WINTER 2015 NEWSLETTER

INSURANCE LAW UPDATE

By Jennifer Kelley

SUPREME COURT OF TEXAS

***In re Nat'l Lloyds Ins. Co.*, No. 13-0761, 2014 Tex. LEXIS 1108 (Tex. Oct. 31, 2014).**

In *In Re National Lloyds Insurance Company*, the Supreme Court of Texas granted an insurer's petition for writ of mandamus to overturn a discovery order compelling the production of unrelated claim files of other insureds. In that case, the insured, a homeowner, filed a lawsuit against her homeowner's insurer for breach of contract, breach of duty of good faith and fair dealing, fraud, conspiracy to commit fraud, and DTPA and Insurance Code violations arising from an allegation that the insurer undervalued the insured's insurance claim for damages that allegedly occurred from two separate storms in the Dallas area.

During discovery, the insured requested production of all claim files from the previous six years involving three individual adjusters. She also requested all claim files from the past year for properties in Dallas and Tarrant Counties involving Team One Adjusting, LLC, and Ideal Adjusting, Inc., the two adjusting firms that handled the insured's claims. The trial court ordered production of the files for claims handled by Team One and Ideal Adjusting. The trial court also limited the order to claims related to properties in Cedar Hill and to the storms that caused the damage to the insured's residence.

The insured argued that the claim files of other insureds were necessary so she could compare National Lloyds' evaluation of the damage to her home, with National Lloyds' evaluation of the damage to other homes, to support her contention that her claims were undervalued. The Supreme Court of Texas disagreed, stating, "we fail to see how National Lloyds' overpayment, underpayment, or proper payment of the claims of unrelated third parties is probative of its conduct with respect to Plaintiff's undervaluation claims at issue in this case." The supreme court further stated, "scouring claim files in the hopes of finding similarly situated claimants whose claims were evaluated differently from Erving's [insured] is at best an impermissible fishing expedition." The supreme court, therefore, agreed with the insurer that the trial court's order compelling discovery of such information was necessarily overbroad.

TEXAS COURTS OF APPEALS

***Drew v. Tex. Farm Bureau Mut. Ins. Co.*, No. 05-13-01619-CV, 2014 Tex. App. LEXIS 13976 (Tex. App.—Dallas Dec. 31, 2014, no pet.).**

In *Drew*, the Dallas Court of Appeals affirmed a trial court's grant of summary judgment on behalf of an insurer for the alleged breach of the policy contract for refusing to defend the insured in an underlying lawsuit. The underlying lawsuit involved the lock out of a tenant in sufferance. Charles Sneed sued the insured alleging that he owned a home in Coppell, Texas subject to a deed of trust that he held. On August 3, 2010, Sneed alleged that the insured

purchased the home at a trustee's sale and Sneed continued to live in the house. The insured never attempted to remove Sneed, nor did the insured make any demand for Sneed to vacate the premises. In September 2010, while he away from the premises, the insured removed Sneed's personal property, changed the locks, and threatened Sneed's wife with arrest when she tried to stop the garage sale of their possessions. The insured then allegedly used the proceeds from the sale of Sneed's personal property on improvements on the property in question. The Sneeds subsequently filed suit against the insured.

The insured tendered Sneed's Original Petition to its insurer for defense under its homeowner's insurance policy. The insurer declined to defend the suit. The insured tendered Sneed's Fourth Amended Petition to its insurer, and, once again, the insurer refused to defend the insured in the lawsuit. The insured subsequently brought suit against the insurer, and the trial court granted the insured's Motion for Summary Judgment.

On appeal, the court reiterated the long standing rule that the duty to defend is analyzed under the eight corners rule. The appellate court, therefore, first looked at the policy's definition of "occurrence" which was defined as "an accident, including exposure to conditions, which results in bodily injury or property damage during the policy period." The appellate court next analyzed Sneeds' First and Fourth Petitions—the petitions the insured tendered to the insurer. The Original Petition alleged conversion, violation of the Texas Theft Liability Act, and unjust enrichment. The Fourth Amended Petition alleged causes of action for conversion, unjust enrichment, and sought exemplary damages.

The insurer argued that the conduct alleged in both of the petitions was not an "accident" and therefore was not an occurrence under the insured's policy. The insured, on the other hand, argued that the Sneeds' conversion claim was not an intentional tort; rather, the Sneeds' allegations were of negligent acts by the insured thereby justifying coverage under the policy. The appellate court concluded that the sale of Sneeds' possessions was "intentional and deliberate, even if the insured had no intent to injure the Sneeds. The insured's actions of changing the locks and selling the Sneeds' possessions were also found not to be accidental, but rather voluntary and intentional. As such, the appellate court affirmed the trial court's grant of summary judgment in favor of the insurer.

***In re Farmers Ins. Exch.*, No. 13-14-00330-CV, 2014 Tex. App. LEXIS 12952 (Tex. App.—Corpus Christi Dec. 4, 2014, no pet.).**

In *In re Farmers Insurance Exchange*, the Corpus Christi Court of Appeals granted conditional mandamus, finding that a turnover order issued by a trial court went too far in adjudicating the merits of the coverage suit. In the underlying lawsuit, there were allegations of defamation, fraud, intentional infliction of emotional distress and interference with the possessory right of a child. The insurer disputed coverage but defended its insured, one of the two co-defendants in the underlying lawsuit, and filed a separate declaratory judgment action in the same court regarding the coverage questions. After a bench trial of the underlying lawsuit, the trial court rendered final judgment in the amount of $10,736,000 and held that both defendants were jointly and severally liable. In the same underlying lawsuit, the trial court then granted plaintiff's application for post-judgment relief, and signed a turnover order finding: 1) the losses claimed were covered by the insurer's policy, 2) the insurer was presented with the

opportunity to settle for an amount within its policy limits but failed to do so and, as a result, 3) the insurer was liable for the full amount of the judgment. The insurer filed a petition for writ of mandamus.

