Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

SEP 14, 2022

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Last week a federal District Court in Dallas granted the insurer's motion for Summary Judgment on all issues related to claims made on a cyber policy. At the same time the Court denied the plaintiffs partial motion for summary judgment in *Southwest Airlines Co., v. Liberty Insurance Underwriters, Inc.,* 3:19-CV-2218-C (N.D. Tex., September 6, 2022, mem. Op.)

It is well known that Southwest Airlines experienced an electronic systems failure in July 2016 that caused the cancellation of thousands of flights. Southwest Airlines sought recovery for a variety of business interruption expenses. As part of this claim Southwest also sought the recovery for a variety of items given to customers including frequent flyer miles, discount codes, and vouchers. At the time of the system failure, Southwest was insured by a tower of coverage under a specialty risk policy that included a System Failure Coverage Endorsement – sometimes referred to as a cyber policy.

Liberty was one of the excess insurers and moved for summary judgment arguing that a significant percentage of Southwest's claim for system failure losses was outside the "System Failure Coverage" language, and thus was not a "Loss" under the Policy. This was because, in part, a substantial part of Southwest's claim for system failure damages fell within the Exclusions of the Policy for 1) Consequential Damages, 2) Liability to Third Parties, or 3) Unfavorable Business Conditions.

The Court ruled the coverage that Southwest sought does not exist as a matter of law. This was, in part, because the system failure claim did not exceed the layers of coverage under Liberty's layer in the tower of coverage The Court ruled enough of Southwest's system failure claim fell within one or more of the policy exclusions to preclude coverage. And in the absence of coverage, the breach of contract claim failed as a matter of law. And the Plaintiff's bad faith causes of action failed because coverage never became reasonably clear, there was a bona fide dispute, and there is an absence of damages beyond the alleged contract damages.

Editor's Note: To our knowledge this is the first ruling on the substance of what is covered under a System Failure Coverage Endorsement in the airline context. MDJW takes this opportunity to congratulate our client team at Liberty Mutual for granting us the privilege to represent them in this case. We also congratulate the firm Partners who have led our defense of this case for the last three years: Chris Martin, Brad Allen and Melinda Burke.

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ONGOING DISPUTE DETAILS NATURE AND TERMS OF PUBLIC ADJUSTER / ATTORNEY AGREEMENT – SUMMARY JUDGMENT REVERSED

The Houston Court of Appeals recently reversed summary judgment in favor of the Dick Law Firm in a fee dispute between the law firm and a public adjuster and his company and remanded the case to the trial court for further proceedings. In *Eric Ramirez and LA Public Insurance Adjusters v. Dick Law Firm,* 2022 WL 3970341 (Tex.App. – Houston (1st Dist.) September 1, 2022), Ramirez and LA Public Adjusters (Ramirez) entered a continuing business relationship with the Dick Law Firm in May 2012 to provide estimates, appraisal and expert witness services in relation to homeowners insurance claims and lawsuits pursued by the Dick Law Firm. The fee arrangements with Ramirez varied, sometimes on a flat fee and others on a square footage of the property. And Ramirez was to be paid "hourly fees to prepare for and provide testimony at depositions or trials." Ramirez alleged they assisted Eric Dick and his firm with "hundreds of insurance appraisals" used to "successfully recover hundreds of thousands of dollars" for clients. Ramirez filed suit to recover $115,258.02 in unpaid fees and in response, the Dick Law Firm asserted that $1,287.50 check with a memo stating "full and final payment of any and all claims" cashed by Ramirez constituted an accord and satisfaction. The trial court agreed and granted summary judgment in favor of Dick and this appeal followed.

The Houston Court of Appeals provides an excellent and detailed discussion of the elements and proof required to establish the affirmative defense of "accord and satisfaction", examined the competing affidavits of Ramirez and the Dick Law Firm detailing the nature of the fee agreements, e-mails and discussions of surrounding the fee dispute including reference to "outstanding balances" owed on "more than sixty different appraisals" and Ramirez indicating in part that "any payment for less than the total amount owed…would be considered only partial payment" created an issue of material fact. Accordingly, the court reversed summary judgment in the Dick Law Firm's favor and remanded the case to the trial court for further proceedings.

ARTFUL REPLEADING TO DEFEAT LIMITATIONS DEFENSE FOUND TO BE ALL WET – FAILURE TO CHALLENGE FLOOD / SURFACE WATER FINDING ON APPEAL SINKS CLAIM

The Houston Court of Appeals recently affirmed summary judgment in favor of an insurer in relation to property damage caused by Hurricane Harvey in 2017. In *Sosa v. Auto Club Indemnity Co.,* 2022 WL 3722396 (Tex.App. – Houston (1st Dist.) September 1, 2022), the insured presented a claim for damages caused by Hurricane Harvey on August 26, 2017. Auto Club investigated the claim and found that the $1,191.96 cost to repair covered roof damage was less than the insured's deductible and that remaining damage caused by surface and flood water was expressly excluded. So, on September 26, 2017, Auto Club notified the insured of their findings and advised that it was closing the file.

