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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

DEC 15, 2020

SAN ANTONIO COURT OF APPEALS FINDS EVIDENCE OF AN UNREASONABLE INVESTIGATION ALONE DOES NOT SUPPORT A JURY FINDING OF "KNOWING" CONDUCT UNDER THE TEXAS INSURANCE CODE

The San Antonio Court of Appeals recently addressed an insurer's duty to defend when faced with false or fraudulent claims against the insured. In *Allstate Vehicle and Property Insurance Company v. Reininger*, No. 04-19-00443-CV, 2020 WL 6928405 (Tex. App.—San Antonio, Nov. 25, 2020) (mem. op.), Allstate appealed a trial court's judgment after a jury trial in favor of an insured for claims of breach of contract, bad faith and DTPA violations. The underlying suit stemmed from a hailstorm that struck Reininger's home. An inspection of the home found only cosmetic damage subject to a policy exclusion. After the first inspection, the insured noticed water leaks inside their home. Because they had not experienced any interior leaks before the hailstorm, they requested a further inspection of their roof and a second inspection was scheduled. The second inspection was cancelled, although the claim file showed the insured wanted to reschedule. For unknown reasons, Allstate closed its file.

Reininger sued Allstate for breach of contract, bad faith, fraud, and violations of the Texas Insurance Code and the Deceptive Trade Practices Act. He claimed Allstate: misrepresented the terms of his policy, both before he purchased it and during the adjustment of his hail damage claim; denied his claim without performing a reasonable inspection of his roof; and refused to pay his claim after liability became reasonably clear. At trial, the jury found in Reininger's favor on his breach of contract, fraud, and statutory claims. It also found Allstate had "knowingly" engaged in unfair or deceptive acts or practices and assessed additional damages as a result of that finding. Finally, the jury awarded attorney's fees. Reininger elected to recover on his statutory claims and the trial court signed a judgment consistent with the jury's verdict. Allstate appealed.

After examining the record, the Court first found there was legally sufficient evidence to support the jury's finding of unfair or deceptive acts. Rejecting the *bona fide* coverage dispute defense, the Court reasoned that a reasonable factfinder could have found the unreasonable investigation caused a wrongful denial and therefore caused damage. The Court then addressed Allstate's jury charge challenge to questions related to the cosmetic damage exclusion. The Court found Allstate had failed to adequately preserve these objections at trial and therefore waived them. The Court then addressed legal sufficiency of the jury's finding of "knowing" conduct. They found that while there was evidence to show the investigation was unreasonable, there was no evidence to support a finding that this failure was a "knowing" act of falsity, unfairness, or deception. The Court reversed the award of additional damages and attorney's fees.

The Court affirmed the portion of the trial court's judgment awarding actual damages under the Texas Insurance Code but reversed the portion of the judgment awarding additional statutory damages based on the jury's finding that Allstate acted "knowingly." The Court also reversed the award of attorney's fees and remanded this matter for a new trial on attorney's fees.

FEDERAL COURT IN HOUSTON RULES IN FAVOR OF ALLSTATE AFTER BENCH TRIAL ON ALLEGED WINDSTORM DAMAGE AND INSURANCE CODE CLAIMS

A Federal District Court Judge in Houston recently dismissed all claims against Allstate related to a windstorm claim after a bench trial. In *Corbett v. Allstate Vehicle and Property Insurance Company*, No. 4:17-CV-3368 (S.D. Tex. Nov. 30, 2020), Judge Al Bennett dismissed all contractual and extra-contractual claims after a two-day bench trial. The basis of the lawsuit was a claim by the Corbetts that their home had suffered storm damage. Allstate denied the claim after an inspection finding there was no physical damage. After the claim was denied, the Corbetts filed suit seeking damages for breach of contract and Texas Insurance Code violations. The Corbetts were represented at trial by Sean H. McCarthy of Williams, Hart, Boundas, Easterby, LLP, and Andrew Cook of the Cook Law Firm. Allstate was represented by Kevin Risley of Thompson. Coe, Cousins & Irons LLP. The Corbetts claimed there had been severe weather that caused the damage and, further, that their testimony was the only credible evidence of the weather that occurred that day. After Plaintiffs' case-in-chief, Allstate moved for judgment as a matter of law which the court denied at the conclusion of trial.

