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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MAR 7, 2023

"INDEPENDENT INJURY" ISN'T A PLEADING REQUIREMENT

To close out the month of February, the United States District Court of the Eastern District of Texas held that plaintiffs do not necessarily need to plead independent injuries to recover for extracontractual claims against insurance carriers. In *Blue Star Sports Holding, Inc. v. Federal Insurance Company*, 2023 WL 2266128, Blue Star discovered that two of its employees embezzled over six million dollars of company funds through illegal wire transfers. It filed a claim under its Federal insurance policy under its "Employee Theft" provision, but Federal denied the claim.

Blue Star filed suit against Federal for breach of the implied covenant of good faith and fair dealing, breach of contract, bad faith, and other claims. However, Blue Star alleged only the denial of benefits as its damages and not any independent damages. Federal moved to dismiss the extracontractual claims, arguing that the "independent injury rule" and "no-recovery rule" work together to disallow claimants from recovering for extracontractual bad faith claims unless the claimant pleads an independent injury. The Court disagreed.

The Court cited the 2018 Supreme Court of Texas case, *USAA Texas Lloyds Co. v. Menchaca,* 545 S.W.3d 479, to state that the "independent injury rule" only limits the recovery of damages that flow from a mere denial of policy benefits. So an insured is required to specifically plead an independent injury only if he/she seeks to recover damages beyondthe policy benefits.

ADDITIONAL INSURED NOT COVERED BY BLANKET, LEFT OUT IN THE COLD FOR ITS OWN NEGLIGENCE

Also in the last week of February, the United States Fifth Circuit Court of Appeals issued an opinion interpreting the language involved in an insurance policy's "additional insured" provision. In *Schlumberger Technology Corporation v. Carolina Casual Insurance Company*, 2023 WL 2240461, Spotted Lakes, LLC was transporting sand for Schlumberger when it was involved in a four-vehicle accident, including two tractor trailers, with one tractor-trailer operated by Schlumberger and the other by Spotted Lakes. One of the drivers of a non-tractor-trailer sued Schlumberger, and they settled prior to trial. Schlumberger then filed a separate action against Spotted Lakes, seeking the recovery of its defense costs, the settlement amount, and attorneys' fees and costs. Schlumberger and Spotted Lakes had a Master Transportation Agreement that required Spotted Lakes to list Schlumberger as an additional insured on its own policy. Spotted Lakes' policy had a Blanket Additional Insured Endorsement providing that "insured" includes any person or organization that you are required to provide insurance, but only to the extent of Spotted Lakes' negligence.

Although the Southern District of Texas agreed with Schlumberger that this meant Schlumberger was covered under the policy, the Fifth Circuit held otherwise. Specifically, the Fifth Circuit noted that the policy excluded all acts outside of those arising out of Spotted Lake's negligence. Here, the original plaintiffs only sued Schlumberger and only alleged its negligence. Thus, the "only your negligence" language limited the "any person or organization that requires you under an insured contract" language, and the Fifth Circuit sided with Spotted Lakes and its insurance company.

"SILT AND OTHER MATERIALS AREN'T POLLUTANTS" SAYS SOUTHERN DISTRICT OF TEXAS

In another policy-interpretation case this week, *Atain Specialy Insurance Company v. Triple PG Sand Development,* 2023 WL 2307647, a magistrate judge recommended that the Southern District of Texas hold that releasing materials and substances into Houston-area waterways and lakes did not amount to releasing "contaminants" so as to exclude coverage for related claims. In this multi-district litigation case, over 700 plaintiffs sued Triple PG for flooding damages occurring during Hurricane Harvey, alleging that Triple PG released "materials and substances" into Houston's lakes and waterways as far back as 1954, causing their capacity to decrease over time and leading to the plaintiffs' flooding damages. Triple PG's insurer, Atain, filed a declaratory judgment action asserting that it did not need to defend Triple PG in those lawsuits by operation of its Total Pollution Exclusion. The Total Pollution Exclusion said that the insurance did not apply to bodily injury or property damage caused by or arising out of the discharge, release, or escape of pollutants.

Atain argued that TPG's slow clogging of the lakes and waterways constituted "pollution" that fell under the exclusion. The magistrate disagreed and said that the policy clearly defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalies…" focusing on the language that the material must be an "irritant or contaminant." The plaintiffs in these cases alleged only silt, albeit ultimately harmful silt, but only silt, not irritants or contaminants. So, the Total Pollution Exclusion did not apply, and it was recommended that the Court abate the declaratory judgment suit until the state court suits were resolved.