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TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME COURT OVERTURNS RULING AGAINST INSURER FOR ROADSIDE DEATH, HOLDING INSURERS HAVE NO DUTY TO ENSURE POLICYHOLDERS' PHYSICAL SAFETY

Last Friday, the Texas Supreme Court held insurers have no legal duty to ensure the roadside safety of their insureds, reversing a ruling in the Court of Appeals that we reported on in April 2020 **(ARTICLE)**. In *Elephant Insurance Company v. Kenyon*, No. 20-0366 (Tex. Apr. 22, 2022) (slip op.), Kenyon was involved in a single-vehicle accident. She called her husband, who came to the scene, and then called Elephant to report the accident. The relevant portion of her conversation with Elephant's employee was:

Kenyon: Do you want us to take pictures?

Elephant: Yes, ma'am. Go ahead and take pictures.

While taking photos of the vehicle damage at the scene, Kenyon's husband was struck by another car and fatally injured. Kenyon sued Elephant on negligence, negligent undertaking, and negligent training grounds, alleging that the actions of Elephant's employee in encouraging them to take pictures at the scene placed her husband in unnecessary danger. The trial court granted Elephant's summary judgment on the ground that it owed it no legal duty to Kenyon or her husband with regard to their physical safety at the scene, and its duties were limited to its handling of her claim under the policy.

As we reported in 2020, the Court of Appeals initially affirmed Elephant's favorable summary judgment, but after an en banc rehearing, withdrew its original opinion and reversed, finding there was at least some evidence Elephant had voluntarily assumed a duty, and that its encouragement of the Kenyons to take pictures could conceivably be related to its claim handling.

The Texas Supreme court has now reversed that ruling, rebuking the court of appeals for essentially creating and imposing a new legal duty that does not exist at common law. After carefully examining the parameters of permissive interlocutory appeals and the analysis of whether any legal duty exists or should be judicially imposed, the supreme court declined to recognize a legal duty on the part of insurers to ensure the safety of their policyholders at accident scenes.

The court observed that the duty of good faith and fair dealing arises out of the insurer's exclusive control of the claim handling process, a dynamic which does not give the insurer commensurate control over its policyholders' safety at the scene of an accident. The insurer does not control the behavior of the policyholder, of third-party motorists, or of others who may arrive on scene after the accident. Additionally, the danger of being hit by a car on the side of the road exists regardless of whether a person is taking pictures or not. The accident that led to Mr. Kenyon's death could just as easily have happened while exiting the vehicle or while talking to a first responder. At that moment, the Kenyons had both greater knowledge of their immediate environment and risk of harm, and greater control over their exposure to harm than did the Elephant employee on the other end of the phone line.

The supreme court also rejected the negligent-undertaking theory, noting that the Elephant employee simply took a phone call and guided Kenyon through the first steps of the claim process – a conversation that did not include directing the Kenyons when or how to take pictures or purport to offer any safety advice.

Editor's note: MDJW takes this opportunity to congratulate its client the American Property Casualty Insurance Association (APCIA) for granting us the privilege to file an Amicus Brief on their behalf. We also congratulate our law partner and head of our Appellate Section, Levon Hovnatanian, for his efforts in securing this significant victory for Texas insurers.

FEDERAL JUDGE HOLDS ATTORNEY WHO ENGAGES IN CLAIM HANDLING CAN BE SUED UNDER INSURANCE CODE

Last Thursday, a federal magistrate judge in Houston declined to dismiss a Texas law firm from a bad faith lawsuit. In *DODD v. CHUBB NATIONAL INSURANCE COMPANY,* No. 4:21-CV-03671, 2022 WL 1185175 (S.D. Tex. Apr. 21, 2022), Chubb retained a law firm to assist with its evaluation of an underinsured motorist claim. Dodd sued Chubb and the law firm for Insurance Code violations. Chubb argued the law firm was improperly joined because it was not a "engaged in the business of insurance" and because attorneys are exempt from being classified as adjusters subject to the Insurance Code.

Chubb and the law firm presented affidavits describing the role the attorneys played in the pre-suit claim handling, but the affidavits were disputed and objected to. Although authorized to pierce the pleadings and conduct a summary-judgment type analysis, the hotly disputed affidavits did not establish the kind of "discrete and undisputed facts" that would allow that analysis.

The court went on to conclude the insured's pleadings facially established a claim that the law firm had issued letters misrepresenting the policy terms by quoting from a different policy form that contained terms which were not actually a part of Dodd's policy. The pleadings alleged the law firm had investigated and evaluated Dodd's claim, reviewed his medical records, and misstated the policy terms to him. Accepted all well-pleaded allegations as true under the required federal standard, the court concluded this was at least a potentially viable claim, noting that possession of a law license does not categorically exempt conduct that would otherwise fall in the purview of "engaging in the business of insurance."

The magistrate judge simply could not say with certainty that Dodd had no reasonable possibility of recovering against the law firm, and felt duty-bound to recommend the case be remanded to state court.

Editor's note: The opinion made clear Magistrate Judge Edison's views on the actual merits of the Insurance Code claims against the law firm or their chance of success, which he plainly thought were low. But not so low that he felt able to dismiss the law firm as an improperly joined defendant. This holding thus presents a cautionary tale for attorneys who assist their insurer clients with pre-suit claim handling. Without taking care to ensure you avoid accidentally becoming a claim handler, you could be the non-diverse defendant in your client's next bad faith suit. The moral of the story: Provide your client with legal advice, but render unto Caesar the things that are Caesar's, and leave the claim handling to licensed adjusters!