Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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COURT HOLDS THAT INSURER BREACHED DUTY TO DEFEND – COURT FOUND INSURED SUBCONTRACTOR'S ALLEGED DEFECTIVE WORK POTENTIALLY OCCURRED DURING THE POLICY PERIOD

In *Tejas Specialty Group, Inc. v. United Specialty Ins. Co.,* No. 02-20-00085-CV, 2021 WL 2252742 (Tex. App.—Fort Worth, June 3, 2021), Tejas, a subcontractor, sued its liability insurer, United Specialty Insurance Company ("United"), seeking declaratory relief and asserting claims of breach of contract for United's refusal to defend and indemnify Tejas in a third-party claim filed by another subcontractor against Tejas and five other subcontractors, seeking indemnity and contribution in a construction defect case.

United's position in denying a defense was that the Third-Party Petition alleged that the work on the project had been certified as substantially complete by March 9, 2017. Additionally, the Third-Party Petition alleged that the Plaintiffs in the underlying case alleged that problems with the construction had been observed or made known "in the middle of 2017." Because the inception date of United's policy was October 1, 2017, the work and resulting property damage allegedly occurred before the policy was issued, thereby excluding the claims.

The Court of Appeals disagreed: "While simplistically appealing, this position fails when tested against the rules of construction which apply to the eight-corners rule." Construing the allegations of the Third-Party Petition in favor of Tejas and resolving all doubts about coverage in favor of Tejas, the court held that the property damage claim would not be excluded because the work and property damage arising therefrom *could have occurred* after the inception date of the policy. The court reasoned that (1) the Third-Party Petition was not just directed at the work of Tejas and property damages arising from it; the pleading named six subcontractors as third-party defendants, including Tejas; (2) the subcontractors' contracts were all signed in 2014, 2015, and 2016, and the Third-Party Petition was filed on April 30, 2019; thus, it could be inferred that the work of all the subcontractors was performed and the property damage occurred between 2014 and April 30, 2019; and (3) the Third-Party Petition did not allege specifically when Tejas's work was performed during that period, nor did it expressly state when property damage specifically from Tejas's work occurred. So, Tejas's work *could have been performed*, and property damage *could have occurred*, after October 1, 2017. Further, the fact that the work on the project had been certified as substantially complete on March 9, 2017, did not establish that Tejas's work did not occur after that date. Lastly, the certificate of substantial completion was not binding and, thus, the allegation of substantial completion merely created conflicting factual inferences which would not negate coverage.

SUPREME COURT OF TEXAS EXTENDS NORTH CYPRESS TO PERSONAL-INJURY CASES

Last week, the Supreme Court of Texas extended the holding in *North Cypress* (i.e., that a hospital's reimbursement rates and costs of services are discoverable in suits concerning the reasonableness of a hospital lien) to personal-injury cases. In *In Re K & L Auto Crushers, LLC.,* No. 19-1022, 2021 WL 2172535 (Tex. May 28, 2021, mem. op.), Plaintiff was injured in a motor vehicle collision with a tractor-trailer. Plaintiff's medical providers charged him a total of about $1.2 million for surgeries and related treatment. In an effort to dispute the reasonableness of the medical charges, Defendant K & L Auto ("K & L") served subpoenas on Plaintiffs' healthcare providers, seeking production of documents related to (1) the amounts the providers charged insurance companies, federal insurance programs, and in-network healthcare providers for the services, materials, devices, and equipment billed to Plaintiff as of the date of Plaintiff's treatment, (2) the amounts the providers paid for the devices and equipment billed to Plaintiff, and (3) the providers' chargemaster (full) rates for the devices and equipment billed to Plaintiff and how the providers determined those rates. In response, Plaintiff and the providers filed motions to quash the subpoenas based on relevancy grounds, among others.

The trial court sustained the providers' objections and quashed the subpoenas. K & L subsequently filed a petition for writ of mandamus, which was ultimately granted by the Supreme Court of Texas.

On mandamus, the court extended the holding in *In re N. Cypress Med. Ctr. Operating Co., Ltd*., 559 S.W.3d 128 (Tex. 2018) — that a hospital's reimbursement rates and costs of services were discoverable in a suit concerning the reasonableness of a hospital lien — to the context of personal-injury cases. The court concluded that "the negotiated rates the providers charged to private insurers and public payors for the medical services and devices provided to [Plaintiff], and the costs the providers incurred to provide those services and devices, [were] at least relevant to whether the chargemaster rates the providers billed to [Plaintiff] for the same services and devices [were] reasonable." The court held that the information sought was relevant, and the trial court abused its discretion by denying the discovery requests. The court reasoned that "the reasonableness of the claimant's medical expenses is as germane in a personal-injury case as it is in a suit to challenge the validity of a medical lien." The court further reasoned that the discovery requests were sufficiently narrowed and targeted to information regarding the negotiated rates and costs for the same or similar services and

devices for which Plaintiff was billed.

