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May 2019 TEXAS INSURANCE LAW UPDATE

The Fifth Circuit Holds That It Does Not Have Jurisdiction Over Interlocutory Order Deferring Insurer's Indemnification Claim

In *Sentry Select Insurance Company v. Ruiz*, -- Fed.Appx. --, No. 18-50605, 2019 WL 2246552 (5th Cir. May 23, 2019), Sentry Select Insurance Company sought a declaration that it owed its insureds no duty to defend or indemnify them in connection with a Texas state-court action. The district court held that Sentry had no duty to defend, but it deferred decision on the duty to indemnify, administratively closing the case pending conclusion of the state-court litigation. On appeal, Sentry asserted that the Fifth Circuit had jurisdiction to review the district court's deferral of judgment as to indemnification. The Fifth Circuit disagreed, noting that the order was interlocutory and that it lacked jurisdiction under 28 U.S.C. § 1291 to entertain the appeal.

Southern District Denies Motion To Remand After A Timely Section 542A.006 Election By Insurer – Election Was Made Prior To Suit Being Filed

In *Vyas v. Atain Specialty Insurance Company*, No. 4:19-CV-00960, 2019 WL 2119733, (S. D. Tex, May 5, 2019) a Houston federal judge denied a motion to remand because the insurer properly made an election to accept responsibility for the in-state adjuster under Section 542A.006 of the Texas Insurance Code before suit was filed. *Vyas* involved insurance coverage for alleged storm damage to hotels. Vyas alleged that Atain Insurance "overlooked or ignored" the property damage and paid too little. In an attempt to avoid removal, Vyas filed a state court suit against its insurance company, Atain, along with the Texas resident independent adjusting firm that handled the claim. Prior to the suit being filed, Atain availed itself of the new statutory right under Tex. Ins. Code Section 542A.006 to elect responsibility for the adjuster prior to the filing of the suit. Atain promptly removed the case alleging improper joinder. The Court addressed whether to remand the case or to keep it because the adjuster was improperly joined.

The Court noted that several cases in its circuit have found removal is proper in these circumstances as there can be no individual liability for the adjuster if the insurance company has made an election under 542A.006. The Court then noted the authority relied on by Vyas found that when the election is made after the adjuster is joined, removal is improper. The court noted the focus must remain on whether the nondiverse party was properly joined when joined. Based on that analysis, the Court found that because the election was made before the adjuster had been joined, it was improper at the time. The motion to remand was denied and the claims against the adjusting firm were dismissed with prejudice.

Magistrate Judge For Northern District Recommends Granting Motion To Remand Due to Untimely Section 542A.006 Election By Insurer – Election Was Made After Suit Was Filed

In *Athena Trentin et al v. Allstate Vehicle and Property Insurance Co.*, No. 3:19-cv-378-K-BN, 2019 WL 2374163 (N.D. Tex. May 14, 2019), a Dallas magistrate judge recommends granting a motion to remand even though the insurer properly made an election to accept responsibility for the in-state adjuster under Section 542A.006 of the Texas Insurance Code before suit was filed. *Trentin* involved insurance coverage for alleged wind and hail to a boathouse. Allstate denied the claim because its investigation determined that the damages were the result of severe corrosion caused by age and constant exposure to water and oxygen for many years. In an attempt to avoid removal, the insureds filed a state court suit against its insurance company, Allstate, along with the Texas resident insurance agents. Allstate availed itself of the new statutory right under Tex. Ins. Code Section 542A.006 to elect responsibility for an agent prior to the filing of the suit. Allstate promptly removed the case alleging improper joinder. The

Court addressed whether to remand the case or to keep it because the adjuster was improperly joined.

The magistrate judge noted there is a conflict among federal courts in Texas as to whether removal is proper when an insurer has made an election under 542A.006. The magistrate judge joined those courts that conclude that an action is not removable solely on the basis of an insurer's election under 542A.006 when the election is made after the action was filed. It was recommended that the motion to remand be granted.

Houston (14th) Court Of Appeals Holds That UIM Provision Does Not Cover Accident Absent Physical Contact With Unknown Driver.

In *Franks v. Liberty County Mutual Insurance Company*, -- S.W.3d --, No. 14-18-00341-CV, 2019 WL 2097542 (Tex. App.—Houston [14th Dist.] May 14, 2019, no pet.), the Houston Court of Appeals held that uninsured motorist provision of automobile policy did not cover accident that occurred after unknown driver allegedly forced insured into another traffic lane during a high-speed pass, where the unknown vehicle did not make actual physical contact with insured's vehicle. In *Franks*, the insured, Charles Franks, brought suit against its insurance carrier, Liberty, seeking uninsured motorist benefits under his auto insurance policy. The allegations in the underlying liability lawsuit alleged that Franks suffered injuries as a result of the actions of an unknown vehicle, which had forced Franks into another lane resulting in a collision between Franks' vehicle and another vehicle.

