Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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COURT FINDS MATERIAL FACT ISSUE ON REASONABLENESS OF $250,000 "COVID-19 PROTECTION AND DECONTAMINATION COSTS" INCLUDED IN HAIL DAMAGE REPAIR – INSURER'S MOTION FOR SUMMARY JUDGMENT DENIED

A federal District Court judge in the Northern District of Texas recently concluded there is nothing inherently unreasonable about seeking $250,000 in unspecified COVID-19 "protection and decontamination" damages in *Valleyview Church of the Nazarene v. Church Mutual Insurance Co.,* No. 2:20-CV-222-Z-BR, 2022 WL 1460208 (N.D. Tex. July 13, 2022, mem. op.). Valleyview owned and operated a church in Amarillo, Texas. In March and April 2019, two hailstorms occurred on Valleyview's property. Its insurance company, Church Mutual, inspected the property after the first hailstorm and found Valleyview suffered mostly cosmetic damage, along with age-related wear, tear, and deterioration, ultimately concluding that wind and hail caused less damages than Valleyview's $2,500 deductible, so it did not issue any payment. After a second hailstorm, Valleyview submitted a second claim, now including interior water damage. Church Mutual similarly partially denied coverage, stating that the interior damage was due to repeated seepage, leakage, poor workmanship, or maintenance—all excluded from the policy. Valleyview filed a lawsuit for breach of contract, Insurance Code violations, Deceptive Trade Practices Act violations, and breach of good faith and fair dealing.

Church Mutual moved for summary judgment, arguing Valleyview's claim for $250,000 for "COVID-19 protection and decontamination costs" was unreasonable on its face and should be struck or reduced. The Court denied Church Mutual's summary judgment motion on all claims including for the COVID-19 objections, finding a material fact issue as to the proper amount of damages.

The Court also ordered the parties to brief whether it should stay the case and await the Supreme Court of Texas' certified questions from *Overstreet v. Allstate Vehicle and Property Insurance Co.*, 34 F.4th 496 (5th Cir. 2022). In that case, the Fifth Circuit Court of Appeals certified to, and is currently awaiting answers to three questions from, the Supreme Court of Texas:

1. Does the concurrent cause doctrine apply where there is any non-covered damage, including wear-and-tear to an insured party's property, but such damage does not directly cause the particular loss eventually experienced by the insured party?
2. If so, does the insured's allegation that its loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other non-covered perils that the insured contends did not cause the particular loss?
3. If so, can the insured meet that burden with evidence indicating that the covered peril caused the entirety of the loss?

Editor's Note: With courts rejecting COVID-19 insurance claims, efforts to include related damages as part of covered repair costs is a new trend being monitored by MDJW. It further emphasizes the importance of the Texas Supreme Court's anticipated ruling on the Concurrent Cause Doctrine questions. We will continue to monitor these developments and report on new decisions as they occur.

COURT REITERATES THAT NEITHER OPPOSING PARTY'S PLEADING OR ELECTION OF LIABILITY CAN CREATE DIVERSITY OF CITIZENSHIP

A federal District Court judge for the Eastern District of Texas recently remanded a case back to state court after a defendant insurance company was unable to sufficiently allege diversity of citizenship—despite its citation to the plaintiff's petition in *Martinez v. Trisura Specialty Insurance Company*, 1:21-CV-183, 2022 WL 887222 (E.D. Tex., July 13, 2022).

In March 2021, San Juana Martinez filed a lawsuit in state court in Jefferson County, Texas against his insurance company, Trisura Specialty Insurance Company, and an independent adjusting company, Wellington Claim Service, Inc. Trisura filed a notice of removal, alleging that it was an Oklahoma company, Martinez was a Texas resident, and "Defendant Wellington Claim Service, Inc. is listed in Plaintiff's Original Petition as residing in Texas." (A *Google-search demonstrates that Wellington is a Texas-based company*). The Eastern District magistrate judge was unimpressed and without prompting ordered Trisura to "distinctly and affirmatively allege the citizenship of *all* parties to this lawsuit" (emphasis in original). The magistrate judge also noted that similarly, a defendant's election of liability cannot make a case removable. There is no indication in the record that Trisura complied with the court's order to amend its notice of removal.

