Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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HARRIS COUNTY JURY RETURNS CARRIER VERDICT IN BAD FAITH SIU COMMERCIAL ROBBERY TRIAL

Late Wednesday evening, after 90 minutes of deliberation, a Houston jury in *Wen Wireless v. AmGUARD Insurance Company* returned a defense verdict for AmGUARD. The jury answered "no" to the breach of contract question, never reaching the remaining statutory bad faith and attorney fee questions which were predicated on a "yes" answer to the contractual liability question.

On October 18, 2017, Wen Wireless was robbed by an armed gunman. After forcing an employee to open the safes and taking items from them, the robber and an accomplice fled in a vehicle. Police were called and a chase ensued when the getaway vehicle was spotted. Less than thirty minutes after the 911 call, the driver was apprehended in the getaway vehicle with the stolen items and drugs. The robber had jumped out during the chase but was apprehended the next day after carjacking another victim and leading police on another chase.

Wen Wireless filed an insurance claim after the incident for loss to its business personal property. AmGUARD timely and appropriately acknowledged the claim and requested items it needed to investigate the claim. Wen Wireless supplied one document and did not supply the remainder of the requested documentation. Instead, Wen Wireless, represented by Eric Dick of the Dick Law Firm, sued AmGUARD for breach of contract and various other extra-contractual claims in an expedited action. AmGUARD answered the suit by asserting, among other things, the policy's condition precedent of duty to cooperate.

Wen Wireless then moved to compel appraisal and abate the lawsuit, which AmGUARD contested. The court ordered appraisal to take place and abated the lawsuit, but the court ordered appraisal to be completed within thirty days. When appraisal was still not completed nine months later, the court lifted the abatement order, allowing the lawsuit to continue. The appraisal finally completed two months later.

After discovery, AmGUARD asserted the policy's condition of concealment, misrepresentation, or fraud as an additional defense to the claim. At the pre-trial hearing, the trial court granted AmGUARD's motion to set the order of trial proceedings, which allowed AmGUARD to open and close the evidence.

The trial started on the five-year anniversary of the robbery, October 18, 2022. At trial, the court allowed the appraisal award and testimony from both appraisers to come into evidence. The jury also heard testimony from one of Wen Wireless' owners. The jury also heard from the primary investigator and supervisor who investigated the robbery.

Our firm was privileged to represent AmGUARD in this matter with Chris Martin and Jamie Cooper representing AmGUARD at trial.

FIFTH CIRCUIT RESOLVES SPLIT IN DEEPLY DIVIDED DISTRICT COURTS; ADOPTS RULE THAT VOLUNTARY-INVOLUNTARY RULE IS INAPPLICABLE IF AGENT IS IMPROPERLY JOINED AT THE TIME OF REMOVAL

The Fifth Circuit Court of Appeals recently resolved the split in authority and adopted the rule that the voluntary-involuntary rule is inapplicable if the agent is improperly joined at the time of removal. In *Advanced Indicator and Manufacturing, Inc. v. Acadia Insurance Co.*, No. 21-20092, 2022 WL 4731473 (5th Cir., Oct. 3, 2022, mem. op.), Advanced Indicator and Manufacturing, Inc. ("Advanced") claimed its building was damaged by Hurricane Harvey's winds. However, Advanced's insurer, Acadia Insurance Company ("Acadia"), determined that the damage was caused by routine wear and tear, and denied Advanced's claim.

On August 7, 2018, Advanced sued Acadia (an out-of-state resident) and Warren (an in-state resident), the adjuster, in state court, alleging various claims, including breach of contract and common law bad faith. Because Advanced and Warren were both Texas residents, there was not complete diversity at the outset of the suit, and the matter could not be removed to federal court. However, on August 30, 2018, Acadia elected to accept responsibility for Warren under Section 542A.006 of the Texas Insurance Code (which provides that should an insurer accept responsibility for its agent after suit is filed, "the court shall dismiss the action against the agent with prejudice."), and then removed the case to federal court. In response, Advanced filed a motion to remand the case to state court, arguing that Warren was not improperly joined notwithstanding Acadia's Section 542A.006 election. The district court denied Advanced's motion to remand, and Advanced subsequently appealed.