U.S. DISTRICT COURT CONCLUDES THAT THE IMPROPER-JOINDER RULE DOES NOT OVERRIDE THE VOLUNTARY-INVOLUNTARY RULE & JOINS LINE OF CASES HOLDING IMPROPER-JOINDER RULE IS NOT APPLICABLE TO POST-FILING 542A ELECTION

Two weeks ago, the United States District Court for the Northern District of Texas remanded suit against the insurer back to state court despite the insurer's post-suit 542A.006 election and subsequent dismissal of the non-diverse agent. In *Morgan v Chubb Lloyds Ins. Co. of Texas*, Civil Action No. 4:21-cv-00100-P (N.D. Tex. May, 25, 2021), after a storm allegedly damaged Plaintiffs' property, they submitted a claim to their insurer, Chubb. Believing that the agent performed an "outcome-oriented investigation" and improperly denied their claim, Plaintiffs sued Chubb and the non-diverse agent in state court. Chubb (post-filing of suit) accepted responsibility for the agent and moved for dismissal of the agent, pursuant to 542A.006 of the Texas Insurance Code (allowing insurer to elect to accept potential liability of the agent and requiring dismissal of the action against the agent upon such acceptance). The state court dismissed the agent. Chubb subsequently removed the case to federal court based on diversity jurisdiction. Then, Plaintiffs moved for remand to state court.

In deciding whether the agent's (non-diverse) citizenship should be considered for jurisdictional purposes (an issue for which "the district courts are deeply divided"), the Court undertook to resolve "two conflicting rules within removal jurisdiction": (1) the voluntary-involuntary rule, which states that an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff (for example, by the plaintiff's nonsuit or dismissal of a party) and (2) the improper-joinder rule, which allows defendants to remove actions when the plaintiff cannot establish a cause of action against the non-diverse party in state court.

The Court concluded that the improper-joinder rule is not an exception to the voluntary-involuntary rule. Further, "even if a post-filing § 542A.006 election qualified as an improper joinder, this could not override the voluntary-involuntary rule."

The Court further concluded that "a post-filing 542A.006 election cannot convert a properly joined defendant into an improperly joined defendant." "[I]n a post-filing, § 542A.006 election, the improper-joinder rule is inapplicable." To that end, the Court found that the Fifth Circuit's phrase "at the time of removal"—which has formerly been applied to find that post-suit 542A elections result in improper joinder and, thus, removal—"is dicta" and "has never been part of Fifth Circuit holdings."

Editor's Note:

The U.S. District Court for the Northern District of Texas issued an almost identical opinion in *Kessler v. Allstate Fire and Casualty Ins. Co*., No. 4:21-CV-00173, 2021 WL 2102067 (N.D. Tex. May 25, 2021, mem. op.).

The Fifth Circuit has ordered briefing on an appeal which involves this issue; the case on appeal is 21-20092; *Adv. Indicator v. Acadia Ins. Co*.

TEXAS JUDICIARY REQUESTS $6.7 MILLION FROM TEXAS LEGISLATURE TO RESOLVE BACKLOG OF CASES RESULTING FROM COVID-19 SHUT-DOWNS

In an article published by Bloomberg Law on a May 24, 2021, Correspondents reported that without additional resources provided to the Texas judiciary, "it will take [Texas courts] anywhere from *three to five years* to dig out" of the backlog of cases resulting from COVID-19 shut-downs. Thus, the Texas judiciary has "asked for $6.7 million from the legislature that [it] calculate[s] would allow [it] to resolve all the cases in the backlog that were pending through the end of December in one year." Part of this funding would be used to hire retired judges.

The Texas judiciary is also telling the legislature that virtual court sessions should be continued post-pandemic. To that end, "Supreme Court Chief Justice Nathan Hecht used his biennial address earlier this year to advise litigators that some pandemic experiments are here to stay because of cost and convenience." "'Virtual trials will continue to play a role in the new normal,' said Hecht."

Bloomberg Law's full article is posted at https://news.bloomberglaw.com/us-law-week/texas-court-backlog-could-last-five-years-without-more-funding.