Mr. Martinez moved to remand the case, and Trisura responded, but the magistrate recommended remand, and the Court adopted the recommendation this week.

COURT SPECIFIES WHEN INSURANCE BREACH OF CONTRACT AND BREACH OF DUTY TO INDEMNIFY CLAIMS BEGIN TO ACCRUE

This week, a federal District Court judge in the Southern District of Texas delineated when various statutes of limitation for insurance claims begin to accrue. In *Patriot Logistics v. Travelers Property & Casualty Company of America*, (4:20-cv-03565, 2022 WL 2704844 (S.D. Tex., July 12, 2022)), Wheels Clipper hired cargo hauling company Patriot Logistics to move a shipment of alcohol from Illinois to Houston. Patriot Logistics successfully completed most of the transport and stored the alcohol shipment at a drop yard in Houston with a security guard and gate. Nevertheless, the shipment was stolen, the theft having been confirmed on video.

Patriot Logistics filed a claim with Travelers for the loss of cargo under its policy, and Travelers denied that claim in January 2018. Patriot Logistics and Wheels Clipper tried but were unsuccessful in reaching a settlement agreement, so Wheels Clipper sued Patriot Logistics in April 2020. Patriot requested defense and indemnification from Travelers, which Travelers denied. Patriot Logistics settled with Wheels Clipper for the full amount of its lawsuit claim.

Patriot Logistics sued Travelers in September 2020. Travelers moved for summary judgment, stating that Patriot Logistics' breach of contract, breach of good faith and fair dealing, and Insurance Code violations claims' statutes of limitations ran two years[1] after January 2018, when Traveler's initially denied Patriot Logistics' claim for the stolen cargo. Patriot Logistics disagreed, claiming that the statutes of limitations ran two years after April 2020, when Travelers refused to defend and indemnify Patriot Logistics in its lawsuit against Wheels Clipper. In an interesting decision, the Court granted in part and denied in part Travelers' motion.

The Court held that the earliest alleged contractual breach was Travelers' duty to defend Patriot Logistics, and that did not arise until there was a live lawsuit, in April 2020. The Court adopted the same reasoning for the breach of the duty of good faith and fair dealing and the same for Patriot Logistics' claim for violation of Chapter 542 of the Texas Insurance Code for defense costs resulting from a breach of the duty to defend. Travelers got the earlier statute of limitations date for violation of Chapter 541 of the Texas Insurance Code, for unfair methods of competition or unfair or deceptive acts or practices, holding that such claims accrue upon issuance of a denial letter.

Editor's Note: This decision emphasizes the complexity of navigating coverage issues involving the duty to defend and the importance of well written decision letters, continued monitoring and the use of declaratory judgment actions to address coverage issues when appropriate.

[1] Contracts default to a four-year limitations period, but can be agreed to two years, and such an agreement was conceded in this case.

DEFENSE OBLIGATION FOUND IN CONSTRUCTION DEFECT CASE BY FEDERAL JUDGE IN AUSTIN

A federal District Court judge in Austin recently ordered a liability insurer to defend its insured in a residential construction defect case, continuing the recent Texas trend on broadly construed duty-to-defend issues. In *Mid-Continent Cas. Co. v. JTH Customs, Inc.*, No. 1:21-CV-00520-LY, 2022 WL 2441855 (W.D. Tex. July 4, 2022) (slip op.), JTH designed and built a custom home for the plaintiffs. JTH used subcontractors to perform the work. After the plaintiffs moved in, they alleged they experienced numerous problems with the home, including mold, electrical issues, drainage and masonry issues, and defects in the windows, doors, swimming pool and fountain.