On appeal, the Fifth Circuit was faced with a question that has "deeply divided district courts." That is, whether the voluntary-

involuntary rule (i.e., the "judicially created rule dictating that 'an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff'") bars removal to federal court when an insurer makes a Section 542A.006 election after the filing of suit. Some courts have held that the voluntary-involuntary rule bars removal, while other courts have held that the voluntary-involuntary rule is inapplicable if the agent is improperly joined at the time of removal. The Fifth Circuit adopted the latter approach, reasoning that "courts have long recognized an exception to the voluntary-involuntary rule where a claim against a nondiverse or in-state defendant is dismissed on account of fraudulent joinder" and "to determine whether a plaintiff has improperly joined a non-diverse defendant, the district court must examine the plaintiff's possibility of recovery against that defendant at the time of removal." Because Acadia elected to accept liability for Warren before removal, even though suit had already been filed, Section 542A.006(c) required the court to dismiss the action against Warren with prejudice. Thus, at the time of removal, "there [was] no possibility of recovery by Advanced against an in-state defendant" (i.e., Warren), so Warren was improperly joined at the time of removal and Acadia's removal was proper.

FIFTH CIRCUIT CONCLUDES THAT INSURER HAD NO DUTY TO DEFEND CLAIM OF ASSAULT AGAINST INSURED

Recently, the Fifth Circuit Court of Appeals concluded that the insurer had no duty to defend its insured in a lawsuit based on an assault claim. In *Semien v. The Burlington Ins. Co.,* No. 22-20195, 2022 WL 4990409 (5th Cir., Oct. 3, 2022, mem. op.), T&T Global Enterprises, Inc. ("T&T") owned a gas station-convenience store. During a dispute between Semien, a customer, and Truong, the store's clerk, Truong left his post behind a glass-enclosed counter and hit Semien on the head with a metal pole. Consequently, Semien filed suit against T&T and Truong, asserting a claim off assault. In Semien's petition, he alleged that Truong acted negligently, intentionally and/or knowingly when he exited a safe and secure location behind a safe glass and committed an assault against an invitee Paul Semien, and at the time of the incident Truong was working in the course and scope of his employment with T&T.

T&T had a general commercial liability insurance policy issued by Burlington (the "Policy"). Although the Policy provided coverage for assault and battery, it excluded coverage for assault or battery "committed by any insured or agent of any insured." The Policy defined "insured" to include T&T's employees, but "only for acts within the scope of their employment by [T&T] …." As such, Burlington denied that it had a duty to defend or indemnify T&T and Truong.

Semien eventually settled his claims with T&T and Truong. As part of the settlement agreement, T&T and Truong assigned Semien "all rights they have jointly or separately to pursue claims and remedies under [their] insurance contract with The Burlington Company." Semien then filed suit against Burlington, asserting a claim of breach of contract and alleging that Burlington failed to defend and indemnify its insureds for Semien's claims. In response, Burlington moved to dismiss Semien's complaint, arguing that the complaint failed to state a claim on which relief can be granted in light of the assault and battery exclusion. The district court granted Burlington's motion to dismiss. Plaintiff appealed.

On appeal, the Fifth Circuit began its analysis by noting the relevant Texas law: "Under Texas law, an insurer's duty to defend arises when a third party sues the insured on allegations that, if taken as true, potentially state a cause of action within the terms of the policy. But, if the petition only alleges facts excluded by the policy, ... the insurer is not required to defend. When determining whether an insurer has a duty to defend its insured against a third-party lawsuit, Texas courts generally follow the eight-corners rule. Under this rule, courts determine whether an insurer has a duty to defend its insured by looking at the facts alleged within the four corners of the latest amended pleading upon which the insurer based its refusal to defend the action, and the language within the four corners of the relevant insurance policy." Applying the rules, the Fifth Circuit concluded that the Policy excluded coverage for Semien's claims and that Burlington did not have a duty to defend T&T and Truong. The Fifth Circuit reasoned that Semien's allegations in his petition against T&T and Truong made clear that Truong was acting in the course of his employment at the time of the assault.

