Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

FEB 16, 2023

APPEALS COURT CONCLUDES AGREEMENT TO SETTLE SUBROGATION CLAIM UNENFORCEABLE - PRIMARY INSURER WAIVED SUBROGATION RIGHTS

Last week, a Texas Court of Appeals concluded that, pursuant to The Uniform Condominium Act, the insurer waived its right to subrogation and, therefore, its subrogation settlement was unenforceable. In *Great American Ins. Co. of New York v. Nationwide Mutual Ins. Co.,* No. 09-00293-CV, 2023 WL 1825872 (Tex. App-Beaumont, Feb. 9, 2023, mem. op.), a fire originated in the unit of Dana and Donna Evans' high-rise condominium in Austin, Texas. The fire caused damage to their unit and several other units. The Condominium Association was insured through a primary policy with Great American Insurance Company of New York ("Great American"). The Evanses also had a policy (required by the Condominium Association) with Nationwide, which covered "damage to other Units or property located therein, the cause of which originates from such Owner's Unit." Great American paid the claims presented by the Evanses (and the other unit owners). Subsequently, Great American made a subrogation demand against Nationwide for the Evanses' remaining liability limit of $266,540.25. Nationwide accepted the demand. The Evanses, upon learning of the settlement, sent Nationwide an email contending that Great American did not have the right to a claim against their policy because Great American's policy must waive the right to subrogation against unit owners pursuant to Section 82.111(d) of the Texas Property Code (i.e., The Uniform Condominium Act (the "Act"), which establishes rules that apply to the creation, development, and management of condominiums, including the insurance coverage condominiums must carry). Apparently agreeing with the Evanses, Nationwide did not fund the settlement. Consequently, Great American sued Nationwide alleging that Nationwide accepted and then breached the subrogation settlement agreement.

On appeal, the issue was whether the Act, in particular Section 82.111(d) which requires condominium associations to obtain an insurance policy that, among other things, waives the carrier's right to subrogation against unit owners, applies to a condominium owners association's insurance company. And, if so, does it make an agreement to settle a subrogation claim unenforceable. The Court of Appeals concluded that "it's clear from the language in the statute that the legislature intended section 82.111 to apply to insurers that sell condominium policies to condominium associations. Further, section 82.111 "doesn't allow the association or its insurer the right to vary or waive the rights conferred on unit owners in section 82.111 including the waiver of subrogation provision." Thus, "Great American [was required] to waive its subrogation rights, which left it with no right to sue the Evanses in an effort to shift the losses that fell on its policy to the Evanses and their insurer." The Court of Appeals upheld the trial court's refusal to enforce the settlement agreement and the take-nothing judgment entered against Great American.

U.S. DISTRICT COURT GRANTS INSURER SUMMARY JUDGMENT ON MISREPRESENTATION CLAIM BUT DENIES SUMMARY JUDGMENT ON BAD-FAITH CLAIM.

Last week, the United States District Court for the Northern District of Texas granted the insurer summary judgment on the insured's misrepresentation claim and denied the insurer summary judgment on the insured's bad-faith claim. In *Bakri v Nautilus Ins. Co.,* No. 3:21-CV-2001-N, 2023 WL 1805142 (N.D. Texas [Dallas Division], Feb. 7, 2023, mem. op.), Bakri had an insurance policy with Nautilus that covered multiple of his properties. Bakri alleged that a winter storm caused damage to his properties. Nautilus, however, claimed that the damage was merely cosmetic and denied coverage. Consequently, Bakri filed suit alleging violations of Section 541 of the Texas Insurance Code, among other claims. Bakri alleged that Nautilus (1) made misrepresentations when it stated that the damage was not covered under the policy because it was cosmetic and (2) acted in bad faith in investigating the claims. In response, Nautilus sought summary judgment. The U.S. District Court granted summary judgment on the misrepresentation claim and denied summary judgment on the bad-faith claim.

Regarding the misrepresentation claim, the court concluded that "making factual misrepresentations regarding whether damage is covered does not constitute a violation of section 541. The misrepresentation must be about the details of a policy, not the facts giving rise to a claim for coverage." Because Bakri did not provide evidence that Nautilus misrepresented the scope of the policy, Nautilus was entitled to summary judgment as a matter of law.

Regarding the bad-faith claim, Nautilus argued that the claim failed because Bakri admitted in his deposition that the dispute was merely a reasonable difference between experts. The court, however, concluded that Bakri's testimony was not dispositive and a reasonable disagreement by the experts on the scope of coverage did not mean that Nautilus acted in good faith during the investigation. Further, Bakri provided evidence indicating bad faith, including his expert's opinions that Nautilus failed to investigate different sources of wind and hail damage, failed to conduct a multisource investigation of causation, and used improper methods or intentionally overlooked a multitude of different covered damages, including the replacement to the roofs and the exterior damages. The court concluded that the export report raised a fact issue as to whether Nautilus failed to act in good faith during the investigation and, thus, denied summary judgment on the bad-faith claim.