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TEXAS INSURANCE LAW NEWSBRIEF

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WESTERN DISTRICT OF TEXAS REMAINS IN THE MINORITY HOLDING TIME IS JUST A NUMBER FOR ELECTION OF LIABILITY – REMAND DENIED

Last Wednesday, the United States District Court for the Western District of Texas reaffirmed its commitment to remain in the minority of Texas Courts to hold that the timing of when an insurance company elects to accept liability of an agent is not determinative for purposes of improper joinder.

In *Warner v. Trumbull Insurance Company*, 2022 WL 3448748 (W.D. Tex., August 17, 2022), Cynthia Warner alleged that her home suffered severe roof damage in a May 2020 windstorm. Ms. Warner notified Trumball, her insurance carrier, which assigned a claim representative that in turn retained Ladder Now to inspect Ms. Warner's roof. Ladder Now performed the inspection, and Trumball denied the claim based on the inspection result. Ms. Warner filed suit against Trumball, Hartford, the claim representative, and Ladder Now for breach of contract, DTPA violations, fraud, Insurance Code violations, and civil conspiracy, alleging that Trumball should have sent its own inspector, not an independent one, and it should have performed an inspection for a water leak claim that it did not perform.

About six weeks after the suit was filed and almost 2 years after the windstorm, Trumbull served Ms. Warner with a written notice of its election to accept whatever liability Ladder Now incurred pursuant to Section 542.006 of the Texas Insurance Code, and it removed the lawsuit to federal court under diversity jurisdiction—having diversity of citizenship satisfied with Ladder Now then considered an improperly joined party. Ms. Warner objected to the removal, arguing that Ladder Now was a proper party when the suit was filed since Trumball made the election after suit was filed.

The Court disagreed, stating that the timing of the election made no difference because under Section 542.006, whether the election is before or after suit, the result is the same: the party is dismissed as an improper party. Thus, Trumball successfully removed the case, regardless of having made its election—and creating diversity of citizenship—after the lawsuit was filed.

Editor's Note: Even though the insurance company won this case, this case emphasizes the importance that insurance companies and their counsel elect to accept liability of their agents as early as practical. As this court stated, "[t]his Court has consistently endorsed the *minority* view" and insurance companies have no guarantee of being sued in a minority-view jurisdiction.

IMPROPER JURY CHARGE RULING UNWINDS TAKE-NOTHING JUDGMENT FOR INSURED – NEW TRIAL GRANTED

In a relatively straightforward case, last Thursday the Texas Court of Appeals for Dallas emphasized how crucial it is to submit correct jury charges to juries. The Texas Court of Appeals in Dallas remanded the case for trial. In *Cobb. v. Hansen*, 2022 WL 3499998 (Tex.App. – Dallas, August 18, 2022), Cobb sustain injuries at his friends, the Hansens' house when their gas pizza oven exploded while he was trying to light it given their directions. He sued them for premises liability and general negligence, characterizing it as negligent activity for how they directed him to light the pizza oven. At the trial however, over Cobb's objection, the court refused to submit a general negligence charge to the jury, only allowing a premises liability questions to be presented to the jury. The jury found the friends not negligent on premises liability questions, and Cobb was given a take-nothing judgment, which he appealed.

The Hansens' victory was short-lived. The Dallas Court of Appeals held that this was a case in which the matter was timely raised and properly requested, so Rule 278 of the Texas Rules of Civil Procedure required the trial court to submit questions, instructions, and definitions that are raised by the pleadings and supported by evidence to the jury. It thus found reversible error and remanded the case for a new trial.

Editor's Note: This case demonstrates the importance of not only convincing the judge or jury, but to also apply the law correctly in submitting the jury charge. MDJW often deploys one of its three Board Certified Appellate Lawyers to charge conferences to help ensure a proper charge is submitted or related error is preserved.

