Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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CALIFORNIA CODIFIES PRE-SUIT SETTLEMENT DEMANDS

On January 1, 2023, a new California statute went into effect governing time-limited pre-suit settlement demands within the policy limits. California Civil Procedure Code § 999 governs demands made under auto, homeowner, and commercial premises liability insurance policies covering claims for bodily injury or property damage. The new statute sets a very specific list of boxes which must be ticked:

A time-limited demand is defined as one made BEFORE a suit or arbitration is filed;

The demand must be in writing and identified as a time limit demand;

It must allow 30 days to respond (or 33 if sent by mail);

It must state the date and location of the loss;

It must state the claim number, if known;

It must include a description of all known injuries sustained by the claimant;

It must contain a clear and unequivocal offer to settle all claims for an amount within policy limits;

It must offer to satisfy all liens;

It must offer a complete release for all insureds from all present and future liability for the occurrence;

It must include reasonable proof to support the claim, which may include medical records or bills;

It must be sent directly to the insurer at its designated address for receiving such demands OR to the adjuster assigned to the handle the claim, if known;

A demand that fails to meet all of these requirements is presumed unreasonable in any resulting lawsuit for damages (but this does not apply to pro se claimants).

The insurer must respond by the deadline, whether it accepts the demand or not. Failure to respond by the deadline will be considered relevant evidence in a resulting suit for extra-contractual damages. The insurer may request clarification or additional information, and the claimant may not deem those requests a rejection in and of themselves.

Editor's Note: Although our Newsbrief focuses first and foremost on Texas insurance law, we know many of our clients handle claims and litigation in many states; therefore, we bring this important California development to your attention. (The Texas equivalent is known as a *Stowers* demand after the 1929 case which first imposed liability on an insurer for negligently failing to accept a reasonable demand within policy limits. In California, these will likely become known as 999 demands. A key difference is that a Texas *Stowers* demand may be made either before or during litigation, while § 999 is specific to pre-suit demands.) Many thanks to a good friend and client for the tip.

AUSTIN FEDERAL MAGISTRATE DECLINES TO DETERMINE NUMBER OF OCCURRENCES UNTIL COMPLETION OF UNDERLYING SUIT

A federal magistrate judge in Austin recently recommended that an auto insurer's motion for summary judgment on the number of occurrences, and thus the number of policy limits potentially owed, be postponed until the completion of the underlying lawsuits. *Clear Blue Ins. Co. v. Fernandez and F&I Enterprises, Inc.,* No. 1:22-CV-00038-RP, 2023 WL 222239 (W.D. Tex. Jan. 17, 2023) (slip op.)

The underlying loss arose while an employee of the insured trucking company was attempting to back a tractor-trailer into a driveway, a maneuver which requires the truck to block the road. The gears jammed, preventing him from putting the truck in reverse and completing the maneuver, leaving the trailer blocking both sides of the highway. While the employees were trying to free the gears, a

driver on the highway crashed into the side of the trailer, killing the driver and injuring the other occupants of the van. The trucking company employees began assisting the survivors of that crash, and a few minutes later, a second vehicle driven by Fernandez crashed into the truck, injuring Fernandez.

Fernandez and the family of the deceased driver in the first vehicle both sued the trucking company in two separate lawsuits. Fernandez explicitly blamed the trucking company for not taking steps after the first crash to warn other drivers of the hazard. The insurer filed this declaratory judgment action and moved for summary judgment, arguing the two collisions were a single accident because they arose from a single cause – the trucking company's failure to back safely into the driveway so that the truck blocked all traffic in the road.

The magistrate judge's opinion observed that under Texas law, the key question was whether there was a single proximate, uninterrupted and continuous cause which resulted in all of the injuries and damage. If so, there would be one occurrence. But if there were a pause and some intervening cause, including a resumption of negligent conduct by the insured, there would be multiple occurrences and thus multiple limits in play. However, the magistrate concluded none of these questions were ripe because the underlying suits were still pending, there were no stipulations between the parties about the negligent conduct, and therefore deciding the number of occurrences and number of limits available would be a prohibited advisory opinion on indemnity, which may not be adjudicated until the underlying litigation is resolved by settlement or trial.

Editor's Note: While the magistrate's opinion does not telegraph the likely ultimate answer on the merits, the practical effect of the court's "decision not to decide" is likely to be much the same as an openly adverse decision. And it is consistent with recent patterns in Texas courts, which have been trending toward results that keep the pressure on insurers to defend, continue defending, and to settle questionable claims.

