Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JUL 14, 2021

FEDERAL COURT COMPELS INSURER TO PRODUCE BROAD CATEGORIES OF DOCUMENTS RELATED TO INSURED'S COVID-19 CLAIM BUT FINDS NO HARM IN LATE DISCLOSURE

A federal court recently held that an insurer was required to produce several categories of documents in discovery, while giving the insurer additional time to supplement its response. *Cinemark Holdings, Inc., et al. v. Factory Mut. Ins. Co.*, No. 4:21-CV-00011 (E.D. Tex. June 29, 2021) involved a dispute between one of the largest movie theater chains in the U.S. ("Cinemark") and its insurer ("Factory") over whether the "all-risks" insurance policy ("Policy") covered Cinemark's claims for COVID-19-related losses.

After filing suit in federal court, the parties were required to exchange initial disclosures. Before the due date, Cinemark sent Factory a letter providing examples of the categories of documents it expected to receive in Factory's initial disclosure regarding documents the party would use to support its claims or defenses, including (1) the drafting of the disputed Policy wording and underwriting of the Policy; (2) Factory's investigation and handling of the claim; (3) Governing procedure manuals (claims and underwriting); (4) Representations to state regulators that inform he meaning of the Policy wording; (5) Factory's knowledge of COVID-19 and Cinemark's loss; and (6) Information about other similar COVID-19 claims. Factory objected to these categories of documents as irrelevant and unduly burdensome/unreasonable and did not produce them by the Court's initial disclosure deadline.

Upon approval of the Court, Cinemark moved to compel production of the documents and asked the Court to prohibit Factory from relying on the categories of documents in the case due to Factory's failure to produce the documents by the initial disclosure deadline.

The Court granted Cinemark's motion to compel in part, holding that the categories of documents were relevant as to (1) Factory's intent and understanding of the Policy; (2) whether Factory acted in good faith; (3) whether Factory followed industry custom and its own internal guidelines for investigating Cinemark's claim; (4) whether the Policy can be reasonably interpreted in multiple ways; (5) how COVID-19 affected Cinemark's property under the policy; and (6) Cinemark's allegation that Factory used certain documents to uniformly deny COVID-19 claims.

The Court also held that Factory's failure to disclose these materials by the initial disclosure deadline was harmless, as such disclosure would require production of thousands of documents (itself requiring thousands of hours of review prior to production) with only ten days' notice. Therefore, the Court compelled production of the documents but gave Factory thirty days to produce them.

STATE APPELLATE COURT UPHOLDS TAKE-NOTHING JUDGMENT RENDERED IN PERSONAL INJURY CASE

Last week, a Houston Court of Appeals affirmed a trial court's take-nothing judgment rendered after the jury found the insured driver was not negligent in a motor vehicle accident case. *Jowdy v. Rossi et al.*, No. 01-19-00715-CV (Tex. App.—Houston [1st Dist.] July 6, 2021).

In *Jowdy*, the insured driver ("Rossi") testified at trial that she was on a tollway when she rear-ended a driver who was stopped at the toll booth exit lane ("Jowdy") and "caused [the] wreck 100 percent." Jowdy, who was stopped despite the fact that she was in the "toll tag" lane that did not require traffic to stop, testified that she did so because traffic was heavy. Jowdy also testified she believed Rossi was looking off to the side prior to impact. Conversely, Rossi testified she was looking straight ahead with both hands on the wheel, was not speeding or on her phone, and tried to stop in time but could not. Additionally, the investigating officer, Deputy Reeves, testified Rossi's failure to control her speed was a contributing factor to the accident. Deputy Reeves also testified that, although all drivers have a duty to drive in a prudent manner, accidents could happen even when people are trying to follow the law.

Upon hearing all the evidence, the jury found Rossi not negligent, and the trial court accordingly rendered a take-nothing judgment against Jowdy. Jowdy appealed, in part claiming the evidence was factually insufficient to support the jury's finding of no negligence, given that Rossi has "admitted" to causing the accident and Deputy Reeves testified she believed Rossi caused the accident and indicated that Rossi failed to control her speed.

On appeal, the Court reminded Jowdy that the occurrence of a rear-end accident does not mean one is negligent as a matter of law, a plaintiff must prove specific facts to support every element of a negligence claim, and there was conflicting evidence regarding whether Rossi was negligent and that such negligence proximately caused the accident. Further, Rossi presented evidence that she exercised some care. Consequently, the jury had to determine whether a reasonably prudent driver would have acted in the same way under the same circumstances, which required judging the credibility of the witnesses and resolving any inconsistencies in witness

testimony to determine whether Rossi was such a “reasonably prudent driver.” Moreover, the Court made clear that a driver’s statement acknowledging they were responsible for the crash is not conclusive evidence that the driver breached the duty of ordinary care. Rather, whether such an admission rose to the level of negligence is a question for the jury.

Because Jowdy did not show that the jury’s verdict was against the great weight and preponderance of the evidence, the Court upheld the trial court’s take-nothing judgment.