OPEN AND OBVIOUS WORKPLACE HAZARDS PRECLUDE EMPLOYER LIABILITY

Last week, in *Allen v. Sherman Operating Company, LLC*, Cause No. 21-40913 (5th Cir. August 15, 2022), the United States Court of Appeals for the Fifth Circuit reiterated that employers are not insurers of their employees' safety, particularly for "hazards that are commonly known or already appreciated by the employee."

Ms. Allen worked for Sherman for nearly a decade. During her time there, employees tripped on a phone cord daily, the Court quoting

witnesses' words: "employees tripping over the cord was a 'daily thing.'" Ms. Sherman herself moved the cord at least twice to avoid tripping over it. Nevertheless, in 2018, Ms. Sherman tripped over the phone cord one time too many, injuring herself. She consequently sued Sherman. Sherman was granted summary judgment that the Fifth Circuit affirmed on the basis that Ms. Sherman clearly knew about the cord. "Mrs. Allen knew this phone cord could be hazardous and had taken steps to make is safer in the past. Sherman had no duty to warn of or fix a hazard generally known to its employees or to Mrs. Allen herself. The phone cord was both."

PAYING APPRAISAL AWARD AND INTEREST NOT ENOUGH TO PROTECT INSURERS FROM POST-APPRAISAL LITIGATION

Recently, a Houston court of appeals reversed a summary judgment originally granted in favor of an insurer after the insurer paid an appraisal award on a residential wind/hail claim. In *Tex. FAIR Plan Ass'n v. Ahmed*, No. 14-20-00585-CV, 2022 WL 3268391 (Tex. App.—Houston [14th Dist.] Aug. 11, 2022, no pet. h.) (slip op.), FAIR Plan initially found the hail damage was below the deductible. Ahmed sued, and FAIR Plan demanded appraisal. The appraisal resulted in the two appraisers issuing an agreed award which was above the deductible. FAIR Plan promptly paid the replacement cost less the deductible, choosing not to enforce the policy's replacement cost conditions.

While this suit was pending, the Supreme Court of Texas decided *Barbara Technologies Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019), holding that payment of an appraisal award after the Texas Insurance Code Chapter 542 payment deadline for the claim has elapsed does not entitle the insurer to summary judgment. When *Barbara Technologies* was issued, FAIR Plan immediately made a supplemental payment to Ahmed of the Chapter 542 interest plus pre-judgment interest plus $2,500 in "estimated" attorney fees. FAIR Plan then moved for summary judgment on the ground that it had paid not only the appraisal award itself, but also all amounts that might be considered due under Chapter 542 as interpreted by the *Barbara Technologies* opinion.

At the same time, Ahmed filed his own motion for summary judgment, seeking a much larger attorney fee award. The court denied FAIR Plan's motion, conducted a bench trial on attorney fees, and awarded Ahmed a judgment which included the Chapter 542 interest and $96,000 in attorney fees through trial.

On appeal, the appellate court concluded neither side was entitled to judgment, reasoning that *Barbara Technologies* was based on liability for a claim that is either proven or admitted, and because appraisal does not determine liability, paying an appraisal award is not proof of liability. Therefore, the court reversed the judgment in favor of Ahmed and remanded the case.

Editor's Note: When *Barbara Technologies* was issued, many in the industry read it to mean that when paying an appraisal award after initially finding the claim below the deductible, the insurer should also calculate and pay the most generous amount of Chapter 542 interest that might be due, to ensure any alleged violation has been fully cured and nothing more could be owed under Chapter 542. Some federal courts have favored that approach, while at least one has not. FAIR Plan obviously took that approach here but found this state court much less receptive than the federal courts.