Then on November 11, 2020, over three years later, the insured hired the Dick Law Firm and filed suit alleging significant property damage occurred on August 26, 2017 and alleging breach of contract and other extra-contractual allegations. Auto Club's answer asserted numerous affirmative defenses, the policy exclusion for flood and surface water damage and that the two year and one day limitations period in the policy barred the claims. Sosa then filed an amended pleading that changed the date of loss from August 26, 2017, to June 28, 2019, attached documents to try to support the new date of loss, and demanded appraisal. This was the live pleading when the court granted summary judgment in favor of the insurer. Auto Club moved for summary judgment on several grounds and argued in part that the only claim reported to Auto Club was the 2017 Hurricane Harvey claim and that the house had two feet of flood water due to flood - an excluded cause of loss. Lastly, the insurer asserted that covered roof damage was less than the insured's deductible.

The trial court granted Auto Club's traditional motion for summary judgment and made several findings including that the insured did not demand appraisal or file suit within the applicable limitations period, that Sosa's "effort to recast the Hurricane Harvey claim [was] prohibited" and that flood and surface water damage were excluded from coverage. And in dismissing all claims, the court impliedly granted summary judgment on any extracontractual claims.

On appeal, the court observed that the insured only challenged three of the four grounds for granting summary judgment in the insurer's favor, failing to challenge the court's ruling that the damages claimed were the result of flood or surface water and were not covered or were otherwise excluded by the policy. Accordingly, any other error complained of would be harmless as this unchallenged ground supports summary judgment. Summary judgment in favor of the insurer was affirmed.

Editor's note: Appellate practice is highly specialized and early engagement of appellate counsel is encouraged to avoid many traps for the unwary. MDJW's appellate section primarily consists of three board certified appellate lawyers who stand ready to assist in keeping favorable judgments and to help with efforts to overturn unfavorable results.

MERE ALLEGATIONS OF BAD FAITH AND UNSUPPORTED INSURANCE CODE AND DTPA CLAIMS DISMISSED ON MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR A FAILURE TO STATE A CLAIM

Last Tuesday and Wednesday, U.S. District Court Judge Micaela Alvarez in the Southern District of Texas, McAllen Division, once again emphasized that mere allegations of bad faith, fraud and statutory violations, or simple recitations of the statutes without more, will not support the claims asserted and survive judicial scrutiny. In *Barbara Ochoa Corporation v. Acceptance Indemnity Ins. Corp.,* 2022 WL 4097346 (S.D. Tex. McAllen Div., September 7, 2022), the homeowner filed suit over disputed wind and hail damage following Hurricane Hanna and alleged causes of action for breach of contract and various extracontractual claims. The insurer filed a 12(b)(6) Motion to Dismiss for failure to state a claim. And applying a well-reasoned analysis under the rule, the contract, the pleadings and applicable law, the court dismissed with prejudice, the insured's claims for violation of the Texas Insurance Code and Texas Deceptive Trade Practices - Consumer Protection Act. Only the breach of contract claim remains.

Similarly, in *Kelly v. State Farm Lloyds,* 2022 WL 4084435 (S.D. Tex. McAllen Div., September 6, 2022), in a homeowners insurance dispute arising from claim for property damage allegedly caused by Hurricane Hanna, the court considered State Farm's partial motion for summary judgment arguing that the "case boils down to a *bona fide* coverage dispute, not a bad faith denial of coverage." The court considered the insureds interrogatory responses and deposition testimony and agreed. Accordingly, the court granted summary judgment dismissing all extracontractual claims with prejudice.

SPLIT IN AUTHORITY OVER ADMISSIBILITY OF AFFIDAVITS ADDRESSING REASONABLE AND NECESSARY MEDICAL EXPENSES TO TAKE QUICKTRIP TO FIFTH CIRCUIT

Recently, the U.S. District Court of the Northern District of Texas, Dallas Division analyzed a split in authority amongst federal district courts over whether Affidavits Concerning Authenticity of Medical Expenses Pursuant to Texas Civil Remedies and Practices Code § 18.001 and controverting affidavits, were admissible. In *Chapman v. QuickTrip Corp*., 2022 WL 4002904 (N.D. Tex. – Dallas Div., August 31, 2022), the court analyzed the Code provision, the deep divisions amongst federal courts as to whether the Code provision is procedural or substantive, potential conflict with the Federal Rules of Evidence, including Rule 702 addressing expert testimony and hearsay rules, and finding no conflict, the court conducted an *Erie* analysis to address the question applying Texas law.

The court observed how "Section 18.001 enables parties to prove up ***uncontested*** reasonable and necessary medical expenses at a significantly reduced time and costs. This is as it should be." Accordingly, the found that "Section 18.001 is 'bound up' in state substantive rights such that it must apply in order to avoid the inequitable administration of laws. Such a conclusion is consistent with the Fifth Circuit's categorization of other state laws governing damages as substantive." Then addressing the timing and notice provisions of Section 18.001, the court refused to extend its holding and instead, found that the timing and deadlines and filing or controverting affidavits under Section 18.001 is procedural and governed by federal procedural law, the local rules and other court orders.

Lastly, the court noted that "federal district courts within this Circuit are very divided on this Section 18.001 affidavits issue. And resolving this issue would advance the ultimate termination of this litigation, as it would 'eliminate complex issues so as to simplify the trial' and 'eliminate issues to make discovery easier and less costly.'" Accordingly, the court certified its Order for immediate interlocutory appeal under 28 U.S.C. § 1292(b).