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TEXAS INSURANCE LAW NEWSBRIEF

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FEDERAL MULTI-DISTRICT LITIGATION PANEL REJECTS CENTRALIZATION OF SUITS INVOLVING COVID-19 BUSINESS INTERRUPTION CLAIMS

Last week, the United States Judicial Panel on Multidistrict Litigation ("MDL Panel") declined to centralize various actions pending in Pennsylvania and Illinois district courts arising out of the myriad claims filed by insureds for business interruption losses allegedly caused by the COVID-19 pandemic and the subsequent governmental orders suspending or severely limiting operations of "non-essential" businesses. In re: COVID-19 Bus. Interruption Protection Ins. Lit., MDL No. 2942, 2020 WL 4670700 (U.S. Jud. Panel on Multidistrict Lit. Aug. 12, 2020).

The MDL Panel noted there are currently over 260 actions filed in 48 different district courts against over 100 insurers involving breach of contract and declaratory judgment actions. Some of the claimants were seeking to centralize the pre-trial proceedings in the litigation. Although the MDL Panel acknowledged the suits may have common questions of fact, it concluded industry-wide centralization would not be convenient, efficient, or further justice because each case involved different policies, coverages, conditions, exclusions, and policy language. Moreover, each policy was purchased in different states by different businesses in different industries. The MDL Panel concluded such differences outweighed any benefit provided by industry-wide centralization and would, in fact, undermine the purposes of centralization, which is to promote judicial convenience and efficiency.

The MDL panel appeared open to insurer-specific centralization, given that the policies at issue would likely be the same or similar, and it would therefore be more likely the actions would share common pre-trial issues. However, the MDL Panel avoided ruling on the issue because it was not brought up by any of the parties. Rather, the MDL panel issued orders to four insurers or groups of related insurers (Certain Underwriters at Lloyd's, London; Cincinnati Insurance Company; the Hartford insurers; and Society Insurance) to show why actions against them should not be centralized.

Editor's note: The decision from the MDL Panel was not surprising given the few numbers of cases thus far before that Panel and the incredible diversity of the proposals offered. Most of the policyholders couldn't agree and the carrier positions were equally diverse. Neither the parties or the Panel addressed institutional discovery issues and such discovery efforts will drive future MDL proposals.

When we created the first Insurance coverage/ bad faith litigation MDL in the Texas wind/ hail litigation several years ago, we advocated and the Texas MDL Panel adopted carrier-specific MDLs which worked exceptionally well. We were encouraged to see the federal MDL Panel recognize the appropriateness of such an approach in certain situations for certain carriers. MDL efforts will continue for carriers at both the state and federal levels for several more years and we will continue to monitor and report on all significant efforts.

FEDERAL JUDGE DENIES INSUREDS' REQUEST TO REMAND TO STATE COURT DUE TO IMPROPERLY JOINING PARTY

A federal district judge in San Antonio recently dismissed all claims against Clearview Risk Insurance Programs, LLC, d/b/a Strata Underwriting Managers ("Strata") after finding the insureds improperly joined Strata to the lawsuit, in an apparent attempt to deprive the federal court of subject-matter jurisdiction. 444 Utopia Lane, LLC, et al., v. Peleus Ins. Co., et al., No. SA-20-CV-0716-XR, 2020 WL 4593209 (W.D. Tex. Aug. 11, 2020) involved a claim made by the insureds alleging substantial hailstorm damage to their property. After the adjuster's inspected the property, coverage was denied because the claim was untimely. The insureds filed suit against Peleus Insurance Company ("Peleus") and Strata in state court for

breach of contract, violations of Insurance Code Chapters 541 and 542, DTPA violations, and breach of the duty of good faith and fair dealing.

Strata denied it was a party to the insurance contract, and Peleus removed the case to federal court on the basis of diversity, asserting that Strata was improperly joined. In doing so, Strata cited a letter it sent to the insureds before they filed suit accepting liability of "any other agent or representative of Peleus" pursuant to Texas Insurance Code Chapter 542A, which allows an insurer to accept whatever liability an agent might have for the agent's acts or omissions regarding weather-related claims for property damage. The insureds argued Peleus could not accept liability for Strata's actions because Strata and Peleus were engaged in a joint enterprise to provide them with insurance and, thus, Peleus actions did not relate to their claim.

The court disagreed with the insureds, finding Strata acted Peleus' agent in placing the insurance, which fit the definition of "agent' under Texas Insurance Code Chapter 542A. Consequently, the court held Strata was improperly joined, denied the insured's motion to

remand, and dismissed all claims against Strata without prejudice.

FEDERAL APPEALS COURT RULES INSURER HAS DUTY TO DEFEND ITS INSURED CONTRACTOR UNDER "EIGHT CORNERS" RULE

The Fifth Circuit Court of Appeals recently ruled an insurer had a duty to defend its insured in a negligence action arising from the insured's faulty construction work on a residential home. Gonzalez v. Mid-Continent Casualty Company, No. 19-10565, (5th Cir. Aug. 13, 2020) involved a suit by a homeowner against a contractor performing siding work on the home. The homeowner sued the contractor in Texas state court, alleging the contractor negligently hammered nails through the house's electrical wiring when he installed wiring in 2013, which caused a fire to erupt in 2016.

When the contractor sought defense and indemnity from his insurer, the insurer refused to provide either because the insured canceled his policy in June 2014. In turn, the contractor sued the insurer in state court for breach of contract, breach of the duty to defend, breach of the duty to indemnify, and a declaratory judgment seeking the parties rights and obligations under the policy. The insurer removed the case to federal court and moved for summary judgment. The federal court denied the insurer's motion and instead entered a partial summary judgment holding that the insurer owed the contractor a duty to defend. The insurer appealed.

On appeal, the Court applied the "eight-corners" rule applicable under Texas law, which provides that the liability insurer is to determine its duty to defend solely from the terms of the policy and the pleadings of the third-party claimant. In so doing, the Court emphasized the language to the policy applied to "(1) an accident (2) that causes physical injury to tangible property (3) during the policy period." Moreover, the third-party claimant's petition alleged the contractor "improperly hammered nails through electrical wiring" in 2013, which caused the 2016 fire. The petition also alleged that the fire "related back" to the construction of the siding in 2013. Based on the language in the policy and the petition, the Court held the insurer owed a duty to defend the contractor, ruling that so long as any of the alleged damage occurred during the policy period, the duty to defend attaches.

The insurer also argued that two exclusions in the policy applied because they precluded coverage for property damage to "that particular part" of real property on which the contractor directly or indirectly was performing operations, or that had to be restored, repaired, or replaced because his work was incorrectly performed on it. However, the Court disagreed, stating the "particular part" of the property the contractor was hired to work on was the siding, not the electrical wiring, and holding the exclusions therefore did not apply. The Court did not rule on whether the insurer had a duty to indemnify the insured because the issue was not before the Court on appeal.