See *Abundis v. Allstate Tex. Lloyd's*, 494 F. Supp. 3d 442 (S.D. Tex. 2020); *Trujillo v. Allstate Vehicle & Prop. Ins. Co.*, 2020 WL 6123131 (S.D. Tex. Aug. 20, 2020); *Ahmad v. Allstate Fire & Cas. Ins. Co.*, 2021 WL 1429523 (S.D. Tex. Feb. 28, 2021), report and recommendation adopted, 2021 WL 1428491 (S.D. Tex. Mar. 24, 2021) (all holding payment of award plus interest entitled insurer to summary judgment); but see contra *Martinez v. Allstate Vehicle & Prop. Ins. Co.*, 2020 WL 6887753 (S.D. Tex. Nov. 20, 2020) (holding payment of 542 interest did not fully cure a 542 violation). See also *Reyna v. State Farm Lloyds*, 2020 WL 1187062 (S.D. Tex. Mar. 12, 2020) in which the insurer did not pay 542 interest, but was held to have fully complied with Chapter 542 by making reasonable payments within the initial 60-day statutory period, even though appraisal later determined a higher value for the claim.

An approach that was successful in the *Abundis* case was calculating and paying all Chapter 542 interest that could possibly be due and making an offer of judgment on attorney fees.

FACTUAL DISPUTE ON ORIGIN OF PLUMBING LEAK REVERSES INSURER'S SUMMARY JUDGMENT

In a recently decided residential plumbing leak case, the crucial coverage question was whether a plumbing leak originated below the slab, which would trigger a $5,000 coverage sublimit, or above the slab, which made the entire policy limit of over $600,000 available. In *Piot v. Allstate Veh. & Prop. Ins. Co.,* No. 02-21-00335-CV, 2022 WL 3273600 (Tex. App.—Fort Worth Aug. 11, 2022, no pet. h.) (slip op.), Allstate's sole evidence in support of its summary judgment was a report from the leak detection consultant stating the leak originated below the slab. The Piots did not offer their own evidence, but impeached Allstate's evidence, eliciting testimony that cast doubt on what the inspector had done to verify that the leak actually originated below the slab. The court of appeals held that given the burdens of proof on a motion for summary judgment, the Piots had created a fact issue sufficient to preclude summary judgment for the insurer and reversed summary judgment in favor of the insurer and remanded the case for trial.

NO INSURANCE COVERAGE FOR CHILD'S TRAGIC DEATH – DAYCARE'S AUTOMOBILE EXCLUSION APPLIED

The Fifth Circuit Court of Appeals recently affirmed summary judgment finding an automobile exclusion in a daycare's insurance policy precluded coverage for a three-year-old child's tragic accidental death when left on a bus after a field trip. In *Scottsdale Insurance Co. v. Discovering Me Academy, L.L.C.,* 2022 WL 3040663 (5th Cir., August 2, 2022), the caretaker checked the child off

the list as having exited the bus following a field trip. And when a teacher later noticed the child was not present, a classmate erroneously reported that the child left the field trip with his parents. Later, when a parent came to pick him up from school, the child was eventually found on the floor of the bus dead from heat exhaustion.

Scottsdale Insurance filed a declaratory judgment action to determine its duties and obligations under a general liability insurance policy issued to the daycare, which included and additional coverage for damages "arising out of sexual and/or physical abuse, caused by one of your employees, or arising out of your failure to properly supervise." "Sexual and/or physical abuse" is defined as "sexual or physical injury or abuse, including assault or battery, negligent or deliberate touching." But the policy also included an automobile exclusion precluding coverage for "'bodily injury' … arising out of the ownership, maintenance or use of any … 'auto' owned or operated by or rented or loaned to any insured."

The daycare did not contest whether injuries arose out of the use of an auto, but instead asserted that the additional sexual and physical liability coverage form did not include an auto exclusion. The court disagreed, noting that the form states that "[c]overage is subject to this coverage form *and* the exclusions, conditions and other terms of this policy." Applying the long-accepted rule that courts must "read all parts of a policy together, giving meaning to every sentence, clause and word to avoid rendering any portion inoperative." The court found that "[t]he use of the word "*and"* here clearly incorporates those exclusions in the policy as a whole into the particular form." Accordingly, the district court's decision finding that the automobile exclusion precluded coverage was affirmed.