss. The court also denied the motion to remand because the parties were diverse and the adjuster was improperly joined. In a footnote to the opinion, the Court remarked that, despite the denial of the motion to remand, it "has serious concerns as to whether, as

a practical matter, this simple hail-storm insurance coverage case should have been removed to federal court rather than remained in the state court."