Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

SEP 27, 2022

DALLAS FEDERAL COURT TACKLES ANOTHER CONCURRENT CAUSATION ISSUE

This week, the United States District Court of the Northern District of Texas added another case to the list of parties and onlookers anxiously awaiting the Supreme Court of Texas's forthcoming ruling on concurrent causation. In *Garcia v. State Farm Lloyds*, 2022 WL 4349547 (N.D. Tex. September 19, 2022), John Garcia sued his property insurer, State Farm, to recover for alleged wind and hail damage. State Farm moved for summary judgment, arguing Garcia failed to specify what damages on his roof were caused by wear and deterioration in contrast to what was caused by the hailstorm. The Court noted that this squarely implicated the Supreme Court of Texas' certified questions from *Overstreet v. Allstate Vehicle and Property Insurance Co.*, 34 F.4th 496 (5th Cir. 2022). In *Overstreet*, the Fifth Circuit certified to, and is currently awaiting answers to three questions from, the Supreme Court of Texas:

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?

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?

If so, can the insured meet that burden with evidence indicating that the covered peril caused the entirety of the loss?

For now, the Court denied State Farm's summary judgment motion, noting that there is some evidence in the record that wind and hail caused the entirety of Garcia's loss—though the parties were directed to file a status report within 14 days of the *Overstreet* decision.

Editor's Note: This case serves as one of many in which Texas insureds, insurers, attorneys, and judges are in a holding pattern awaiting the *Overstreet* decision.

SOUTHERN DISTRICT OF TEXAS ALLOWS CORPORATE DEPOSITIONS FOR UIM DAMAGE INFORMATION

Last week, the Texas Court of Appeals in Tyler allowed an Insurance company's corporate representative deposition in an underinsured motorist (UIM) claim despite the insurance company stipulating most of the issues in the case.

James Hanna's vehicle was struck by Arturo Aguirre's vehicle, then Hanna settled with Hanna and his liability carrier for its policy limits. However, Hanna also filed a claim with Central Mutual, his own insurance company, for UIM benefits. Central stipulated that Hanna was insured with UIM limits of $100,000; Hanna was in an accident that Aguirre caused; and Aguirre settled with Hanna for $30,000. Central's amended Answer asserted the affirmative defense that Hanna failed to mitigate his damages—thus bringing the amount of damages into dispute. Hanna accordingly sought Central's corporate representative deposition, claiming he was entitled to obtain discovery regarding Central's calculation of his damages. Central quashed the deposition, and the trial court—and ultimately the Tyler Court of Appeals—denied the motion to quash. The Courts held that UIM causes of action inherently involve a determination of the amount of damages. With the amount of damages as an issue in the case, and parties allowed discovery on any relevant issue in a case, Hanna was entitled to the deposition of the corporate representative on this issue. Notably, the Courts disagreed with Central's arguments that this was privileged information and unduly burdensome, and it was not determinative that there were more convenient and less expensive means of obtaining information/discovery on this issue.

"PHYSICAL LOSS" MEANS "TANGIBLE LOSS" ACCORDING TO THE FIFTH CIRCUIT

Last week, the United States Court of Appels for the Fifth Circuit clarified that pandemic closures are not "physical losses" to businesses. In *Coleman E. Adler & Sons, L.L.C. v. Axis Surplus Insurance Company,* 2022 WL 4354638 (5th Cir. September 20, 2022), the owner of a New Orleans jewelry store had to shut down his store due to being a non-essential business during the height of COVID-19. Adler sought business interruption reimbursement from his insurance policy as a "direct physical loss of or damage to" his property. His property insurer, Axis, denied his claim, and Adler filed suit against Axis and his insurance agents alleging the insurance agents were liable for not recommending pandemic coverage. The insurance defendants removed the case to federal court and obtained dismissals for a failure to state a claim, which Adler appealed.

The Fifth Circuit first addressed the issue of whether a direct physical loss of or damage to property meant only tangible deprivations of property. The Fifth Circuit held that even though one Louisiana state appellate court did hold that similar policy language covered

a restaurant's losses from the pandemic (*Cajun Conti, LLC et. al. v. Certain Underwriters at Lloyd's, London et. al.*, 022 WL 2144863 *5 (La. App. 4 Cir. June 15, 2022)), the Rule of Orderliness required the Fifth Circuit to be consistent with its previous holding, *Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co*., 29 F.4th 252, 257 (5th Cir. 2022).

The Court additionally addressed Adler's claims that the insurance agents were liable for not recommending pandemic coverage. The Court reaffirmed that insurance agents have a duty of reasonable diligence to provide coverage to their clients, but that duty does not include the obligation to investigate or advise whether the client has obtained the correct amount or type of insurance coverage—even if the insurance agent has a "close relationship" with the client.

Editor's Note: Although it of course remains a good business practice for an insurance agent to recommend the full range of insurance options to their clients, this case serves as a good reminder of those limitations on an insurance agent's duties.

ERISA PRE-EMPTION REQUIRES A CLEAR ASSIGNMENT AND BALANCE BILLING ISN'T QUITE DEAD

Early last week, the United Stated District Court of the Southern District of Texas held that (1) the Employee Retirement Income Security Act (ERISA) did not pre-empt and (2) the Texas Legislature explicitly left some (as-yet-to-be-determined) circumstances in which balance billing is permitted.

In *ERLC, LLC v. Blue Cross Blue Shield of Texas et. al.*, Guzman was taken to ERLC for emergency medical treatment. His insurer, BCBS considered ERLC an out-of-network provider, and only paid ERLC $466 of its $90,000 bill. Guzman paid $412. ERLC sued BCBS and Guzman in state court for breach of contract and insurance code violations. BCBS sought removal, claiming jurisdiction under (1) federal question, stating ERISA pre-empted all of the suit's claims, and (2) diversity, claiming Guzman was improperly joined. The Court ultimately denied both and remanded to state court.

The Court held there was no federal question jurisdiction in this case for two reasons: (1) there was no evidence in the record that Guzman assigned his ERISA claims to ERLC, thus ERLC lacked standing to bring any ERISA claims, and (2) even if there had been an assignment, the Texas Insurance Code included a claim for a rate of repayment, distinct from ERISA's provision for a right of repayment. ERLC lacking standing to bring an ERISA claim and having distinct state court claims, the Court found no federal question jurisdiction.

To determine whether the Court had diversity jurisdiction, it considered whether Guzman was improperly joined as a defendant. This was determined by whether ERLC could plead a valid Insurance Code violation against Guzman individually. The Court held that ERLC could in fact bring such a claim in the form of a right to "balance" bill Guzman. BCBS noted, and the Court agreed, that the Texas Legislature seemingly "substantially limited the right of non-network providers to bill patients for the difference between the billed amount and the paid amount" (citing *Tex. Med. Res., LLP v. Molina Healthcare of Tex. Inc..,* 620 S.W.3d 458, 467 (Tex. App.—Dallas 2021, pet. granted)). However, the court noted that certain exceptions are carved out for out-of-network providers in the Texas Administrative Code, which may allow some instances in which such providers may bill patients for the provided services. Thus, the Court gave the benefit of the doubt to ERLC, the non-movant for removal.

Editor's Note: As the law continues to evolve in the area of balance billing, state courts and/or the Texas Legislature will almost undoubtedly continue to shape this area of the law into a more conclusive resolution.