Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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INSURER OWED NO DUTY TO DEFEND IN DOG BITE CASE SAN ANTONIO COURT OF APPEALS AFFIRMS DISMISSAL CLAIMANT'S DECLARATORY JUDGMENT

Last Wednesday, the San Antonio Court of Appeals upheld summary judgment for the insurer in an insurance coverage dispute arising from a personal injury action between roommates. *Claudia Medrano v. Jeff Tafoya, et al.*, No. 04-21-00096-CV, 2022 WL 3638233 (Tex. App.—San Antonio Aug. 24, 2022). In the underlying personal injury lawsuit, Claudia Medrano, who was bitten by her roommate Lora Vergott's dog in a home the two rented from a man named Richard Gonzalez, sued Ms. Vergott for negligence and strict liability. Mr. Gonzalez had an insurance policy with Acceptance Insurance Co. ("Acceptance"), the claims of which were managed by Innovative Risk Management ("Innovative").

After initially suing Ms. Vergott, Medrano added Acceptance, Innovative, and Innovative adjuster Jeff Tafoya to the lawsuit, seeking a declaratory judgment that Acceptance had a duty to defend Vergott under Mr. Gonzalez's insurance policy. However, Ms. Medrano never sued Mr. Gonzalez or Affinity Insurance Program Marketing, LLC, which was also a policy holder of the insurance policy.

Ms. Vergott did not file an answer to Ms. Medrano's lawsuit, and Ms. Medrano moved for a default judgment against her. After the trial court entered a default judgment against Ms. Vergott, Acceptance, Innovative, and Mr. Tafoya moved for summary judgment, claiming the declaratory judgment action against them should be dismissed for lack of subject matter jurisdiction based on a lack of standing, ripeness, and justiciable controversy. The trial court granted their motion and dismissed Ms. Medrano's claims with prejudice. On appeal, Ms. Medrano argued the trial court erred in granting summary judgment because she has standing, and her claim is ripe. In response, Acceptance, Innovative, and Mr. Tafoya claimed the case was not moot, and even if it was not moot, the trial court did not err in granting summary judgment.

The Court rejected the argument that Ms. Medrano's lawsuit was moot and disagreed with Acceptance, Innovative, and Mr. Tafoya that, because Ms. Vergott did not appeal the default judgment and any court's decision on a duty to defend would not have any practical legal effect since there was no lawsuit to defend. Instead, the Court held that cases brought under the Declaratory Judgments Act remain live even if all requests for substantive declaratory relief become moot so long as a claim for attorney's fees under the Act remained pending, which the Court held was the case with Ms. Medrano's lawsuit.

Turning to the standing and ripeness issue, the Court rebuffed Ms. Medrano's position that the final judgment she obtained against Ms. Vergott implicated Acceptance, Innovative, and Mr. Tafoya's obligations under Mr. Martinez's policy and she therefore had standing to enforce the policy. The Court then noted, as Acceptance, Innovative, and Mr. Tafoya argued, that Texas is a no-direct-action state where a third-party claimant cannot enforce an insurance policy directly against an insured until it has been established by judgment or agreement that an insured has a legal obligation to pay damages to the injured party. Because Ms. Medrano sought a declaratory judgment action against the insurer and its agents on their duty to defend Ms. Vergott before Mr. Gonzalez's liability had been established by judgment or agreement, the trial court did not err in granting the summary judgment and dismissing Ms. Medrano's claims. Consequently, the Court affirmed the trial court's holding.

Editor's Note: MDJW's Appellate team had the privilege of representing Innovative Risk Management in defending the summary judgment granted in their favor and congratulates them on this significant victory!

FEDERAL COURT REMANDS INSURANCE DISPUTE TO STATE COURT DESPITE INSURER'S ACCEPTING LIABILITY FOR ITS ADJUSTER WHILE CASE WAS PENDING IN STATE COURT - REJECTS IMPROPER JOINDER ARGUMENT

Last week, a federal court in Fort Worth rejected an insurer's argument that accepting liability for its adjuster made its case removable to federal court and that the adjuster was improperly joined. *Davis v. Allstate Vehicle Property Insurance Co.*, No. 4:22-cv-705-P, 2022 WL 3641153 (N.D. of Tex.—Fort Worth Aug. 22, 2022) involved an insurance coverage dispute between Casey and Jared Davis (the "Davises") and their homeowner's insurance carrier Allstate Vehicle Property and Insurance Company ("Allstate") that arose after the pipes burst in the Davises' home due to a winter storm. The Davises sued Allstate and its adjuster Phillip Butler in state court and alleged various violations of the Texas Insurance Code by Allstate and Mr. Butler.

While the case was pending in state court, Allstate elected to accept liability for Mr. Butler under Chapter 542A of the Texas Insurance Code and moved to dismiss Mr. Butler from the lawsuit. However, before the state court could rule on the motion to dismiss, Allstate removed the case to federal court under a theory of diversity jurisdiction. In its notice of removal, Allstate did not

dispute Mr. Butler's Texas citizenry but claimed removal was proper because Mr. Butler was no longer a party to the case since Allstate accepted liability for him and, even if he was still a party, he was improperly joined.

The federal district court, on its own motion, concluded that it lacked subject matter jurisdiction and remanded the case to state court. In doing so, the federal district court held that, even if Allstate elected to accept liability for Mr. Butler, it could not make an action removable by doing so because "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." Further, the federal district court held that Mr. Butler remained a party because the state court did not grant Allstate's motion to dismiss and, even if it had, such an order is interlocutory under Texas law and thus does not terminate a defendant's status as a party.

