FLETCHER | FARLEY
CONFLICT RESOLVED

Fletcher Farley Newsletter

April 2020

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 3:27

Greetings from Paul Bennett

Yesterday I mediated a heated dispute, with both parties firmly convinced of their positions, and unyielding in their demands. There were recriminations, and much back and forth. I'm happy to say that the matter was settled in the end, with neither side completely happy, but with the conflict resolved. Was this a products liability claim? A commercial dispute? A trucking accident you ask? Why no, this was a dispute between my two eight year olds over Netflix! And so goes week three of the Dallas County COVID-19 shelter in place order and my new remote workplace.

What seemed unimaginable to most of us has become a new norm, at least for the moment. On the evening of March 22, Dallas County Judge Clay Jenkins issued his shelter in place order and by the morning of March 24 our physical Dallas office was closed and all of our lawyers and staff were home and working remotely. Travis County followed in short order. With a few hiccups, the transition has been remarkably smooth. Although jury trials throughout Texas have been canceled and courthouses may be empty, there are still disputes, new lawsuits are being filed daily, and cases are being worked and resolved. Lawyers are adapting to the status quo and taking depositions by phone and video conference. My tongue in cheek reference notwithstanding, mediations are taking place too, with my partners reporting that many have been successful. Rest assured that the lawyers of Fletcher

Federal Court Rulings on Diversity in Bad Faith Actions Make it Imperative to be Proactive in Addressing Claims Against Adjusters

Lorin Subar

The following discussion is limited to first party claims under Chapter 542A – property damage claims which are storm related.

Historically, in pleading bad faith cases against insurers, plaintiffs would invariably include individual adjusters as defendants, primarily for the purpose of defeating an insurer's ability to remove a state court action to the (generally) much friendlier venue of the Texas federal courts. In 2017, the Texas Legislature enacted Section 542A.006 of the Texas Insurance Code which provides, in part, that if an insurer elects to accept the liability of its adjusters, the adjusters could not be

Farley are at work for our clients and ready and available to respond to your needs.

Wherever this newsletter finds you, I sincerely wish that you and your loved ones and work colleagues are all healthy and well and that we see you in person again soon.

The Coronavirus – Do I Have Coverage for That?

Craig Reese

With everything that is going on with the economy and businesses, business interruption coverage has become a very hot topic. This article will briefly discuss some of the issues related to business interruption coverage and civil authority coverage. Many other coverage issues exist with respect to liability policies and even worker's compensation insurance coverage but those issues are outside the scope of this article. Many of the issues set out in this article are cutting edge and little to no case authority exists at this time. Additionally, and as noted by all coverage lawyers everywhere, any coverage question must start with an evaluation of the particular policy at issue to determine whether any arguments exist for possible coverage for a loss.

Business interruption insurance protects against losses sustained during periods of suspended operation due to property damage. First, before most property insurance policies are triggered, the loss must result from a covered occurrence and there must be a direct physical loss of or damage to the insured property. While many policies do not contain a definition of direct physical loss, many carriers are arguing that the property policy only covers damage to or destruction to property, which does not exist in the context of coronavirus claims. Courts are not consistent in the application of the law to the question of what constitutes a direct physical loss and some courts have held that property can sustain physical damage absent structural alteration. Second, carriers may argue that even if property damage exists, that damage did not cause a loss of income. In other words, the business did not shutter its doors due to property damage, but instead to limit the spread of the virus. Third, many property policies, since at least 2006, contain an exclusion for loss due to a virus or bacteria and this exclusion applies to business interruption claims

joined as defendants to any subsequent lawsuit as "no cause of action exists against the agent related to the claimant's claim." Therefore, if an adjuster was subsequently named as a defendant, the court was required to dismiss the adjuster based on improper joinder. As the joinder was improper, presence of the nondiverse adjuster would not bar an insurer from removing the case to federal court.