The appellate court examined Texas law applicable to turnover orders (a procedural device allowing judgment creditors—that is, successful plaintiffs—to reach assets of a judgment debtor—that is, the insured defendants, which, in this case, was the insured's insurance claims against its insurer for indemnity under his liability policy). The appellate court concluded that the order went too far in adjudicating the merits of the coverage suit. In doing so, the appellate court noted that the order was manifestly improper and exceeded the trial court's jurisdiction. Mandamus was conditionally granted, directing the trial court to vacate its order regarding coverage. The appellate court also noted that the trial court still retained jurisdiction to address the issues raised in the separate coverage lawsuit.

FIFTH CIRCUIT

***Berkely Reg'l Ins. Co. v. Phila. Indem. Ins. Co.*, No. 13-51180 c/w No. 14-50099, 2015 U.S. App. LEXIS 1284 (5th Cir. Jan. 27, 2015) (unpublished).**

In *Berkley Regional Ins. Co.* the Fifth Circuit held that notice to a broker was not notice to the insurer under an umbrella policy, and prejudice existed as a matter of law with regard to late notice. In that case, the insured was sued in state court for premises liability. The insured had a primary policy with Nautilus Insurance Company and an umbrella policy with Philadelphia Indemnity Ins. Company. The isnured was defended by Nautilus. During the suit, the insured tendered the pleadings and notice of the suit to the broker for the umbrella policy. Philadelphia never received actual notice. The jury returned a verdict of $1,654,663 against the insured. With interest and cost, the Judgment was entered for $2,167,300. Nautilus tendered its limits and interest. The insured then gave direct notice to Philadelphia and demanded it pay the excess. Philadelphia refused to pay based on late notice and prejudice. Nautilus obtained a supersedeas bond on the judgment through Berkley Regional Ins. Co. and Berkley paid the remainder to the underlying plaintiff in exchange for an assignment of the plaintiff's and the insured's rights under the umbrella policy. Nautilus subsequently brought suit against Philadelphia as assignee and subrogee of the plaintiff and the insured. The district court granted summary judgment in favor of Philadelphia, concluding there was lack of notice because notice to the broker did not constitute constructive notice to Philadelphia, and that the lack of notice constituted prejudice to Philadelphia.

On appeal, the Fifth Circuit noted that the umbrella policy required the insured to "see to it" that Philadelphia was "notified promptly." This language did not require direct notice to Philadelphia, so the Court looked to the contract between Philadelphia and the broker to determine if the broker had authority to receive notice on behalf of Philadelphia. The Fifth Circuit held that the agreement "at least arguably created an agency relationship . . ."; however, while the agreement expressly provided that the broker had authority to solicit and place business for Philadelphia, it was silent about accepting notice of a claim. The Fifth Circuit noted: "The claims process is distinct from policy brokering, and even though Wortham [broker] may have had authority to broker policies, this authority did not impliedly include authority to accept notice of claims." The Fifth Circuit, therefore, concluded that the notice was not just late, but

"wholly lacking." Thus, because Philadelphia was denied the opportunity to investigate and participate in any aspect of the suit including mediation, Philadelphia was prejudiced as a matter of law. Summary judgment in favor of Philadelphia was affirmed.

FEDERAL DISTRICT COURTS

***Nasti v. State Farm Lloyds*, No. 4:13-CV-1413, 2015 U.S. Dist. LEXIS 3009 (S.D. Tex. Jan. 9, 2015).**

In *Nasti*, the Southern District of Texas, Houston Division, partially granted an insurer's Motion for Summary Judgment, and dismissed an insured's bad faith claims pursuant to the *bona fide* dispute doctrine. In that case, the insured sued his insurer for alleged storm damage to his home. After receiving a free roof estimate from a local roofer, the insured reported a claim to his insurer and requested an inspection. The insurer inspected the claim and determined that the amount of damage did not exceed the insured's policy deductible. The insured requested a second inspection and the insurer determined that there was no storm damage. Despite finding no storm damage, the insurer did not alter the original estimate establishing that the insured's alleged damage was below his deductible. The insured's expert opined that the roof needed to be entirely replaced for $49,808.47 and that the insurer's adjusters ignored and underestimated covered damage. The insured sued his insurer for breach of contract, and multiple violations of under the Texas Insurance Code and Deceptive Trade Practice Act.

The district court found that a fact issue existed regarding the conflicting estimates between the insurer and the insured's expert with regard to his breach of contract claim; however, the district court dismissed the insured's bad faith and prompt payment claims because the insured's expert provided a declaration clearly establishing that a genuine dispute as to the extent of covered versus non-covered damages existed. Since a *bona fide* dispute regarding what damage, if any, should have been covered, the district court partially granted the insurer's summary judgment and dismissed all of the insured's claims except for breach of contract.