AUSTIN FEDERAL MAGISTRATE RECOMMENDS DISMISSING MOST CLAIMS IN UIM BAD FAITH SUIT

A federal magistrate judge in Austin recently recommended that all claims against an auto insurer by its policyholder be dismissed EXCEPT for the policyholder's request for declaratory judgment (DJ) as to whether uninsured motorist (UIM) benefits were owed. In *Shaban v. United Financial Cas. Co.,* No. 1:22-CV-00847-LY, 2023 WL 324518 (W.D. Tex. Jan. 18, 2023) (slip copy), the policyholder sought UIM benefits from his own auto insurer after an accident with an allegedly uninsured motorist. The policyholder sued, seeking DJ as to whether UIM benefits were owed, and also alleging breach of contract, negligence, misrepresentation, Insurance Code violations, and DTPA violations.

After successfully removing the case to federal court, the insurer filed a Rule 12(b)(6) motion to dismiss all of the claims except the DJ claim because an auto insurer has no contractual duty to pay UIM benefits until the policyholder has obtained a judgement against the adverse driver, and here the policyholder could neither plead nor prove he had done so. The federal magistrate agreed, observing that under these circumstances, the DJ claim was the only properly pleaded claim. The magistrate judge recommended that all claims except the DJ claim be dismissed, and noted that because the case was now pending in federal court, the DJ claims would be construed under the Federal Declaratory Judgment Act rather than the Texas Declaratory Judgment Act as originally pleaded.

Editor's Note: This recommendation, while still short of being an official ruling from the district judge, may lead to battles over whether UIM suits will be litigated in state court, where it is more difficult to obtain dismissals of extra-contractual claims, and where the Texas Declaratory Judgment Act allows for attorney fee awards… or in federal court, where the reverse is true on both counts.

NO DAMAGES? THEN NO ATTORNEY'S FEES!

Recently, in *Jones v. Allstate vehicle and Property Insurance Company*, 2022 WL 17419386 (Tex. App.—Houston [14th Dist.] December 6, 2022) the Texas Court of Appeals in Houston held Jones not a "prevailing party" and therefore not entitled to her attorney's fees, even though the jury awarded her money.

Oneida Jones sued her insurer Allstate for allegedly wrongfully denying her homeowner policy claim. She won the trial. The jury found that she was entitled to $6,935 for Allstate's conduct, and that she incurred $27,000 in reasonable, necessary attorney's fees. The Court noted that Allstate had already paid her $4,670, and her deductible was $3,040. Because the total of those two amounts exceeded the $6,935 the jury had awarded, the Court held that Jones would take nothing from the verdict, including attorney's fees and court costs.

Jones argued that she was entitled to attorney's fees and court costs because she was a "prevailing party" entitled to them under Chapter 541 of the Insurance Code. The Court noted that generally, a prevailing party is the one "vindicated by the trial court's judgment, not the jury's verdict." With this reasoning in mind, "Allstate paid the full amount it owed Jones on her claims before trial, which means that Jones did not prevail and cannot recover attorney's fees."

CLAIMS FOR "UNFAIR" INSURANCE PRACTICES ARE NOT ASSIGNABLE, EVEN IN CASES OF LIFE AND DEATH

A Federal District Court for the Western District of Texas joined several of its sister courts in holding that claims for unfair insurance

practices are not assignable. In *Tuyo Holdings, LLC v. Transamerica Life Insurance Company* 2022 WL 17490982 (W.D. Tex., December 6, 2022), Barry Siegal obtained a life insurance policy. He sold the policy rights to a third-party purchaser, then it passed hands several times over the next ten years until it landed in Policy Services' hands, then Tuyo's, when Policy Services went through bankruptcy. In 2020, the policy lapsed for a failure to pay additional premiums. Tuyo filed a declaratory judgment action for wrongful termination of the policy, alleging that Transamerica did not fulfill the Notice requirements of Texas Insurance Code § 541.

Transamerica sought dismissal of the Chapter 541 claim, arguing that Chapter 541 claims are not assignable. The Western District Court agreed, citing precedent from itself as well as cases from the Texas Court of Appeals in Dallas and the Texas federal district courts in the Northern and Eastern Districts of Texas. These lines of cases likened Chapter 541 claims to Deceptive Trade Practices claims, that are for aggrieved consumers, not litigants for personal profit. The court accordingly dismissed Tuyo's Insurance Code cause of action.