What the Texas Legislature did not foresee was that many times, the election by an insurer under Section 542A.006 to accept the responsibility of an adjuster was not being made until suit was already filed against both the insurer and the adjuster. Therefore, while the court still had to dismiss the adjuster, the initial joinder of the adjuster, made when the lawsuit was filed and before the election, was not an improper joinder. This was not lost on either plaintiffs filing for remand back to the state court, or on federal courts seeking to remove cases from their dockets.

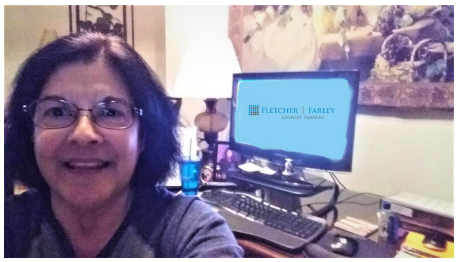
As improper joinder of a defendant is generally determined on the day the lawsuit is filed, the initial reaction from the federal courts resulted in a split decision on whether the dismissal of an adjuster, coming immediately after suit was filed and based on a clear Texas statute, could be considered improper joinder. That split in opinions has now become a

(CP 01 40 07 06). Finally, carriers will likely argue that the coronavirus constitutes a pollutant or contaminant, which may be excluded. This is likely the weakest argument given that courts have routinely found that mold did not constitute a pollutant or contaminant.

Another source of potential coverage exists under the civil authority coverage part of a property policy, if such coverage was purchased. Typically, again dependent on your particular policy, where a covered cause of loss causes damage to property other than the property insured under the policy, the policy will pay for the actual loss of business income sustained by the insured caused by an action of a civil authority that prohibits access to the premises insured under the policy. There are two basic requirements for coverage: (1) access to the area where the insured property is located is prohibited by the civil authority as a result of property damage and the damaged premises are within a prescribed area; and (2) the action of the civil authority is taken in response to a dangerous physical condition resulting from the property damage. This is limited coverage – typically available only for a four week period.

There is little question that a lot of litigation will arise out of the coronavirus. Recently, a first party coverage action was filed in Louisiana by a business against its insurer. Additionally, at least five states have introduced legislation to do away with the requirement of direct physical loss and the virus exclusion in an effort to assist policyholders within those states.

We stand ready to assist you with all aspects of insurance coverage, beginning with assisting to evaluate the language of your particular policies, as those issues begin to arise from this pandemic. In the meantime, we want to remind you to stay safe, stay healthy, and look at the language of your particular policy.



Behind the Scenes
Yolanda Rodriguez, Paul Bennett's assistant, is in her home office working to keep the firm, and Paul, running smoothly.

Conflicts Resolved

Fletcher Farley Obtains Summary

landslide in favor of remand back to the state courts based on the interpretation that because joinder of an adjuster was not improper at the time suit was filed, there was no improper joinder for the later dismissal. Therefore, there is no diversity, even though the nondiverse adjuster is no longer in the lawsuit.

The issue for an insurer is when to make the election and still be timely. Section 542A.006 coming as it does immediately after the Insurance Code's requirement for sixty days' notice of any claims against an insurer, would suggest that the election would not be necessary until the notice of claim has been sent by the insured, and would be timely if sent to the insured withing the sixty days. ***But we would suggest that the best course of action is once a determination has been made internally that the insurer will be making the election under Section 542A.006, the election should be communicated in writing to the insured immediately; with or without a formal notice from the insured.*** The federal courts are not clear as to what effect the premature filing of suit without giving proper notice would have on a Section 542A.006 election, but there is no reason to give a court pause to deny a motion to remand because while the lawsuit was filed prematurely, the joinder of the adjuster was not otherwise improper.