The trial court found that because the evidence and expert testimony presented at trial did not show hail or wind damage caused by the January 2, 2017 storm, the Corbetts had not met their burden of establishing coverage. Accordingly, Allstate did not breach the Policy by denying the claim. Citing *Menchaca*, the court also found because an insured may not recover under the Texas Insurance Code unless a claim is covered by the policy, the Corbetts cannot recover under the insurance code. Notably, relying on testimony from Allstate's expert engineer Mark Kubena, the court made a finding of fact that a "wind speed of fifty-eight miles per hour is insufficient to damage the property's roof." Additionally, while not specifically commenting on it, the trial court appears to have disregarded the testimony from the Corbetts' expert Shannon Kimmel that the home suffered roof damage from hail 1.5" in diameter.

FEDERAL COURT IN DALLAS SIDES WITH INSUREDS IN DISPUTE INVOLVING INSURER'S MOTION FOR SUMMARY JUDGMENT ON ITS DUTY TO DEFEND

Last week, a federal district court in Dallas denied an insurer's motion to summary judgment seeking a declaratory judgment that it had no duty to defend the insureds under its policy. *Covington Specialty Ins. Co. v. USAI LP, et al.*, No. 3:18-CV-3271-N, 2020 WL 7245073 (N.D. Tex.—Dallas, Dec. 9, 2020). Covington Specialty Insurance Company ("Covington") filed the motion in response to a lawsuit filed against its insureds involving claims of negligence, premises liability, and wrongful death. Such claims arose out of an incident in which the decedent was working as a private security guard at a property in Highland Park Texas when he and his vehicle were swept away by floodwaters.

The petition in the underlying suit alleged that floodwaters from a nearby creek swept the decedent away as he attempted to escape his vehicle. The Covington policy covered bodily injuries or property damage but *excluded* bodily injury or property damage "arising out of or resulting from the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft" and defined 'auto' as "[a] land motor vehicle, trailer, or semitrailer designed for travel on public roads, including any attached machinery or equipment; or . . . [a]ny other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged."

The Court applied the "eight-corners rule" and found that the insureds had established coverage under the policy; therefore, the insurer had the burden of proving that the "auto exclusion" under the policy applied.

When addressing whether an injury arises out of the use of a vehicle for the purposes of insurance coverage, the Court applied the factors set out in *Mid-Century Ins. Co. of Tex. v. Lindsey*, namely: (1) the accident must have arisen out of the inherent nature of the automobile, as such; (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated; and (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury."

In this case, Covington argued that the relevant "accident" was the decedent's "sitting post" in his vehicle during a flash flood. Although the Court agreed that an accident might arise within the territorial limits of an automobile despite the injury occurring outside of it, it nevertheless stated that there was "no reason to suggest that 'sitting post during a flash flood' is the relevant injury-producing event as opposed to the more natural reasoning that the flash flood itself produced the injury."

Covington also argued that the Court should apply the "but for" causation test and not the "producing cause" test when addressing the coverage issue. The Court quickly struck that argument down, emphasizing that the Texas Supreme Court has held that the "producing cause" test applies when, as here, the Court is tasked with interpreting *automobile* insurance coverage. Against this backdrop, the Court concluded that the connection between the vehicle and the decedent's death was tenuous at best. Consequently, the Court held that Covington failed to show that the vehicle was the producing cause of decedent's death and not the flash flood. Having shown that Covington failed to meet its burden of establishing that the "auto exclusion" applied, the Court granted summary judgment in favor of the insureds.

FEDERAL COURT IN TYLER REJECTS COVID-19 CLAIMS

A federal district court in Tyler recently dismissed an insured's claims for breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code against his insurer, Ohio Security Insurance Company ("Ohio Security"), which arose out of the insured's allegations that Ohio Security wrongfully denied his claim for coverage under the policy's business interruption and civil-authority provisions. *Sultan Hajer d/b/a Rug Outlet v. Ohio Security Ins. Co.*, No. 6:20-cv-00283 (E.D. Tex.—Tyler, Dec. 7, 2020) involved claims made by the insured, Sultan Hajer, who owns and operates a retail rug business called Rug Outlet in Tyler, Texas. When the local county judge and, later, Governor Greg Abbott issued stay-at-home orders closing all non-exempt businesses for several weeks in March and April 2020, the insured was forced to close Rug Outlet. The insured then submitted a claim under the business interruption and civil-authority provisions to Ohio Security, who rejected the claim and maintained that the policy did not apply.