NORTHERN DISTRICT RE-AFFIRMS THAT STATUTE-BASED, INDEPENDENT INJURY FOR EXTRA-CONTRACTUAL INSURANCE CLAIMS ARE EXTREMELY RARE

Mid last week, the United States District Court for the Northern District of Texas, Fort Worth Division, held that a couple's extra-contractual claims were moot once their policy-based damages were paid.

In *McNeely et. al. v. State Farm*, 2022 WL14915590 the plaintiffs suffered roof damage from a hailstorm. (N.D. Tex. October 25, 2022). They filed a claim with State Farm, and State Farm initially refused to pay. The McNeely's sued, and over the course of two years, State Farm paid the cash value of the hail damage, late payment penalties pursuant to the Texas Prompt Claim Act, and $19,420 for the McNeely's attorney's fees. State Farm then moved, and was granted, summary judgment for the McNeely's extra-contractual claims. The Court agreed with State Farm that the McNeely's were provided everything due to them, including late fees and attorney's fees, under their insurance policy and that they had no independent injury or damages outside of their policy benefits. Notably, the Court disagreed with the McNeely's argument that State Farm's delay created an independent injury in the form of an increased cost to replace their roof. Instead, the Court affirmed that the occurrence of a statutory violation (like violation of the Prompt Payment Act) "would be rare, and we in fact have yet to encounter one."

WESTERN DISTRICT OF TEXAS HOLDS PRE-TRIAL, NON-RETAINED EXPERTS NOT SUBJECT TO CONTINGENT-FEE WITNESS PROHIBITIONS

In a roof damage case, *Arthur et. al. v. Liberty Mutual Personal Ins. Co.*, 2022 WL 14225368 (W.D. Tex. October 24, 2022), the Arthurs sued their insurer, Liberty Mutual for not paying a claim for their weather-damaged metal roof. Liberty Mutual denied the claim on the basis that it was a policy exclusion for cosmetic damage. The Arthurs hired a public adjuster with the agreement that he would be paid 10% of whatever insurance settlement they received. They later initiated a suit against Liberty and designated the public adjuster as a non-retained expert regarding the market value of repairs for their home. Liberty Mutual sought to exclude the public adjuster's testimony, arguing that the fee arrangement violated Rule 3.04 of the Texas Rules of Disciplinary conduct, which prohibits attorneys from offering to compensate a witness contingent upon the outcome of the case. The Court disagreed, stating that this type of fee arrangement was approved by the Texas Department of Insurance; it was between Plaintiffs and the expert, not Plaintiffs' attorney; and it was dependent on any insurance settlement and entered into prior to the litigation started, not necessarily the outcome of litigation or dependent on his testimony. The court overall seemed to indicate that the bias concerns that could normally be presumed on contingent fee testimony were absent in this situation.

FIFTH CIRCUIT: "COMPLETE DIVERSITY IS STILL REQUIRED EVEN IF ONE OR MORE DEFENDANTS HAVE NOT BEEN SERVED."

Also mid last week, the United States Court of Appeals for the Fifth Circuit held that "snap removals," those in which a defendant tries to remove an action before a resident co-defendant has been served, are not permitted absent full diversity of citizenship.

Even though this case (*In Re:* Levy, 2022 WL 14732482 (5th Cir. October 26, 2022)) arose out of the Eastern District of Louisiana, the parties cited apparently contradictory Texas cases to determine whether snap removals were allowed. 28 U.S.C. § 1441(b)(2) states that an action that is otherwise removable and based solely on diversity of citizenship may not be removed if any defendant is joined and served. Relying on this and *Texas Brine Co., LLC v. American Arbitration Association, Inc.* 955 F.3d 482 (5th Cir. 2020), Liberty mutual argued that that snap removals were permissible. However, the Court sided with the plaintiffs and *New York Life Ins. Co. v. Deshotel*, 142 F.2d 873 (5th Cir. 1998) to hold that *Texas Brine* was only allowed a "snap removal" because the parties were completely diverse. "[A] defendant may not remove an otherwise-removable matter if any properly joined defendant is a citizen of the forum."