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TEXAS SUPREME COURT FINDS FENCE IS COVERED AS PART OF DWELLING OVERTURNS APPELLATE COURT AND SUMMARY JUDGMENT IN FAVOR OF INSURER

The Supreme Court of Texas recently found that a wind damaged fence on the insured property was part of the dwelling and not an "other structure" covered by a lower policy limit. In *Nassar v. Liberty Mutual Fire Insurance Company*, 2017 WL 382424 (Tex. January 27, 2017), the insured had 4000 linear feet of fencing that sustained $58,000 in damage as a result of Hurricane Ike. The insurer argued that the fence was not part of the dwelling and only qualified for coverage as an "other structure" which was limited to 10% of the dwelling limit or $24,720 as paid. The insured filed suit and the trial court agreed with the insurer's policy interpretation and granted summary judgment in their favor. The 14th Court of Appeals in Houston affirmed. See *Texas Insurance Law Newsbrief* October 7, 2015.

The Supreme Court of Texas analyzed the homeowner's policy "dwelling" provision covering "the dwelling on the residence premises…including structures attached to the dwelling" and; the "other structures" provision referencing structures on the residence premises "set apart from the dwelling by clear space". The court observed that "structures" was not defined in the policy so the word should be given its "ordinary and generally accepted meaning" under Texas law. "Structure" was defined in part as "any construction…composed of parts purposely joined together." The court also observed that the fencing in this case was either bolted to the dwelling in four places (Liberty Mutual's contention) or "fastened to the dwelling either by being cemented to the brick and slab of the house (as the Nassar's contend)." And either way, the fence was "attached to the dwelling" and as such, the policy unambiguously extended coverage to the fence as part of the dwelling.

The court also addressed Liberty Mutual's question of "when a fence attached to a dwelling by another fence would become an 'other structure' under the policy" by noting that this is "a fact issue best resolved by the trial court on remand." "On the undisputed facts in this record, a fact finder could reasonably determine that some of the 4,000 feet of fencing constructed of different materials and spanning six acres in a 'network' across the Nassars' property is not part of the 'structure attached to the dwelling.'" Accordingly, the court of appeals decision affirming summary judgment in favor of Liberty Mutual was reversed and the case was remanded to the trial court for further proceedings.

Editor's Note: This case emphasizes the need for claim adjusters to make a factual determination (documented with good photos) of whether the fence is "attached to the dwelling." It can also be significant in underwriting terms – in the Nassar case, there was 4,000 linear feet of fencing that evidently hadn't been considered in the underwriting process.

APPELLATE COURT AFFIRMS TAKE-NOTHING JUDGMENT AGAINST INSURER

Last Thursday, the Houston Court of Appeals, 14th District affirmed the trial court's take nothing judgment against Fireman's Fund Insurance in a lawsuit seeking over $100 million in damages related to a Hurricane Ike property damage claim. In *Triyar Companies, LLC v. Fireman's Fund Insurance Company*, 2017 WL 536641 (Tex. App. - Houston [14th Dist.] February 9, 2017), Triyar claimed damage to Greenspoint Mall and San Jacinto Mall from Hurricane Ike. Fireman's Fund investigated the claim, found storm related damage to both malls totaling $8,103,576. And after applying deductibles totaling $4,026,820, Fireman's Fund paid $4,076,756 based on Actual Cash Value. Triyar filed suit alleging breach of contract, breach of the duty of good faith and fair dealing and statutory violations under the Texas Insurance Code. After a one month jury trial, the jury found that the insurer did not breach the contract or violate the insurance code but answered other questions that were in conflict with these answers. On Fireman's Fund's motion, the trial court disregarded the contradictory findings and entered a take-nothing judgment in favor of Fireman's Fund. Triyar appealed the judgment and Fireman's Fund filed cross-points.

