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TEXAS INSURANCE LAW NEWSBRIEF

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COURT OF APPEALS REAFFIRMS INSURED'S DUTY TO SEGREGATE COVERED DAMAGES, EVEN AFTER INSURER MAKES PARTIAL PAYMENT

Last Friday, a Texas appellate court upheld a summary judgment in favor of a property insurer based on the "concurrent cause" doctrine because the insured had failed to segregate its allegedly covered damages from non-covered damages. *Prime Time Family Entertainment Center, Inc. V. Axis Ins. Co.*, --- S.W.3d. ---, No. 11-18-00241-CV, 2020 WL 6108263 (Tex. App.—Eastland Oct. 16, 2020, no pet. h.) (slip op.) involved a claim for hail damage to a commercial roof in Abilene. Prime Time made a claim after a hailstorm, and during its investigation, Axis learned there was a significant history of prior roof problems.

Axis found some covered hail damage, and paid $245,000 for the covered damage, while holding back an additional depreciation payment, and advising Prime Time it would need to investigate further to determine whether the remainder of the roof problems were actually caused by the storm. Prime Time spent $750,000 replacing the entire roof and sued Axis, seeking $2 million in damages. Additional discovery turned up a history of extensive roof problems, including emails a month before the storm suggesting the roof already needed replacing.

Axis sought and won summary judgment in the trial court because Prime Time's expert made no attempt to separate the pre-existing problems from the damage caused by the storm and quantify them. On appeal, Prime Time argued Axis had essentially waived the concurrent cause doctrine, which places the burden on the insured to prove how much of its damages are covered, by making a partial payment that was undisputed. The court of appeals relied on the well-established rule that coverage cannot be expanded beyond the policy terms by waiver or estoppel, and held Prime Time was not excused from its duty to segregate merely because Axis had made an undisputed payment for part of the damage. The court affirmed the summary judgment in favor of Axis, which included summary judgment on all of Prime Time's extra-contractual claims as well, because it had failed to establish a breach of contract.

OVERPAYING CARRIERS CONTINUE TO HAVE DIFFICULTY COLLECTING FROM UNDERPAYING CARRIERS IN TEXAS

Last week, a federal judge in Dallas undertook the difficult task of allocating damages covered by two umbrella policies when the underlying suit is settled without trial. *Great American Ins. Co., v. Employers Mut. Cas. Co.*, No. 3:18-CV-01819-X, 2020 WL 6082955 (N.D. Tex. Oct. 15, 2020) (slip op.) involved a fatal auto accident and a driver defendant who was an employee of one insured (Corona), while performing duties in the course of another insured's business (Liberty Tire). The resulting death claim was settled for a total of $7 million. Corona's and Liberty Tire's two primary policies funded the first $2 million, but their umbrella insurers disputed who must fund the remaining $5 million.

Employers insured Corona for $1 million, and Great American insured Liberty Tire for $30 million. Great American contended Liberty Tire was an insured under Corona's policy, and therefore Employers must exhaust its $1 million limit before Great American's $30 million limit would be triggered. When Employers refused to pay its limit, Great American funded the remainder of the settlement and brought this suit to recover the $1 million from Employers. (There was some evidence Employers had offered to pay pro rata by limits, which Great American rejected.)

The court concluded Employers' policy was triggered first, but only to the extent the settlement was actually covered under Employers' policy. While Corona was the named insured under the Employers policy and its liability was clearly covered, Liberty Tire was what is sometimes referred to as an "omnibus insured;" that is, only an insured to the extent of its vicarious liability for Corona's acts. The court went on to hold that Great American could only recover from Employers to the extent it could prove the settlement had been for Liberty Tire's vicarious liability by way of Corona, and not for Liberty Tire's own direct liability.

Without a trial resulting in specific jury findings on these issues, answering the question of how much of the settlement was for Liberty's vicarious liability versus its direct liability turned out to be nearly impossible for Great American. Even after putting on two sets of affidavits from the defense attorneys evaluating the various exposures of the insureds, the court still found the affidavits to be conclusory and not adequate summary judgment evidence. Therefore, the court granted summary judgment in favor of Employers.

Editor's Note: This result leaves open the question of how Great American could have proven the settlement was covered under Employers' policy, short of refusing to pay and forcing the underlying suit to trial. All its after-the-fact efforts failed, but it remains conceivable that writing terms into the settlement agreement specifying exactly what was being paid for each set of exposures might have been sufficient. Considering settlement agreements are generally the result of arms-length negotiations between all the parties, this may be easier said than done.

This ruling appears to follow in the footsteps of *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765 (Tex. 2007) in cementing the maxim that in Texas insurance, no good deed goes unpunished. Although the court's reasoning here was somewhat different from that in *Mid-Continent*, the fundamental outcome is the same – an insurer who overpaid to settle the case and protect its insured was rebuffed in its efforts to collect from the underpaying insurer. And we predict this ruling, like *Mid-Continent*, has the potential to chill insurers' reasonable efforts to put the protection of their insureds first and work out allocation disputes between carriers later. This result will likely be appealed to the Fifth Circuit, and will we watch it carefully and report on further developments.

PROPERTY INSURER CUTS OFF POST-APPRAISAL PROMPT PAYMENT CLAIMS BY PROMPTLY PAYING WHAT IT OWES

Last Wednesday, a property insurer facing a post-appraisal claim under Texas Insurance Code Chapter 542 (Prompt Payment of Claims) won a summary judgment. In *Abundis v. Allstate Texas Lloyd's*, No. CV H-19-0953, 2020 WL 6060971 (S.D. Tex. Oct. 14, 2020) (slip op.), the policyholder invoked appraisal during litigation, and Allstate ultimately paid an appraisal award on a residential hail claim.

Mindful of the Texas supreme court's holding in *Barbara Technologies Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019), which allowed policyholders to continue pursuing Chapter 542 claims after payment of an appraisal award in certain circumstances, Allstate also made an additional payment to cover any interest it might owe under Chapter 542, and then made an offer of judgment in an amount designed to cover the plaintiff's incurred attorney fees up to that point.

After the policyholder rejected the offer of judgment, Allstate moved for summary judgment. Considering the reasoning applied by the supreme court in *Barbara Tech*, the district court here concluded Allstate had successfully shown it could not owe any more 542 interest on the claim because it had already paid all the interest owed. Likewise, the offer of judgment cut off any ability to cover later-accrued attorney fees. Thus, Allstate was entitled to summary judgment.