

SPRING 2014 NEWSLETTER

INSURANCE LAW UPDATE

By Jennifer Kelley

TEXAS COURTS OF APPEALS

***Melvin West v. Southern County Mut. Ins. Co.*, No. 05-13-00012-CV, 2014 Tex. App. LEXIS 4015 (Tex. App.—Dallas Apr. 10, 2014, no pet. h.).**

In *Melvin West*, the Dallas Court of Appeals concluded that the phrase “domestic employee” as used in a business automobile policy was not ambiguous when read in the context of regulatory framework. In that case, West was employed by Super Surface, Inc. (“Super”) to drive concrete trucks. When West was injured as a result of one of the trucks rolling over, Super filed an insurance claim for West’s injuries under its auto policy. Super and West then settled, and Super assigned its insurance claim to West. West sued the insurer, which in turn filed a motion for summary judgment on the basis that the following exclusion applied to West’s bodily injuries:

Bodily Injury to:

- A. An employee of the insured arising out of and in the course of employment by the insured ...

But this exclusion does not apply to bodily injury to domestic employees not entitled to workers’ compensation benefits or to liability assumed by the insured under an insured contract.

West opposed the summary judgment on the grounds that “domestic employee” in the exception to the exclusion was ambiguous “because it could refer either to employees who work in a household or to employees who are citizens of the United States.” As a result, West argued it should be construed in favor of coverage; that is, “all employees who are within the United States are excepted from the bodily-injury exclusion.”

The insurer, on the other hand, argued that “the full phrase ‘domestic employees not entitled to workers’ compensation benefits’ is unambiguous and refers to a class of employees who both work in a household and are not covered by workers’ compensation.” The insurer further argued that West’s injuries were not covered because he fell under the bodily-injury exclusion, and that the domestic-employee exception did not apply to West because he was not a household employee who was not entitled to workers’ compensation insurance. The trial court granted the insurer’s summary judgment.

The Dallas Court of Appeals affirmed the summary judgment and followed the Fort Worth Court of Appeals in concluding “the ‘domestic employee’ exception unambiguously referenced employees who work in the home.” The full phrase in the exception “refers to a

specific class of employees referenced in the Texas Workers' Compensation Act (TWCA) and the Texas Motor Vehicle Safety Responsibility Act (TMVSRA)." "We conclude this is the only reasonable meaning." Thus, "considering the contract as a whole and the regulatory framework, we conclude 'domestic employee not entitled to workers' compensation insurance' unambiguously refers to employees who work in a home. We overrule West's sole issue."

THE FIFTH CIRCUIT

***Molly Props., Inc. v. Cincinnati Ins. Co.*, No. 13-50567, 2014 U.S. App. LEXIS 2358 (5th Cir. Feb. 7, 2014) (unpublished opinion).**

In *Molly Props.*, the Fifth Circuit affirmed summary judgment in favor of an insurer based on non-payment of premiums, and concluded that cancellation was not affected by failure to provide notice to the mortgagee. In that case, the insured filed suit against the insurer for breach of contract after the insurer denied the insured's fire claim for nonpayment of premiums.

On appeal, the insured did not dispute that it was notified that its policy would be cancelled for non-payment of premiums. Instead, the insured argued that the policy was not cancelled at the time of the fire because the insurer had failed to give notice of the cancellation to the mortgagee on the property. The Fifth Circuit disagreed, noting that unless the terms of the policy provide otherwise, a policy cancellation is not affected by the failure of the insurer to give notice of the cancellation to the mortgagee. Thus, because the policy at issue did not condition the cancellation of coverage on notification to the mortgagee that the policy was being cancelled, the Fifth Circuit concluded that the mortgagee's lack of knowledge about the cancellation was irrelevant with regards to the insured's loss of coverage.

The Fifth Circuit also noted that an insured cannot recover as a third-party beneficiary to an agreement between the insurer and the mortgagee, concluding that any promise by the insurer to provide a cancellation notice to the mortgagee was made for the benefit of the mortgagee and not the insured.

