Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME COURT ALLOWS CORPORATE DEPOSITIONS IN UIM CASES

In a recently released mandamus opinion, the Supreme Court of Texas held that a policyholder seeking UIM benefits from his own auto carrier may take depositions of corporate representatives in the UIM case, even where no extra-contractual claims are asserted and the only issue is the insured's legal entitlement to recover damages from the underinsured motorist. However, the court issued partial mandamus relief requiring the scope of any such deposition to be strictly limited.

In re USAA Gen. Indem. Co., 20-0281, 2021 WL 2483767 (Tex. June 18, 2021) was a suit to brought recover UIM benefits after the policyholder settled with the tortfeasor driver. It did not include any common-law or statutory "bad faith" type claims. The policyholder initially sought to depose USAA's corporate representative on a broad list of 19 topics, which was later narrowed to include topics such as the policyholder's compliance or failure to comply with policy conditions and USAA's contention that it was entitled to offset other recoveries. USAA contended that a UIM case of this type should resemble a typical car wreck case in which the tortfeasor's liability and the plaintiff's damages are determined first, and then the amount owed under the plaintiff's UIM insurance is determined. USAA argued its corporate representatives could add nothing to questions of liability and damages because they had no personal knowledge of the car accident.

The supreme court rejected that argument, noting discovery extends to all relevant facts, and lack of *personal* knowledge does not necessarily equate to lack of *relevant* knowledge. USAA disputed both liability and damages, which suggested USAA had some information about those issues, and the court noted the rules of procedure allow all permissible forms of discovery to be taken in any order. But the court emphasized that it was *not* tacitly approving stealth discovery on bad faith issues, stating, "A plaintiff may not obtain discovery on an unasserted, abated, or unripe bad-faith claim under the guise of investigating a claim for benefits."

The court also rejected USAA's proportionality argument, stating it was hard to see how one deposition of one party's corporate representative, who likely had knowledge of some relevant facts (even if second-hand), was out of proportion to the needs of the case. The court reached this conclusion although it admitted the corporate representative's knowledge was likely to be cumulative of other sources of information. The court also rejected the notion that a deposition is inherently more burdensome than written discovery. However, the court held out the possibility that USAA's proportionality and undue burden argument might have carried the day if it had put on more concrete evidence of the burden involved in presenting its witness for deposition.

Although the court allowed the deposition to proceed, it aggressively limited the topics which could be covered, and its opinion gives carriers fairly wide latitude to instruct their witnesses not to answer questions which attempt to delve into either topics that are not disputed, such as the existence of the policy, the coverage limits, and the conditions precedent that are being asserted; or unripe topics like entitlement to offsets or the basis for the carrier's claim decision.

Editor's note: In summarily rejecting the notion that depositions are more burdensome than written discovery, we presume the members of the supreme court did not ask the witnesses who must appear and be subjected to hours of preparation and questioning. The court's comments suggest that a detailed affidavit from the witness setting forth the travel and hours away from normal duties that would be required, along with the availability of other, more direct sources of information about the limited permissible topics, might be the way to reach a different result.

SAN ANTONIO COURT REFUSES TO ENFORCE HOMEOWNER POLICY'S COSMETIC DAMAGE EXCLUSION AND AFFIRMS TREBLE DAMAGE AWARD

In a reprise of a case we reported on December 15, 2020, (here) the San Antonio Court of Appeals recently affirmed on rehearing a judgment in favor of a policyholder on a residential hail claim and reinstated a previously overturned award of treble damages. *Allstate Veh. & Prop. Ins. Co. v. Reininger*, No. 04-19-0443-CV, 2021 WL 2445622 (Tex. App.—San Antonio June 16, 2021) involved a hail claim made regarding a home with a metal roof. The Allstate insurance policy contained a cosmetic damage exclusion which stated the policy did not cover "[c]osmetic damage caused by hail to a metal roof surface, including but not limited to, indentations, dents, distortions, scratches, or marks, that change the appearance of a metal roof surface." It also stated, "We will not apply this exclusion to sudden and accidental direct physical damage to a metal roof surface caused by hail that results in water leaking through the metal roof surface."

This exclusion resulted in a battle of the experts over the question of whether hail damage to the metal roof was cosmetic or not. The jury found Allstate breached its contract, committed fraud, and knowingly violated the Texas Insurance Code, awarding treble damages for the knowing violation. In its original opinion issued last December, the court of appeals upheld the actual damages, but reversed the treble damage award.

After the original opinion was issued, both parties moved for rehearing. The court granted Reininger's motion and denied Allstate's. In last week's replacement opinion, the court repeated most of its original conclusions upholding the actual damages awarded by the jury, but also reinstated the jury's award of treble damages. The court stated there was evidence Reininger disputed the original finding of cosmetic damage, and that the adjuster did not follow company procedure requiring him to retain a structural engineer before denying the claim. Additionally, there was evidence showing Allstate knew Reininger had requested a second inspection and that his agent had also requested a second inspection, but Allstate closed its file without completing the requested inspection. The court concluded this evidence was sufficient to support the jury's finding of a knowing violation.

Editor's Note: It is extremely rare for treble damage awards to be upheld on appeal, and we will continue to watch this case, as it is likely an appeal to the Supreme Court of Texas will be sought.

FEDERAL COURT DISMISSES ALL EXTRA-CONTRACTUAL CLAIMS IN HARVEY SUIT AND DECLINES TO ENFORCE PROMPT NOTICE CONDITION

A federal judge in Houston recently adopted a magistrate's opinion granting summary judgment for an insurer on all extra-contractual claims in a first-party suit concerning roof damage alleged to be from Hurricane Harvey, allowing only the breach of contract claim to proceed.

Exhibit Network Intern'l, Ltd. v. Union Ins. Co., Defendant., 4:19-CV-4221, 2021 WL 2482563 (S.D. Tex. June 17, 2021) involved a Harvey claim that was reported 15 months after Harvey. The insurer sought summary judgment based primarily on a late notice defense and argued it did not have to show prejudice to enforce the defense because in addition to the typical prompt notice, the policy also contained an endorsement adding a specific one-year reporting requirement for windstorm or hail losses "in the catastrophe area as defined by the Texas Insurance Code." The insurer argued this meant Harvey, which was a designated catastrophe, triggered the one-year reporting requirement, while the policyholder argued the reference to a "catastrophe area" meant only certain geographic areas, and its property was outside any statutory catastrophe area.

The court agreed with the policyholder, concluding the endorsement did not apply, only "prompt" notice was required, and the insurer must prove prejudice in order to enforce the notice condition. The court concluded the insurer's evidence did not show with sufficient specificity how it was prejudiced, such as identifying specific witnesses who could not remember key facts or specific intervening events that changed the condition of the roof. The court also noted the policyholder testified on the conditions he saw in 2017, and his retained expert, Peter de la Mora, testified that in his opinion, the roof was damaged by Harvey and no other cause. The court concluded this evidence created a fact issue whether the insurer as prejudiced by the delay. Therefore, the court allowed the breach of contract claim to proceed.

Editor's Note: This outcome is an object lesson in the difficulty of proving the prejudice required to enforce prompt notice conditions under Texas law. Under liability policies, a default judgment against the insured or evidence of specific settlement offers that were lost due to the insured's failure to inform the insurer are generally enough to establish prejudice, but under first-party property policies, there are virtually no clear guidelines. The implication of this ruling is that mere passage of time and the additional wear and tear that comes with it is not enough, although it remains to be seen what would be enough. One solution may be expert reports that explain in more detail how the passage of time and intervening weather conditions have made it more difficult or even impossible to determine the true cause of damage.