Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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U.S. DISTRICT COURT ADDRESSES SPLIT IN TEXAS COURTS ON ISSUE OF IMPROPER JOINDER

Last week, the United States District Court for the Eastern District of Texas concluded that an insurer's Section 542.006 election to accept claims adjusters' liability after a lawsuit has commenced against the adjuster does not by itself establish improper joinder. In *Scout 5 Properties, LLC v. Acadia Ins. Co.,* No. 2:21-CV-00231-JRG-RSP, 2021 WL 5051564 (E.D. Texas, [Marshall Division] October 31, 2021, mem. op.), Scout 5 Properties ("Scout") experienced a storm that resulted in damage to its property, which was covered by its policy with Acadia Insurance Company ("Acadia"). Mr. Miller adjusted Scout's claim. Unsatisfied with Miller's submission, Scout filed suit against Acadia and Miller in state court, alleging violations of the Texas Insurance Code ("TIC"). Subsequently, Acadia elected to accept whatever liability Miller may have had pursuant to Section 542A.006 of the TIC, and filed a motion to dismiss, which the court granted. Then, Acadia removed the lawsuit to federal court, contending that the dismissal of Miller meant that he was improperly joined and, consequently, complete diversity existed to establish federal jurisdiction. In response, Scout filed a motion to remand, which the U.S. District Court granted.

The U.S. District Court began its analysis by noting the split in the decisions of Texas district courts:

One line of decisions concludes that a § 542.006 election made after a lawsuit commences but before removal renders the in state adjuster improperly joined because the election, which requires that the adjuster be dismissed with prejudice, precludes any recovery against the adjuster. The other line of decisions concludes that the touchstone of the improper joinder inquiry is whether parties were improperly joined at the time of joinder, and thus that an insurer's § 542.006 election after a lawsuit has commenced does not by itself establish improper joinder.

The U.S. District Court adopted the latter approach. "The focus must remain on whether the nondiverse party was properly joined when joined." "Simply put, if an insurer elects to accept full responsibility of an agent/adjuster after the insured commences action in state court, the insurer must prove that the non-diverse adjuster is improperly joined for reasons independent of the election made under Section 542A.006 of the Texas Insurance Code." "Therefore, the voluntary-involuntary doctrine [i.e., the voluntary dismissal or nonsuit by the plaintiff can convert a nonremovable case into a removable one] demands the case be remanded since neither [Acadia's] § 542.006 election nor the state court's order dismissing Mr. Miller were voluntary acts of [Scout]."

Notably, the U.S. District Court rejected Acadia's argument that "when a state court order creates diversity jurisdiction and that order cannot be reversed on appeal, our precedent treats the voluntary-involuntary rule as inapplicable" – a phrase taken directly from *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 297 (5th Cir. 2019). The U.S. District Court interpreted the Fifth Circuit's phrase as one discussing "misjoinder, not removal analysis more broadly." "The Fifth Circuit was making the point that when a ***misjoinder*** determination is unappealed (or unappealable) that the diversity of the misjoined defendant is not considered for purposes of the voluntary-involuntary rule."

TEXAS COURT RE-EXAMINES ITS PREVIOUS DECISION ON WHAT CONSTITUTES AN "OCCURRENCE" UNDER CGL POLICIES

Recently, an Amarillo court of appeals revisited the meaning of an "occurrence" under a liability insurance policy and concluded that when the insured acts intentionally, there is no "occurrence", but when the insured concurrently acts with negligence, the distinct act of negligence constitutes an "occurrence." In *LaTray v. Colony Ins. Co.*, 07-19-00350-CV, 2021 WL 5127520 (Tex. App.—Amarillo Nov. 4, 2021, no pet. h.) (mem. op.), the court, on a motion for rehearing, withdrew and superseded its opinion in *LaTray v. Colony Ins. Co.*, 07-19-00350-CV, 2021 WL 97204 (Tex. App.—Amarillo Jan. 11, 2021, no pet. h.) (mem op.). However, the court kept intact its initial opinion, except to conclude that the insured's negligent behavior of damaging a fence, while engaged in the intentional conduct of placing construction debris on one's property, constituted an "occurrence."

In *LaTray*, the insured, after obtaining permission from a tenant rather than the true property owner, intentionally placed 40 tons of construction debris onto a piece of property. In doing so, the insured knocked down fencing as he drove onto and off the property, causing over $8,000 in damage. When the property owner discovered the construction debris and damaged fence, a lawsuit against the insured ensued.

On appeal, the court of appeals noted that an allegation of negligence cannot create an accident out of an intentional act, because coverage depends on facts, not legal theories of recovery. Further, because the insured clearly intended to move the debris and leave it where he left it, and the claimed injury was the natural and probable consequence of that action, the insured's bare mistake as to

whether he had permission from the true owner of the property did not convert his intentional placement of the debris into an "occurrence." Thus, because there was no "occurrence", the court concluded that there was no coverage concerning the dumping of debris.

On the motion for rehearing, Latray contended that the result of the damaged fencing was not a reasonably foreseeable effect of placing the debris and, thus, the act of damaging the fencing constituted an "occurrence" under the policy. The court agreed. Although the insured intended to use the dump truck and truck and trailer to move the debris onto the property, he did not intend to damage the fencing on the property as he did so.

Nonetheless, the insurance policy included and auto exclusion, which the court found precluded coverage under the policy for knocking down the fence.

U.S. DISTRICT COURT DENIES INSURED'S MOTION TO COMPEL APPRAISAL

Last week, the United States District Court for the Southern District of Texas denied the insured's motion to compel appraisal, concluding that the insured did not comply with the conditions precedent under the insurance policy. In *Hall v. State Farm Lloyds,* No. H-21-1769, 2021 WL 5054647 (S.D. Texas, [Houston Division] November 1, 2021, mem. op.), the insured's residence allegedly sustained damage caused by an explosion 1.8 miles away. Before filing suit, the insured invoked the policy's appraisal clause in a letter stating that he was entitled to recover $184,376.59 for the damages to the property, that this estimate was substantially different from State Farm's belief (without identifying any loss amount that State Farm "believed" applied), and that the adjuster did not perform an adequate inspection or was not adequately trained. State Farm denied the insured's request, noting that neither State Farm nor the insured could demand appraisal until there was an itemized disagreement over the loss amount. The insured subsequently filed suit, and again invoked the appraisal process, which State Farm again denied. Finally, the insured filed a motion to compel appraisal.

The court quickly denied the insured's motion based on the policy provisions. That is, the policy included the following conditions to invoking an appraisal: (1) the party seeking appraisal must provide the other party with written, itemized documentation of a specific dispute as to the amount of the loss, identifying separately each item being disputed, and (2) a party may not demand appraisal after that party brings suit or action against the other party relating to the amount of loss.

The court noted that it was unclear why the appraisal process was relevant in the first place, as State Farm and the insured disputed whether the nearby explosion caused any covered damage to the insured's property. "The purpose of an appraisal provision is not to determine the cause of the loss."