To address the issues on appeal, the Houston Court of Appeals presumed, without deciding, that the trial court erred in granting Fireman's Fund's motion to disregard and addressed the matter by analyzing the issues as raised in the insurer's first cross-point. The court examined multiple legal sufficiency and fact based issues and concluded that the take-nothing judgment was "appropriate based on some of Fireman's Fund's arguments under its first cross-point." Based on the jury's findings, Fireman's Fund: overpaid the amount owed for Actual Cash Value by $1.5 million; there was legally insufficient evidence to support a jury finding that the insurer's actions made it impossible for Triyar to repair or replace the damaged property; Triyar was not entitled to Replacement Cost Value; the evidence was legally insufficient to support any lost Business Income; and because "Fireman's Fund paid more than the amount of the only legally viable damage findings made by the jury, there is no basis for awarding the Triyar Parties any actual damages based on any of the bad-faith claims..." Accordingly, the court sustained Fireman's Fund's first cross-point, affirmed the trial court's take-nothing judgment against them and, ordered Triyar to pay all costs incurred in the appeal.

Editor's Note: Christopher Martin with Martin, Disiere, Jefferson & Wisdom, LLP had the privilege of defending Fireman's Fund in the trial court and takes this opportunity to congratulate Fireman's Fund on this significant win.

INSURER'S AFFIRMATIVE DEFENSES NEGATE FINDINGS IN FAVOR OF INSURED

Recently, the Houston Court of Appeals affirmed a take nothing judgment in favor of an insurer based on affirmative defenses that served to negate breach of contract and extra-contractual findings against them. In *League City v. Texas Windstorm Insurance Association,* 2017 WL 405816 (Tex. App. – Houston [1st Dist.] January 31, 2017), Texas Windstorm Insurance Association (TWIA) insured 140 buildings or structures listed on the policy with each having its own deductible. Two days after Hurricane Ike struck on September 13, 2008, League City reported damage and TWIA assigned an adjuster to handle the claim.

In November 2008, the adjuster told TWIA that League City was still working to determine which structures were damaged, and he opined that many locations would not exceed the deductible. Then in May 2009, League City submitted a spreadsheet with supporting documents to the adjuster. The adjuster reported to TWIA that much of the damage reported was for structures or locations not covered by the policy. Payments were issued in June 2009, and again in August 2009 after a TWIA claims supervisor admonished the adjuster for letting the claim "drag on" and instructed him to issue payment based on his own estimates. In October 2011, after paying a supplement, TWIA sent League City a letter detailing its payments for damage to the City Hall and paid withheld depreciation. TWIA never sent a letter to League City denying coverage in relation to the Hurricane Ike claims. And League City did not request any additional payments until it filed suit alleging breach of contract and other extra-contractual allegations against TWIA. League City alleged in part that TWIA ignored or improperly inspected "numerous additional structures."

In its defense, TWIA argued that the policy required prompt written notice of loss including a description of the property, receipts and records of repairs and that damage now claimed was unknown when the claim was under investigation. They also asserted that TWIA closed the file with an open invitation to League City to submit additional damage discovered later. "TWIA argued throughout the trial that it paid every claim made by League City, which sued without ever providing notice of any additional damage." The jury found that TWIA breached the contract, the duty of good faith and fair dealing and violated the Texas Insurance Code. But they also found in favor of TWIA on the affirmative defense asserting lack of notice and failure to keep repair receipts. And, that TWIA was prejudiced by League City's lack of prompt notice and failure to keep repair receipts. The court disregarded the jury findings in favor of League City and entered a take-nothing judgment based on TWIA's affirmative defenses.

On appeal, the court analyzed TWIA's affirmative defenses based on "prompt written notice" and other insured's duties after loss, along with the court's instructions to the jury on these duties and the associated prejudice requirements. The court found sufficient evidence to support the findings in favor of TWIA. The court then focused on materiality arguments and reviewed Texas case law addressing this issue. The court concluded that the lack of notice was material in that TWIA did not know that League City was expecting further investigation or payments. Accordingly, the court concluded that League City's failure to comply with the prompt notice requirement prejudiced TWIA and negated League City's breach of contract claim. Further, the court applied Texas law rejecting extra-contractual claims when coverage is resolved in the insurer's favor, and found there was no extreme conduct producing damages independent of the policy. Accordingly, the court affirmed the trial court's take-nothing judgment in favor of TWIA.