Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF

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## FEDERAL COURT GRANTS MOTION TO DISMISS ON UNDERINSURED MOTORIST / EXTRA-CONTRACTUAL ONLY LAWSUIT

Last Wednesday, in a well written opinion providing an excellent summary of Texas law, the U.S. District Court for the Southern District of Texas, McAllen Division, granted an insurer's motion to dismiss an underinsured motorist (UIM) lawsuit against the insurer in which the insured did not allege breach of contract, but only sought extra-contractual damages flowing from alleged insurance code violations in the denial of the claim. In *Garza v. Allstate Fire and Casualty Insurance Company,* 2020 WL 3077596 (S.D. Tex. June 6, 2020), the insured driver was involved in an accident with an at fault, third-party and incurred $26,180 in medical expenses. The insured requested permission from Allstate to settle with the third-party for a $30,000 policy limit and then presented a UIM claim to Allstate alleging the limits were insufficient. Allstate disagreed and sent a letter to the insured advising that his claim "did not pierce the threshold for an Underinsured Motorist claim." The insured disagreed and this lawsuit followed.

But in the lawsuit, the insured specifically alleged that he "is not seeking any of the proceeds of the UIM policy" instead, suing only for alleged violations of the Texas Insurance Code, Chapter 541 for denying the claim without a reasonable investigation, failing to provide an adequate explanation, and failing to make a good faith attempt to settle the claim. The insured requested actual damages for past and future; medical expenses, pain, suffering and mental anguish. And, he also sought treble damages, attorneys' fees and court costs under the Texas Insurance Code. After removing the lawsuit to federal court, Allstate filed a motion to dismiss under Rule 12(b)(6) for failure to state a claim.

The court engaged in a clear and concise summary of Texas law, analyzing the issues and in part, noted that UIM coverage is intended to protect "insureds who are *legally entitled* to recover" damages from underinsured motorist. And under *Brainard* v. *Trinity Universal,* 216 S.W.3d 809 (Tex. 2006), a settlement or admission by the third-party driver was insufficient to "pierce the threshold of the insured's UIM policy" or prove legal entitlement to UIM coverage. A judgment was required. In this case, there was no judgment, but the court also noted that the insured was not seeking recovery of UIM benefits, instead seeking recovery only for alleged violations of the Texas Insurance Code and Unfair Claims Practices Act. Thus, identifying the issue of whether the insured can bring the Insurance Code claims absent a breach of contract claim.

The court then turned its attention to the "independent injury" rule first pronounced in *Republic Ins. Co. v. Stoker,* 903 S.W.2d 338, 341 (Tex. 1995), observing that there may "some act, so extreme, that would cause injury independent of the policy claim." And then, the court considered the clarification of the "independent injury" rule provided by *USAA Texas Lloyds Company v. Menchaca*, 545 S.W.3d 479, 489 (Tex. 2018). The court artfully took the five rules announced in the *Menchaca* decisions for determining for determining when an insured may assert extra-contractual claims, and boiled them down to their essence: "An insured cannot recover any damages under the Insurance Code based on an insurer's statutory violation unless the insured establishes a right to receive benefits under the policy or an injury independent of a right to benefits." And in the analysis that followed, the court found that the insured's pleadings failed to state a claim for either breach of contract or independent injury and dismissed plaintiff's claims with prejudice.

## ORAL AGREEMENT TO DELAY SERVICE INADEQUATE TO AVOID STATUTE OF LIMITATIONS DEFENSE – SUMMARY JUDGMENT GRANTED

Last Thursday, the Corpus Christi Court of Appeals affirmed summary judgment in favor of the insured based on the claimant's failure to exercise due diligence in serving the lawsuit, despite an alleged oral agreement with the insured's adjuster that service was not necessary while settlement negotiations continued. In *Jones v. Coleman,* 2020 WL 3116498 (Tex. App. – Corpus Christi – Edinburg June 11, 2020), Jones, with the help of his pastor, presented a claim against Coleman through Coleman's insurer Progressive. The day before the two-year statute of limitations was to expire, Jones filed a pro se petition and was told by his pastor that no service was needed based on a discussion with an unnamed claim adjuster for Progressive. But nothing was in writing.

Jones hired an attorney six-months later, and it took another six-months to serve the insured with the lawsuit. Service only took place after the claimant's attorney sent a demand letter and the Progressive adjuster said they would need to for them to serve the insured to continue discussions. An answer was filed and included a statute of limitations defense, which arises when a claimant files suit untimely, or timely files and fails to exercise due diligence in serving the defendant. The insured moved for summary judgment based on the claimant's failure to exercise due diligence in perfecting service, which was granted by the trial court. This appeal followed.

On appeal, the court noted that when a defendant pleads the defense of limitations and shows service was untimely, the burden shifts

to the plaintiff to prove diligence in attempting service. In this case, "Coleman was served thirteen months after limitations expired, approximately eight months after Jones hired counsel, and three months after Progressive told counsel she would not discuss the case until Coleman was served." The court then focused on the alleged oral agreement with an "unnamed adjuster" observing that "oral agreements are insufficient to toll limitations" they must be in writing. And the length of the delay reflected a lack of due diligence as a matter of law. Accordingly, summary judgment in favor of the insured was affirmed.

## SUMMARY JUDGMENT GRANTED IN FAVOR OF WRITE-YOUR-OWN FLOOD INSURER – NO FLOOD COVERAGE FOR GROUND FLOOR OF ELEVATED BUILDING

Last Wednesday, the U.S. District Court for the Southern District of Texas found that a finished ground-floor was not covered under flood policy issued on an elevated residence, and summary judgment was granted in favor of the insurer. In *Nazmudin v. American Bankers Insurance Company of Florida*, 2020 WL 3077860 (S.D. Tex. June 10, 2020), the insured residence was originally built and insured as an elevated structure in 1974, but the ground floor was later finished and enclosed when it was flooded by Hurricane Harvey in August 2017. The insurer paid for the second-floor damage under the flood insurance policy but denied coverage for the first or ground floor under the terms of the policy. The insured argued that because one side of the first floor was at ground level, their home was not elevated and coverage for the ground floor should be afforded.

In granting summary judgment in favor of the insurer, the court observed that the policy's declaration page described the insured property as "Elevated with Enclosure" and the declarations page is part of the policy. The court also considered the *National Flood Insurance Program Adjuster Claims Manual* which warns homeowners that "[s]tructures that are misrated should be reported to the company's underwriting department as soon as possible after the potential error is discovered." And there is no record to support that any such report was made. Obligated to strictly adhere to the payment terms and conditions put in place by Congress, the insurer's motion for summary judgement was granted and the case dismissed with prejudice.

**Editor's Note:** This case serves as a reminder to agents and insureds, as we enter a new storm season, to review policies and coverage to help avoid the harsh consequences of outdated or inadequate coverage.