JTH's liability insurer filed a declaratory judgment action seeking a declaration that it owed no duty to defend JTH because the entire home was JTH's work, and the claim was excluded under "Your Work" and similar exclusions. The court disagreed, holding that the plaintiffs alleged the defective parts of the home, such as windows, caused property damage to other non-defective parts of the home, such as floors, and that the alleged damage to the non-defective work was sufficient to trigger a duty to defend, even though the entire home was JTH's work.

Editor's Note: This ruling continues a Texas trend observed over the last two years in which it has become considerably more difficult for liability insurers to prevail on duty-to-defend questions in Texas. Courts across the state and at every level have become markedly more friendly to policyholders on a wide array of coverage issues affecting the duty to defend. However, in this case, the court was also following an older Fifth Circuit case from 2009, holding that damage to a general contractor's non-defective work caused by its defective work can trigger a duty to defend, even though it is all the general contractor's work.

POLICYHOLDER WHO FAILED TO GIVE PRE-SUIT NOTICE PRECLUDED FROM RECOVERING ATTORNEY FEES

A federal District Court judge in Austin recently held that a property owner who sued its property insurer for Insurance Code violations was not entitled to recover attorney fees because the property owner failed to give the 60-day pre-suit notice required by the Insurance Code. *Satija v. Evanston Ins. Co.*, No. A-22-CV-00408-RP, 2022 WL 2438171 (W.D. Tex. July 5, 2022).

Texas Insurance Code Chapter 542 requires policyholders to give their insurers 60 days' notice before filing suit and provides two possible remedies for violations: abatement of the suit for 60 days after the required notice is given (§542A.005), and a prohibition against recovering attorney fees (§542A.007). Here, instead of seeking the 60-day abatement, the insurer sought and obtained an order

prohibiting the policyholder from recovering any attorney fees incurred after the date of the insurer's motion.

Editor's Note: The 60-day abatement has proven to be a relatively ineffective method of enforcing the notice requirement but considering an award of attorney fees can be a significant part of any final judgment, more insurers should consider this method of enforcement.

FEDERAL JUDGE IN AUSTIN REMANDS SUIT TO STATE COURT WHEN ADJUSTER ELECTION WAS MADE AFTER SUIT WAS FILED.

A federal District Court judge in Austin recently remanded a hail lawsuit to state court after the insurer removed it. In *Jackson v. Meridian Sec. Ins. Co.*, No. A-22-CV-00357-RP, 2022 WL 2383937 (W.D. Tex. June 30, 2022), the policyholder sued the carrier and an individual adjuster without giving the 60-day pre-suit notice required by the Texas Insurance Code. Texas Insurance Code § 542A.006 allows insurers to elect to assume responsibility for their adjusters and force dismissal of individual adjusters from lawsuits, and the carrier made an election to assume the adjuster's liability in this case. Because the lawsuit was the carrier's first notice of the dispute, its election of responsibility for its adjuster was made after the lawsuit was filed. The court cited what it called the "majority rule" set by the Northern District and remanded the case on the ground that there were legitimate claims against the non-diverse adjuster at the time the suit was filed, and therefore, no diversity jurisdiction.

Editor's Note: While this case may not seem significant on its own, it marks a shift in the Western District of Texas. We have been following the development of case law regarding removal and remand in Texas for the last several years in the wake of the promulgation of Texas Insurance Code § 542A.006. At this time, a fairly strong split has developed between the judges in the Northern District of Texas, which consistently considers post-suit elections *ineffective* to support diversity jurisdiction, and the judges in the Southern District, who have supported, in some cases quite strongly, the position that a post-suit election *is effective* to create diversity jurisdiction as long as it pre-dates the removal. The trend has been less clear in the Western and Eastern Districts, with some early Western District opinions accepting jurisdiction under these circumstances. But this opinion suggests at least some of the Western District judges are now beginning to consider the Northern District's position to be the "majority rule" in Texas and following it. Thus, the split between the federal districts in Texas continues to harden and likely will remain in flux until the issue reaches the Fifth Circuit.