Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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## FEDERAL JUDGE ENTERS JUDGMENT FOR SAFECO AGAINST HOMEOWNER WHO FRAUDULENTLY RECEIVED LIVING-EXPENSE PROCEEDS

This month concluded a bench trial in which Senior District Judge David Alan Ezra of Austin found that a homeowner made fraudulent claims for living expenses in violation of Safeco's insurance policy. The dispute in *Safeco Ins. Co. of Indiana v. Igwe*, No. AU-14-CV-587-DAE, 2016 WL 866360 (W.D. Tex., Mar. 3, 2016), arose from a claim that insured Charles Igwe reported on March 10, 2011 for water damage to his home. While Safeco assessed and repaired the water damage, it arranged for Igwe's temporary housing under the "loss of use" coverage of his homeowners' policy. From early in the claim, Igwe complained to Safeco and its third-party housing contractor about the housing options offered to him. Specifically, he complained that the hotels and condominiums that Safeco offered were not large enough to accommodate his wife and four children. Igwe claimed and received per diem reimbursement for expenses for each member of his family.

In April of 2011, Safeco's investigation determined that Igwe and his wife were separated and that his children did not live with him at all times. In a September 2, 2011 letter, Safeco notified Igwe that its $17,200 per diem allowance was comprised of $4,300 per person to cover meal expenses for each family member. Safeco advised him to submit reimbursement receipts for expenses incurred after July 25, 2011. Safeco's letter also informed Igwe that the home restoration would be completed on December 2, 2011 and that this living-expense coverage would end on this date.

Igwe later filed suit against Safeco in Hays County state court for breach of contract and violations of the Texas Insurance Code for Safeco's failure to pay two claims under the policy. Safeco removed the action to federal court in Austin and counterclaimed for fraud by Igwe in connection with the living-expense claim. Safeco moved for summary judgment on Igwe's claims, which the district court granted. This left Safeco's counterclaim as the only remaining claim for trial.

In a bench trial, Judge Ezra found that Safeco paid Igwe $17,200 for per diem expenses; $76,978.43 for two hotel rooms between March 1, 2011 and November 3, 2011; and $12,970.46 to reimburse Igwe for his stay at the Omni Hotel after November 6, 2011. Given evidence that Igwe's children did not live with him during most of this period, the Court found that Igwe committed fraud on Safeco in securing the various living-expense payments. The court further found that this fraud voided the policy, requiring Igwe to repay all amounts Safeco paid to him under the "loss of use" coverage.

## EL PASO COURT OF APPEALS HOLDS BAD-FAITH CLAIMS AGAINST WORKERS' COMPENSATION CARRIER PRECLUDED BY EXCLUSIVE REMEDY DOCTRINE

A recent case out of El Paso clarified the line between bad-faith cases subject to the exclusive remedy of workers' compensation and subrogation claims by the workers' compensation carrier. The issue was resolved in the mandamus proceeding *In re Texas Mutual Ins. Co.*, No. 08-15-00343-CV, 2016 WL 921317 (Tex. App.—El Paso, Mar. 9, 2016), which arose from a fatal injury by an employee of Alamito Construction Company, which was protected by workers-compensation insurance from Texas Mutual. The survivors of the employee sued and obtained settlement from the non-employer defendant that controlled the premises where the accident occurred. Texas Mutual then intervened in the suit, asserting a statutory subrogation lien under Section 417.001 of the Texas Labor Code. Texas Mutual suspended benefits to the survivors under the "future credit" provisions of the Labor Code, and resumed paying benefits when the credit was exhausted. The survivors challenged the suspension benefits in an administrative proceeding but also asserted bad-faith claims against Texas Mutual in state court.

In the administrative proceeding, the Texas Department of Insurance – Division of Workers' Compensation (DWC) found that Texas Mutual was entitled to suspend benefits to offset a third-party recovery, even though the third-party settlement of $75,985.13 was not funded for approximately one year. After an appeals panel affirmed this determination, the survivors filed suit against Texas Mutual in state court. Their claims arose from Texas Mutual's assertion of its subrogation interest and its suspension of benefits.

On mandamus, the Court of Appeals looked to Texas Supreme Court cases holding that the exclusive-remedy provisions applied to claims that a workers-compensation carrier improperly investigated, handled, or settled a claim. The Court first found that the trial court improperly denied Texas Mutual's motion to dismiss by focusing on its subrogation claim rather than on the plaintiffs' bad-faith

claims. In other words, the trial judge had improperly classified the case as a "collection case" not subject to the exclusive jurisdiction of the DWC. The Court also found that the trial court improperly ruled that Texas Mutual waived its right to avail itself of the DWC's exclusive jurisdiction by asserting its subrogation right in state court. The Court held that this violated the rule that subject-matter jurisdiction could not be waived. Noting that the DWC has exclusive authority to regulate improper settlement conduct by insurers, the Court granted Texas Mutual's Petition for Writ of Mandamus, directing the district judge to dismiss the plaintiffs' claims for lack of jurisdiction.

## FEDERAL COURT IN DALLAS DEPARTS FROM PREVAILING CASE LAW ON ADJUSTER LIABILITY FOR FAILING TO EFFECTUATE SETTLEMENT UNDER TEXAS INSURANCE CODE

In another case that follows the recent trend of finding adjusters potentially liable in improper-joinder cases, Senior Judge Joe Fish remanded a hail-damage lawsuit to state court. The facts in *Vakeia Roach v. Allstate Vehicle and Prop. ins. Co.*, No. 3:15-CV-3228-G, 2016 WL 795967 (N.D. Tex., Feb. 29, 2016), are similar to several other recent cases in which homeowners name individual adjusters as defendants to defeat federal diversity jurisdiction. The insured Vakeia Roach sued Allstate and adjuster Darren Morgan for claims arising out of Allstate's partial denial of her insurance claim because the storm damage did not exceed the deductible.

The court focused on Section 541.060(a)(2) of the Texas Insurance Code, which imposes liability for "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement" of an insurance claim. The court cited other cases out of the Northern District that held that this section did not apply to adjusters who do not have the authority to ultimately settle claims. The court considered the Texas Legislature's use of the word "effectuate," and concluded that this simply required that a party play a role in settlement, not that the party actually finalize the settlement. The court also noted that an adjuster has the ability to bring about a prompt settlement because "it is upon his investigation that the insurance company's settlement of a claim is generally based." The court then looked to Roach's allegations that the adjuster conducted a substandard inspection; failed to include many damages in his report; misrepresented the cause and scope of damage and repairs; and made these misrepresentations to both Roach and Allstate. Finding that these allegations satisfied Texas' lenient pleading standards, the court held that Roach had adequately stated a potential claim against Morgan and remanded the case to state court.

## ATTENDING PLRB ANNUAL CLAIMS CONFERENCE IN SAN ANTONIO?

If you are attending the PLRB Annual Claims Conference in San Antonio on April 17-20, please make plans to join the lawyers of our firm and many of our industry friends and clients at a reception on Monday, April 18th from 5:00 to 7:00 p.m. The event will start as soon as the afternoon classes end and will be held in the Atrium of the Marriott RiverCenter (one of the two conference hotels). Light food and beverages will be provided. More details will be announced in the weeks to come, but we hope to see many of our friends and clients there on Monday, April 18th!