IMPROPERLY JOINED DEFENDANTS' CITIZENSHIP REALLY CAN BE IGNORED

In *Hang Nguen, et al. v. Amguard Insurance*, 2022 WL 17477545 (E.D. Tex., December 6, 2022), a Federal District Court for the Eastern District of Texas followed the recent, binding precedent of *Advanced Indicator and Manufacturing, Inc. v. Acadia Insurance Co*, 50 F.4th 469 (5th Cir. 2022) regarding improperly joined defendants. Here, Hang and Kheim Nguyen filed a hail and windstorm claim on their homeowner's insurance policy. Amguard denied coverage, and the Nguyens sued Amguard and adjuster/investigator Shawn Mitchell for various claims, including several alleged violations of the Texas Insurance Code, in state court in Denton County, Texas. Amguard accepted any liability for Mitchell's actions as its agent. Amguard then removed the case to federal court. It alleged the parties were diverse, even though Mitchell and the Nguyens were Texas residents, now that it had accepted Mitchell's liability and he was an improperly joined defendant. The Court agreed, citing last month's 5th Circuit decision in *Advanced Indicator*. The 5th Circuit's holding there was directly on point: "the court may disregard the citizenship of that [improperly joined] defendant, dismiss the non-diverse defendant from the case, and exercise subject-matter jurisdiction over the remaining diverse defendant." (*Nguyen* quoting *Advanced Indicator*, brackets in *Nguyen*).

Notably, the Nguyens originally demanded only $40,776 from the insurance company, below the $75,000 minimum requirement for federal court diversity jurisdiction. However, when they filed suit, they claimed treble damages, and the Court cited 5th Circuit precedent holding that claims for multiplied damages can fulfill courts' amount-in-controversy requirements.

Thus, the Court denied the Nguyen's motion to remand the case back to state court.

FEDERAL MAGISTRATE RECOMMENDS DENIAL OF INSURER'S MOTION TO PRECLUDE ATTORNEY'S FEES IN COVERAGE DISPUTE

Recently, a U.S. Magistrate Judge for the Western District of Texas—Waco Division recommended that the district court deny an insurer's motion to preclude attorney's fees after finding that the claimant satisfied the pre-suit notice requirements of the Texas Insurance Code. *Waco Hippodrome, Inc., v. Central Mutual Ins. Co., et al.*, Civil No. 6:22-cv-349, 2022 WL 17668128 (W.D. of Tex. Dec. 14, 2022). After the historic February 2021 winter storm struck the Waco area and caused several burst pipes and flooding in the Waco Hippodrome Building, the entity that owned the building ("Hippodrome") filed a claim with its insurer, Central Mutual Insurance Company ("Central").

Due to a dispute about the covered damages, on October 5, 2021, Hippodrome filed a lawsuit in state court against Central alleging, in part, that Central violated sections of the Texas Insurance Code. That same day, Hippodrome sent Central a demand letter with notice of its claims. On November 5, 2021, Central removed the lawsuit to federal court. Four days later, Central filed a Motion to Preclude Attorney's Fees, arguing that Hippodrome did not provide the sixty-one-day notice required by the Texas Insurance Code. On November 10, 2021, before Hippodrome could file a response, Central moved to withdraw its previously filed motion on the basis that it had filed it inadvertently. On November 17, 2021, the court granted Central's motion to withdraw and, a day later, Hippodrome and Central agreed to voluntarily dismiss the lawsuit so that they could perform additional inspections while giving Hippodrome the opportunity to re-file its lawsuit no earlier than ninety days afterward. The parties also agreed not to waive any of their existing rights, claims, or defenses.

During the ninety-day period that was part of the agreement, Central re-inspected Hippodrome's property at least two times. However, the parties were still unable to reach an agreement, and Hippodrome eventually filed a new lawsuit in federal court on April 1, 2022. In this new lawsuit, Central again filed a Motion to Preclude Attorney's fees, arguing that Hippodrome did not provide sixty-one-day notice of the new lawsuit. Hippodrome countered that the pre-suit notice it sent on October 5, 2021, satisfied the statutory requirements and it had thus fulfilled its obligations. The trial court referred Central's motion to a Magistrate.