Under the plain terms of the policy, the business interruption provision required "direct physical loss of or damage to property at the described premises." The insured argued that the term "physical loss" was ambiguous and not defined in the policy, so he asked the Court to give the dictionary definition of each word. On the contrary, Ohio Security argued—and the Court agreed—that the term was not ambiguous merely because the insured had a conflicting interpretation and that the term had been interpreted by Texas district courts as requiring "tangible damage to property." In turn, the Court stressed how the insured did not allege any physical damage to his property and added that monetary losses suffered while closed, or a regulation prohibiting people from patronizing a business, did not constitute a "physical alteration of the property."

As to the civil-authority provision—which required access to the business to be prohibited by a civil authority as a result of the damage to the property and civil authority taken in response to dangerous physical conditions resulting from the damage or covered cause of loss that caused the damage—the insured argued that the threat of transmission of the novel coronavirus anywhere people congregate constituted "damage to nearby property" as contemplated by the civil-authority provision. The Court noted that when interpreting civil-authority provisions similar to that in the policy at issue precedent required a causal link between the damage to any neighboring property and the act of civil authority. In this instance, no such causal link existed so the Court held that the civil-authority provision did not apply.

The insured also argued that businesses like his own had to physically change their properties to adhere to subsequent regulations, but the Court quickly struck that argument down holding the provision
"requires physical damage to prompt the act of civil authority, not the other way around."

In any event, the Court stated that, even if either of the provisions referenced above applied, the policy contained a "virus exclusion" clause that precluded coverage if the alleged damage was caused directly or indirectly by a virus, which is exactly what occurred here. As a result, the Court granted Ohio Security's motion and dismissed the case.

FEDERAL COURT IN AUSTIN REMANDS CASE BASED ON LACK OF DIVERISTY JURISDICTION: INSURER PLACED IN AWKWARD POSITION OF ARGUING THAT THE INSUREDS' ALLEGED DAMAGES WERE ACTUALLY HIGHER THAN THE INSUREDS WERE CLAIMING

Recently, a federal district court in Austin ruled that an insurer did not meet its burden of establishing diversity jurisdiction when faced with the insureds' motion to remand to the state district court. *Stockton and Stockton v. Allstate Fire and Cas. Ins. Co.*, No. 1:20-cv-00506-RP (W.D. Tex.—Austin, Dec. 10, 2020). This matter arose out of an underinsured claim made by the insureds with Allstate Fire and Casualty Insurance Company arising out of a motor vehicle accident in which the insureds were involved.

The insureds originally filed in state district court, alleging that they were seeking monetary relief of $100,000 or less, including damages, penalties, costs, expenses, and pre-judgment interest. In response, Allstate removed the suit to federal court based on diversity jurisdiction, which requires that the parties be citizens of different states and the amount in controversy to exceed $75,000.

After the case was removed to federal court, the insureds filed an amended complaint, restating their previous claims but adding an allegation that the amount in controversy did not meet or exceed $75,000, excluding costs and interest. Allstate then moved for dismissal under the federal rules, and the insureds filed a motion to remand arguing that diversity jurisdiction was lacking because the amount in controversy did not exceed the required threshold.

The Court stated that the removing party, Allstate, had the burden of showing federal jurisdiction existed and that removal was proper. The Court also reminded the litigants that it was required to consider the claims in the state court petition as they existed at the time of removal.

The insureds claimed that Texas law mandated the range of damages they pled in their petition ($100,000 or less), and they amended their federal complaint to show they were seeking about $30,000 in damages. Because no specific amount of damages was alleged in the state court petition, Allstate was required to prove by a preponderance of the evidence that the amount in controversy met the $75,000 threshold.

Allstate argued the insureds' assertions in their state court petition that they could possibly recover amounts exceeding $75,000 was all the proof they needed to meet their burden, but the Court held that Allstate was required to provide more than conclusory allegations, and it was not "facially apparent" from the insured's petition that the amount in controversy at the time of removal exceeded $75,000. As such, the Court granted the insureds' motion to remand and sent the case back to state court.