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TEXAS INSURANCE LAW NEWSBRIEF

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COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT ON INSURER'S LIMITATIONS DEFENSE

Last week, the Dallas Court of Appeals affirmed the trial court's grant of summary judgment in favor of insurer based on the insurer's limitations defense. In *Knox Mediterranean Foods, Inc. v. Amtrust Financial Services*, No 05-21-00296-CV, 2022 WL 2980705 (Tex. App.—Dallas, July 28, 2022, mem. op.), Knox owned and operated a restaurant in Dallas. In June of 2016, Knox was burglarized. Knox subsequently submitted a theft and damage claim to its insurer, Amtrust. Amtrust then issued a check to Knox for $8,547, along with a letter stating that the check covered a stolen camera equipment. The letter went on to state that Amtrust had not received documentation it had requested regarding other alleged stolen or damaged property. Then, in June of 2017, Amtrust sent a follow-up letter stating that it was "closing this claim for possible contents damage with no additional payment" and "if this information is incorrect, or if you have additional relevant information you wish for us to review, please contact me at the number listed below." After June 2017, Knox and Amtrust allegedly continued to discuss the claim.

Knox's policy with Amtrust provided that any claim for breach of the policy must be brought "within two years and one day from the date the cause of action accrues." The policy defined accrual of a cause of action as "the date of the initial breach of [Amtrust's] contractual duties as alleged in the action."

On May 20, 2020, Knox filed suit against Amtrust asserting a claim of breach of contract. In response, Amtrust moved for summary judgment on its limitations defense, arguing that Knox's cause of action accrued on June 13, 2017, when Amtrust notified Knox that it was "closing the claim." The trial court granted summary judgment, then Knox appealed. The Court of Appeals affirmed.

On appeal, the sole issue was whether Amtrust's June 13 letter constituted a denial of Knox's claim. Knox contended that (1) the letter did not constitute an outright denial of its claim because it was ambiguous due to the last paragraph in the letter (i.e., "If this information is incorrect, or if you have additional relevant information you wish for us to review, please contact me at the number listed below.") and (2) the parties' communications after June 13, 2017 affected the finality of Amtrust's denial. Amtrust contended that neither the language in the letter nor the parties' continued discussions after June 13, 2017 affected whether the letter was a denial.

The Court of Appeals began its analysis by noting that "in first-party insurance actions, the insured's cause of action accrues when the insurer denies a claim" "However, when there is no outright denial of a claim, the exact date of accrual of a cause of action should be a question of fact to be determined on a case-by-case basis." The Court concluded that the June 13, 2017 letter was unambiguous, constituted an outright denial of Knox's claim, and the parties' later communications did not affect the finality of the denial. "If an insurer's determination regarding a claim and its reasons for the decision are contained in a clear writing to the insured, the denial will not be held to be ambiguous." The Court further reasoned that even if the parties continued communicating about Knox's claim after Amtrust denied it, such communications could not affect the limitations period: "To hold otherwise would be to denude the statute of limitations of its meaning, giving full control of when a claim accrues over to the plaintiff's discretion." "Any statements or activity on the part of the insurance company after the fact involving the claim do not forestall or renew the limitations period." Further, "when an insurer denies a claim, its mere willingness to reconsider that denial does not restart the limitations period."

COURT OF APPEALS CONCLUDES THAT OUTSIDE PHYSICAL CONTACT WITH VEHICLE COULD CONSTITUTE "OCCUPYING" VEHICLE; REVERSES SUMMARY JUDGMENT GRANTED TO INSURER

Last week, the Houston Court of Appeals concluded that the insureds' outside physical contact with the vehicle could constitute "occupying" the vehicle for purposes of establishing that the insureds were "covered persons" under the policy. Accordingly, the Court reversed the trial court's grant of summary judgment to the insurer. In *Hill v Allstate Fire and Casualty Ins. co.*, No 14-20-00562-CV, 2022 WL 2936756 (Tex. App.—Houston, July 28, 2022, mem. op.), Cortney Hill was driving her vehicle when she ran out of gas and parked on the right shoulder of U.S. Highway 59. Minor child D.M. was a passenger. Hill called a family member who arrived with a filled gas can. Because Hill was afraid that she would get hit by a car while filling the gas tank, she pressed her body on the car so she would be as close as possible to avoid the passing cars. Her body was touching the car while she was holding the gas can. D.M. was standing between the front door of the passenger's side and the concrete barrier, holding the door handle. When Hill spotted a rapidly approaching vehicle driving on the shoulder towards them, she yelled for everyone to move, at which point D.M. lay down on the roadway in close proximity to the car.

Hill, individually and as next friend of D.M., filed suit against Allstate for its failure to pay uninsured/underinsured motorist benefits. In response, Allstate filed a motion for summary judgment, arguing that Hill and D.M. were not "covered persons" because they were

not “occupying” the vehicle at the time of the accident. The policy protected covered persons while “occupying” the covered auto. “Occupying” was defined in the policy as “in, upon, getting in, on, out, or off.” Allstate asserted that Hill and D.M.’s “incidental contact” with the vehicle did not equate to them being “on” or “upon” the vehicle. The trial court agreed and granted Allstate’s motion. Hill subsequently appealed. The Court of Appeals reversed and remanded.

On appeal, the Court concluded that Hill and D.M. raised a genuine issue of material fact regarding whether they were occupying the vehicle at the time of the accident, and that the trial court erred in granting summary judgment to Allstate. The Court reasoned that “[b]ecause one of the common and ordinary meanings of the word “upon” is that of “contact with” [as defined by Merriam-Webster Dictionary], it is reasonable to conclude the parties contemplated a construction of the word that would include actual physical contact with the vehicle.” Further, the policy did not limit or restrict the meaning of the word “upon” in defining the term “occupying.” Further, fair-minded jurors could differ in their conclusions regarding whether Hill and D.M. were occupying the vehicle at the time of the accident, even considering that D.M. took evasive actions and was not physically touching the vehicle immediately prior to the accident.