

TEXAS INSURANCE LAW NEWSBRIEF

AUGUST 18, 2014

INSURED FAILS TO COMPLY WITH DUTIES AFTER LOSS - TRIAL COURT JUDGMENT AFFIRMED

Last Tuesday, the Houston Court of Appeals affirmed a take nothing jury verdict in favor of Safeco Insurance Company in a bad faith lawsuit arising from a water damage loss to the insured residence. In *Khan v. Safeco Surplus Lines*, 2014 WL 3907976 (Tex.App. - Houston [14th Dist.], August 12, 2014), the insured returned from a multi-week family vacation and found water throughout the house, reportedly due to an air conditioning pan leak in the attic. Safeco insured the property (under a policy placed by the mortgage company) and investigated the loss. They found numerous sources of water intrusion and mold damage in the house. And, despite Khan's resistance and repeated failure to cooperate in the investigation, Safeco paid the mortgage company based on an \$80,000 estimate for damage to the dwelling and paid Khan the \$26,000 policy limit for personal property. Khan disagreed with the damage estimate and refused to make the needed repairs throughout the pendency of this claim and the litigation which began in May 2001. It took 10 years to get the case to trial after Kahn fired and hired lawyers over and over again. Safeco moved for summary judgment multiple times based on the mold exclusion in the policy and the Texas Supreme Court's mold decision in *Fiess vs. State Farm*, but the trial court judge denied the motions each time and forced Safeco to take it trial. After a two week jury trial in Ft. Bend County (southwest of Houston), Safeco won on every issue. Based on the jury findings, a take nothing judgment was entered in Safeco's favor and this appeal followed.

After finding that Khan had standing as an intended third-party beneficiary under the mortgage company's force-placed policy with Safeco, the Houston Court of Appeals gave careful consideration to Khan's arguments on appeal and challenges to the sufficiency of the evidence in support of the jury's findings. In particular, one of the jury instructions instructed that "Safeco did not fail to comply with the terms of the policy if the Khans did not 'protect the dwelling or property from further damage' or 'make reasonable and necessary repairs to protect the dwelling or property.'" The court observed that Khan testified inconsistently about what he did with the money paid, that he had repair estimates and contractors that would have done the work for amounts paid, that the house sat vacant and unrepaired for years during the pendency of the lawsuit, and that the "jury was free to compare the state the Property in 2002 to the state the Property was in 2011 [time of trial] and note any deterioration in its condition." Concluding that "the record is rife with evidence that the Khans satisfied neither of these duties," the Court overruled each of Khan's issues on appeal and affirmed the trial court's judgment in favor of Safeco.

Editor's Note: Martin, Disiere, Jefferson & Wisdom had the privilege of defending Safeco in both the trial of this case and on appeal. Chris Martin and Chris Avery handled the matter for the last two years before trial and they won the jury trial. On appeal, the head of our appellate section Levon Hovnatanian handled the case. We want to thank Safeco and Liberty Mutual for having the courage to try this case and this defend this appeal. We also want to thank them for the opportunity to defend their interests in this case and for the chance to get this significant victory.

COURT SANCTIONS PLAINTIFF FOR APPRAISAL DELAYS - DISMISSES LAWSUIT WITH PREJUDICE FOR FAILURE TO COOPERATE

A U.S. District Court Judge for the Southern District of Texas, McAllen Division, recently put an end to Plaintiff's contumacious delays involving discovery requests, designation of experts, depositions and ultimately, a failure to cooperate with an appraisal invoked by Plaintiff after a year of litigation. In *Heller v. Ace European Group Limited*, No. 7:12-CV-422 (S.D.Tex.- McAllen Div., August 8, 2014), a hailstorm case from The Valley, the plaintiff litigated the matter for almost a year and then invoked appraisal on July 1, 2013. But, Plaintiff failed to designate an appraiser until January 24, 2014. The two appraisers contacted each other in late January and met on February 26, 2014 to evaluate the property. For the next four months, the insurer's appraiser repeatedly tried to contact the insured's appraiser by phone and email without success. The insurer then moved to dismiss the lawsuit due to the long delays in appraisal.

Judge Alvarez carefully considered the excuses offered by Plaintiff's appraiser who attempted to explain his silence as resulting from an "unavoidably heavy workload" and arguing that "appraisal often takes up to 6 months to complete." The court reviewed the reasons offered which ranged from out of town work, a full time job with Alpha Building Corp., his appraisal work for his own business Arroyo Construction & Maintenance, a family tragedy, and a family vacation during the relevant time frame. The

Court observed the reasons offered, however, reflect "attention to personal and unrelated business matters, rather than an unavoidable backup." The Court then noted that dismissal with prejudice is an extreme sanction that requires two elements: 1) "a clear record of delay or contumacious conduct, and 2) lesser sanctions would not serve the best interests of justice." The Court then concluded that both elements were present in this case.

First, the Court noted a "familiar pattern of delay" involving discovery requests, designation of experts, depositions and, ultimately, a failure to cooperate with an appraisal invoked by Plaintiff. And second, the Court observed multiple other escalating sanctions including \$500 for failing to comply with discovery, \$100 for ignoring the Court's motion practice requirements, the Court's denial of a Plaintiff's motion to compel a deposition, the Court's denial of a second motion to extend their expert deadline, the Court ordering plaintiff to pay a \$14,000 sanction for discovery noncooperation and, Plaintiff's delay in payment of the sanction. Exasperated, the Court warned that further delays would result in further sanctions which could include dismissal. The Court then found the appraisal delay was intentional and Defendants were prejudiced "since the passage of time only further diminishes the appraisers' ability to make an accurate assessment of the cause of damage, and since an extended process of appraisal costs more than a timely process."

Accordingly, the Court held:

Time and again, Plaintiff has delayed this case. Time and again, the Court has sanctioned Plaintiff monetarily and otherwise. Plaintiff may not tire of this pattern, but the Court has. Imposing yet higher monetary sanctions would be neither practical nor effective, and allowing Plaintiff to continue in his old ways would make a mockery of the Court's warnings. Accordingly, the Court **DISMISSES** Plaintiff's remaining claim.

2014 MDJW North Texas Insurance Seminar

September 25, 2014

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Join MDJW Attorneys Chris Martin, Mark Dyer, Kevin Sewell, Barrie Beer, Michael Watson, Jamie Cooper, Matthew Paradowski, Kenni Lucas, Alan Moore, Jason Spivey, Ben Britt, and Ryan Geddie along with special guest speakers Shannon Rusnak, CPA, CFE, MAFF and George Uhl, CPA, CFE, CFF from MDD Forensic Accountants for a FREE one day seminar to examine many of the cutting edge claims handling, coverage, and trial strategy issues confronting Texas insurers today.

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- Reservation of Rights and Denial Letters
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- Texas Expedited Trials, Dismissal of Baseless Claims, and New Pleading Rules - a Sea Change or Business as Usual?
- Forensic Accounting: Using Internet Resources to Investigate Behind the Numbers
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- Advertising Injury Coverage
- Stowers Doctrine Update
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Irving Convention Center
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Irving, TX 75039

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