The Magistrate first found that Central provided no evidence Hippodrome's October 5, 2021, pre-suit notice letter was defective. Indeed, he pointed out that the pre-suit notice letter complied with the statute and, even if it did not, Central relied exclusively on the argument that it was untimely because Hippodrome sent it the same day it filed its state court lawsuit.

Further, the Magistrate found Central's argument unpersuasive for several reasons. First, the plain language of the Texas Insurance Code referred to "the action," which clearly meant the current lawsuit in which the insurer was filing its motion to preclude attorney's fees, not any prior or subsequent lawsuits. Second, Central's argument ignored the fact that the parties had agreed to voluntarily dismiss the first lawsuit, which "rendered the proceedings a nullity" and made it as if the lawsuit had never been filed. Third, Central was assuming Hippodrome's October 5, 2021, pre-suit notice letter did not comply with the substantive requirements of the Texas

Insurance Code, an issue that was never addressed in the previous lawsuit because Central withdrew the motion before Hippodrome could respond to it. Fourth, the parties' previous agreement that no party was waiving any rights, claims, or defenses—which Central argued allowed it to re-assert the basis of its original motion in a subsequent lawsuit—clearly showed the parties' intention was to preserve their rights in the first lawsuit, not any future lawsuits, and did not create any new rights for subsequent lawsuits.

Based on these findings, the Magistrate found that Hippodrome provided the required pre-suit notice on October 5, 2021—one-hundred and seventy-seven days prior to the filing of the second federal court lawsuit—and recommended that the trial judge deny Central's Motion to Preclude Attorney's Fees.

COURT OF APPEALS affirms summary judgment ON extra-contractual claims in favor of insurer

In *Orange Cup Drive In LLC v. Mid-Continent Casualty Co.,* No. 05-21-00448-CV, 2023 WL 110190 (Tex. App.—Dallas, Jan. 5, 2023, mem. op.), Orange Cup operated a convenience store and decided to open the inactive gas station at its site. Gasoline and diesel fuel was used to test the existing tanks and lines, leading to oil releases from the lines to the gas pumps, which permeated the soil. Subsequently, Orange Cup sought coverage under its pollution liability and environmental damage insurance policy with Mid-Continent Casualty Company ("MCC"). The policy had three coverage parts: Coverage A applied to claims by third parties for property damage caused by a release; Coverage B applied to cleanup costs incurred by the insured; and Coverage C applied to expenses to repair or replace the storage tank system. MCC paid $75,000—the maximum amount available—under Coverage C. MCC did not pay any amount under Coverage A. MCC did not pay any amount under Coverage B because Orange Cup had neither paid the deductible nor provided the documentation to support its claim for cleanup costs.

Consequently, Orange Cup filed suit against MCC asserting claims of violations of the Texas Insurance Code, the Deceptive Trade Practices Act, and for common law bad faith and fraud. Orange Cup contended: (1) it was made to believe that it had coverage for third party liability; (2) MCC took advantage of Orange Cup's lack of expertise and knowledge to misrepresent to Orange Cup that it had coverage for liability from a third party claim; (3) MCC refused to approve the contractor to conduct the cleanup of the environmental leakages on Orange Cup's premises and refused to approve any expenses above Orange Cup's deductible, in violation of the parties' Rule 11 agreement; and (4) MCC refused Orange Cup's request to appoint its own contractor to conduct the cleanup if it disapproved of Orange Cup's choice. In response, MCC moved for summary judgment on all the extracontractual claims, which the trial court granted.

On appeal, the Court of Appeals concluded that "Orange Cup failed to raise genuine issues of material fact that it lost policy benefits or suffered an independent injury as a result of MCC's [alleged] statutory violation or bad faith; [thus], the trial court did not err by granting summary judgment for MCC. The Court reasoned that, as to Coverage A, the only affidavit testimony of the belief that Coverage A would cover claims made by Orange Cup's landlord did not provide any facts supporting a contention that the belief was based on any false representation or other statutory violation by MCC. As to Coverage B, the only summary judgment evidence was that of MCC regarding Orange Cup's failure to comply with MCC's numerous requests for documentation showing that Orange Cup was "legally obligated to pay" for a "confirmed release" under the policy. Further, Orange Cup's alleged damages all arose from its alleged loss of benefits under the policy, not from an independent injury.