FEDERAL DISTRICT COURTS

***Hall v. Fidelity & Guaranty Life Insurance Company*, No. 4:13-CV-394-A, 2014 U.S. Dist. LEXIS 20296 (N.D. Tex. Feb. 18, 2014).**

In *Hall*, the Northern District of Texas held that failure to follow procedures to reinstate lapsed policy is fatal. In that case, the insured purchased a life insurance policy on his life and named his wife as the sole beneficiary. When the insured died, the wife sued the insurer for breach of contract, breach of the duty of good faith and fair dealing, violations of the Texas Deceptive Trade Practices Act and violations of the Texas Insurance Code for refusing to pay her the death benefits. The wife contended that the insurer improperly allowed her adult daughter to use an invalid power of attorney to change the beneficiary. The Court disagreed.

The District Court noted that the reason the insurer did not pay the death benefits to the wife was because the life insurance policy lapsed for failure to pay premiums. Initially, the first premium payment was missed because the insured's checking account was closed so monthly

premium payments could not be drafted on it. The insurer sent a notice of rejected payment to the insured. When nothing was paid, the insurer sent two late payment notices to the insured informing him that the policy would lapse if the premiums were not paid by the end of the grace period. When the insurer still did not receive payment, it sent a notice to the insured that the policy had lapsed and was terminated for failure to pay premiums, but also noted that the policy could be reinstated by sending to the insurer a reinstatement application and payment of all past due premiums. The insurer later received payment of one past due premium, but no reinstatement application. The insured then died a few days later. The insurer denied the wife's claim for death benefits and returned the one premium payment.

The District Court held that there was no breach of contract because the wife was not entitled to any benefits under the terms and conditions of the insurance policy. Specifically, because the insurer had not received a reinstatement application or the remaining missed premium payments, the lapsed policy had not been reinstated. Additionally, the District Court held that there was no evidence that a change of beneficiary was ever made so the wife's claim about one was irrelevant. Finally, the District Court held that because there was no breach of contract, there was also no showing that the insurer breached any extra-contractual duties.

***Messersmith v. Nationwide Mut. Fire Ins. Co.*, No. 3:13-CV-4101-P, 2014 U.S. Dist. LEXIS 49211 (N.D. Tex. Apr. 7, 2014).**

In *Messersmith*, the Northern District of Texas refused to remand an insurance case to state court based on improper joinder of an adjuster. In that case, the insureds filed suit against their insurer and an adjuster for denying an insurance claim regarding hail damage to the roof of their business premises. The Adjuster had inspected the damage to the roof and concluded that "the damage was cosmetic". The insurer denied the claim. The insured alleged claims against that the insurer and the adjuster for violations of the Texas Insurance Code, the Prompt Payment of Claims Act, the Texas Deceptive Trade Practices Act ("DTPA"), breach of contract, negligence, and fraud. The insurer removed the case to federal district court based on diversity of citizenship, arguing that the adjuster was "improperly joined" and her citizenship was irrelevant for purposes of determining diversity jurisdiction. The insured disagreed and filed a motion to remand.

In order to determine improper joinder of the adjuster, the District Court examined the complaint under a Rule 12(b)(6)-type analysis as to "whether the complaint states a claim under state law against the in-state defendant." The District Court concluded that the insureds could not recover against the adjuster for several reasons. First, the insureds could not have a claim against the Adjuster under the Prompt payment of Claims Act because the Act only applies to insurance carriers. Second, the insureds did not have a contract with the Adjuster, so there could not be a breach of contract claim. Third, the insureds had no negligence claim against the Adjuster. Fourth, under the fraud claim, the insureds alleged, "Defendants represented to Plaintiffs that if Plaintiffs gave money to Defendants, that Defendants would provide insurance to Plaintiffs." The District Court recognized that the Adjuster was "uninvolved in providing insurance," and rejected the fraud claim. Fifth, the DTPA claims failed because they also "revolve[d] around the sale and provision of insurance for hail damage" and the Adjuster was unrelated to such transactions. Finally, the District Court recognized that Texas law allows adjusters to be held individually liable for violations of the Texas Insurance Code, but the adjuster must have

“committed some act that is prohibited by the section and not just be connected to an insurance company’s denial of coverage.” With regard to the insureds’ allegations of Texas Insurance Code violations against the Adjuster, the District Court rejected all three. First, the District Court noted that the denial of damage or the representation “that the damage was only cosmetic” were not statements that related to the coverage at issue. Second, Adjusters do not have settlement authority on behalf of the carrier. Finally, the District Court recognized that the Adjuster did not have authority to refuse to pay a claim. Thus, the District Court refused to remand the case to state court.