In the coverage lawsuit, Liberty contended that the UIM provision in the policy only provided coverage for accidents involving *unidentified* tortfeasors if there is actual, physical contact between the tortfeasor's vehicle and the insured's vehicle. Franks did not dispute there was no physical contact. Rather, Franks contended subsection one of the UIM provision provided coverage because it also applied to "hit-and-run" vehicles. Subsection one stated that uninsured motor vehicle was defined as a land motor vehicle of any type to which no bodily injury liability bond or policy applies at the time of the accident. The question before the court, therefore, was whether subsection one applied to *unknown* vehicles as well as known vehicles.

Recognizing that Franks' argument had previously been rejected by the Houston [1st] Court of Appeals, the court found that the unambiguous language of the policy provides coverage for a vehicle that is uninsured. It then more specifically limits coverage for an *unknown* vehicle to actual physical contact between the insured's vehicle and the unidentified tortfeasor. Accordingly, the appellate court affirmed the trial court's summary judgment in favor of Liberty.

Southern District Concludes Late Notice Defense Barred Coverage Because Arbitration Award Was Final And Non-appealable

In *Stadium Motorcars, LLC v. Federal Insurance Company*, No. H-18-1920, 2019 WL 2121111 (S.D. Tex. May 15, 2019), a Houston federal judge granted summary judgment in favor of Federal Insurance Company, concluding the insureds had failed to give timely notice. *Stadium* involved insureds suing their insurance carrier for wrongful disclaimer of coverage for an arbitration award entered against them in favor of a former employee. Stadium Motorcars, LLC ("Stadium") and Central Houston Motorcars, LLC ("Central") owned and operated car dealerships in Houston. They were insured under a claims-made Employment Practices Liability Policy, No. 8209-4299, issued by Federal Insurance, effective from January 2016, to January 2017. In February 2016, Central hired Chris Singleton to manage its collision center. Singleton alleged that he discovered that Stadium and Central were fraudulently billing auto insurers and reported that to his supervisor. Singleton contended that he was fired in retaliation. In June 2016, Singleton sued Stadium and Central in Texas state court for breach of contract and wrongful termination.

Stadium and Central notified Federal Insurance of Singleton's lawsuit in August 2016. Federal Insurance responded that the lawsuit appeared to present a covered claim and exercised its Policy right to provide counsel to defend Stadium and Central.

In November 2016, Federal Insurance issued a reservation-of-rights letter confirming that Singleton's lawsuit was a covered claim timely reported. Federal Insurance honored Stadium and Central's decision to choose their own defense counsel and defend "at least through a ruling on the dispositive motion—subject to Federal [Insurance's] reservation of rights." Federal Insurance reserved the right to decline coverage based on the Policy and stated that Stadium and Central's obligations, including to communicate and cooperate, remained in effect.

In March 2017, Singleton voluntarily dismissed his complaint. Stadium and Central informed Federal Insurance of the nonsuit. Federal Insurance administratively closed the claim as "no loss," agreeing to reopen it if Singleton filed another claim.

In April 2017, Singleton filed an arbitration claim against Stadium and Central, asserting the same causes of action he raised in the state-court litigation. Stadium and Central did not inform Federal Insurance of the arbitration. In February 2018, the arbitrator ruled in favor of Singleton, awarding him $334,992 in damages. In March 2018, after the award issued, Stadium and Central notified Federal Insurance and demanded payment.

Federal Insurance declined coverage based on the failure to give timely notice of the arbitration. A coverage lawsuit, and cross-motions for summary judgment, followed. The parties disputed whether Stadium and Central satisfied the Policy's condition precedent for timely

notice; whether Federal Insurance was prejudiced because notice of the arbitration was not given until after the arbitrator issued the award; and whether Federal Insurance's reservation-of-rights letter waived its right to receive notice and to defend the arbitration.

Stadium and Central argued that the provision that "[a]ll Related Claims shall be deemed a single Claim" also controlled the meaning of "any Claim" in the Reporting section. According to Stadium and Central, they needed to provide Federal Insurance only one notice for all "Related Claims," which would serve as notice for subsequently filed Related Claims as well. As a result, Stadium and Central contend, notice of Singleton's lawsuit was notice of the later arbitration asserting the same claims, even though Singleton voluntarily dismissed his lawsuit before the arbitration was filed. The District Court disagreed, finding that the Reporting section requirement for Stadium and Central to give Federal Insurance written notice of "any Claim" as soon as practicable did not limit notice to the first of all subsequent "Related Claims." Accordingly, Stadium and Central had to give Federal Insurance timely notice of the arbitration, and their notice of the subsequently abandoned litigation was not enough.

Next, the court concluded that the insureds failed to give timely notice under the claims made policy and, therefore, no showing of prejudice was required. However, the court noted that, even assuming Federal Insurance had to show prejudice, the requirement was satisfied because the award was final and nonappealable and, therefore, Stadium's and Central's late notice deprived Federal Insurance of the opportunity to participate in the arbitration, defend, or try to settle.