As to Allstate's contention that Mr. Butler was improperly joined because the Davises' state court petition did not adequately state a viable cause of action against Mr. Butler, the federal district court held that the Davises' state court petition sufficiently stated claims against Mr. Butler because they alleged he violated certain sections of the Texas Insurance Code.

FEDERAL COURT CONCLUDES OFF-ROADING INCIDENT WAS AN "ACCIDENT" UNDER INSURANCE POLICIES, REBUFFS INSURER'S CLAIM THAT INDIVIDUAL WHO ENCOURAGED THE DRIVER TO "NAIL IT" PRIOR TO INCIDENT WAS COMMITTING INTENTIONAL TORT THAT PRECLUDED COVERAGE

Last Wednesday, a federal court in Dallas granted motions for summary judgment filed by a trio of claimants and declared an off-roading incident that was the subject of separate litigation was an "accident" under the relevant insurance policies and denied the insurer's motion for summary judgment seeking a declaration otherwise. *Encompass Indemnity Co., et al. v. Gavin Steele, et al.*, 3:21-CV-01650-X, 2022 WL 3691045 (N.D. Tex.—Dallas Aug. 24, 2022) arose out of a dispute between Ian Wolf and his insurers, Encompass Indemnity Company and Encompass Home and Auto Insurance Company ("Encompass"), over whether Encompass owed him a duty to defend and a duty to indemnify after a lawsuit was filed against Mr. Wolf for his alleged involvement in an off-roading incident.

Encompass issued automobile, homeowner's, and personal umbrella policies to Mr. Wolf and agreed to pay for damages for bodily injury and property damage for which Mr. Wolf became legally responsible due to an auto accident or caused by certain accidents. Gavin Steele and Brittany Bernadsky and Ian Wolf were guests at a ranch owned by Chad Michael Bray. At the end of the night, they sought to take a golf cart to the guest house. Mr. Bray insisted on driving the duo in his 2017 Ford Raptor, along with Mr. Wolf as his passenger. Instead of taking Mr. Steele and Ms. Bernadsky to the guest house, Mr. Bray took them to a shooting range on the ranch and then started off-roading in the mud. Mr. Bray stopped on a hilltop and stated he was "done now." In response, Mr. Wolf stated, "No Chad, nail it!" at which point Mr. Bray accelerated to over 60 mph, causing the Raptor to leave the ground, tumble, and eject Steele and Bernadsky—who later sued Mr. Bray, Mr. Wolf, and other parties in state court for negligence, gross, negligence, and negligently assisting and encouraging the negligence of Mr. Bray and alleging Mr. Bray failed to exercise reasonable care to avoid foreseeable injury to Steele and Bernadsky.

Encompass then filed a declaratory judgment action in federal court seeking a declaration that it owed no duty to defend Wolf in the underlying lawsuit and no duty to indemnify Mr. Wolf or pay damages awarded in favor of Steele and Bernadsky. Encompass argued that the policies covered "accidents" but Mr. Wolf yelling to Mr. Bray to "nail it" and thereby continue the off-roading was the natural result of an intentional act, especially because the damage would not be an accident if it was the expected, reasonably anticipated, or ordinary result of the intentional act. On the other hand, Bernadsky and Steele argued that Texas Supreme Court and Fifth Circuit precedent distinguish between intentionally tortious conduct that causes unintended consequences, which would not be an accident, and deliberate acts performed negligently, which would be accidents. They further argued that Encompass's interpretation of the policy would render other policy exclusions on intentional conduct meaningless. As to the duty to indemnity, Steele and Bernadsky argued the issue was premature.

Right off the bat, the Court appeared to admonish insurance companies for attempting to avoid coverage by claiming "insureds intend their actions" and "damage or injury is often foreseeable." Rather, the Court agreed that the Texas Supreme Court and Fifth Circuit had already rejected such arguments.

Because the policies at issue did not define "accident," the Court looked to its ordinary meaning as "a fortuitous, unexpected, and unintended event." The Court then concluded that a claim would not involve an accident if (1) there was an intentional tort or (2) "circumstances confirm that the resulting damage was the natural and expected result o the insured's actions; that is, was highly probable whether the insured was negligent or not." For example, when an insurer attempted to argue that drunk drivers perform the intentional act of drinking and driving, the Fifth Circuit concluded that the party in the underlying case intended to drink, but he did not intend to ram into another car. In this instance, the Court similarly held that, although Mr. Wolf intended to say "Nail it!" to Mr. Bray and thereby encourage Mr. Bray to start off-roading again, but Mr. Wolf did not intend for Mr. Bray to flip the truck and eject Steele and Bernadsky. In other words, Mr. Wolf's statement was not an intentional tort and Steele and Bernadsky being ejected was not a natural and expected result of Wolf telling Mr. Bray to "Nail it." As such, the Court held that the incident met the ordinary definition of "accident," and Encompass therefore owed a duty to defend Mr. Wolf at least due to the auto and homeowner's policies. The Court also agreed with Steele and Bernadsky that the duty to indemnify issue was premature. Therefore, the Court granted Steele, Bernadsky, and Mr. Wolf's motions for summary judgment and denied Encompass's motion for summary judgment.