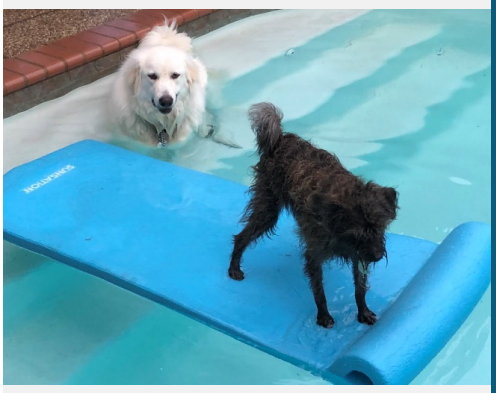
Judgment in Premises Liability Case

Fred Arias, DJ Hardy, and Lorin Subar obtained a summary judgment for a national retailer in a case involving a plaintiff injured when her foot was struck by an automatic door as she was exiting the store, causing her to fall. The plaintiff, an elderly female, claimed to have suffered significant injuries including a fractured hip requiring surgery. The plaintiff allegedly incurred medical treatment has incurred more than $75,000 in paid medical bills related to the incident. While the case was filed in a Texas District Court in Lubbock, it was removed to the Federal Court for the Northern District of Texas in Lubbock. On behalf of our client, we argued that the store had no notice that the doors may have been malfunctioning until the plaintiff's incident. Several store videos bore this out as patrons moved in and out of the doors for well over an hour (the length of the video) before the incident. The plaintiff argued that the both the manufacturer's manuals for the door, and stickers affixed to the doors instructed that the doors required daily inspection and as there were no records of any such inspections, the store should be held responsible. We argued in rebuttal that the failure to maintain the doors in accordance with a manufacturer's maintenance requirements could not establish liability unless the plaintiff could first prove that the required inspection would have revealed the alleged defect. The federal court, applying Texas law regarding premises liability, agreed that unless the plaintiff could establish that the store knew or had reason to know that there was a defect in the automatic door system at the time of the incident, the store had no duty to either warn of or repair the unknown defect. Therefore, the court granted a summary judgment.

Fletcher Farley Obtains Summary Judgment in Landlord-Tenant Dispute

David Colley and Keith Robb were successful in obtaining summary judgment and dismissal of plaintiff's claims in a landlord-tenant dispute in which the plaintiff/tenant alleged she sustained personal injuries due to the presence of toxic mold in the leased premises. Our firm represented the landlord. The plaintiff sued the landlord for negligence, gross negligence, premises liability, alleged violations of the Texas Property Code, and breach of contract. Texas law clearly holds that a landlord owes no duty to tenants or their invitees for alleged dangerous conditions on the leasehold except in extremely limited circumstances (*i.e.*, concealed defects, negligent repairs, or right-of-control over a portion of the leased premises), none of

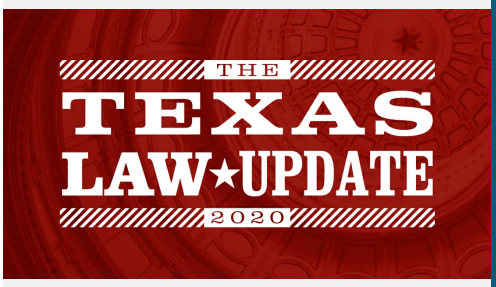
Behind the Scenes



Lorin Subar's co-workers having fun on their break.

Lorin Subar's office has a relaxed dress code.

Texas Law Update Seminar is Postponed



The Texas Law Update 2020 will be rescheduled to a later date in light of the directives related to the coronavirus. Stay tuned for the new date and setting.

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which applied under the facts presented. Thus, the plaintiff's premises liability and negligence-based claims failed as a matter of law based on lack of duty. Moreover, since the plaintiff was seeking personal injury damages as a result of her alleged exposure to toxic mold, her claims for alleged violations of Chapter 92 of the Texas Property Code and breach of contract were precluded.

Behind the Scenes

We are still open for business as usual ... just in different settings. We are grateful for our hardworking attorneys like Kristi Kautz working from home. Even when we can't be there in person, we will still reach out through other channels. We hope you and your families stay healthy.

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