

TEXAS INSURANCE LAW NEWSBRIEF

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COURT OF APPEALS AFFIRMS NO DUTY TO DEFEND THIRD-PARTY SUITS FOR DISCRIMINATION AND CONSPIRACY

Recently, the Dallas Court of Appeals of Texas affirmed Liberty Mutual's summary judgment on issues relating to the insurer's duty to defend under a commercial liability insurance policy. In *Dorvin D. Leis Company of Texas, Inc. v. Ohio Casualty Insurance Company d/b/a Liberty Mutual Group*, No. 05-17-00548-CV, 2018 WL 850931 (Tex. App.—Dallas Feb. 14, 2018), Appellant Dorvin D. Leis Company ("Leis") argued the trial court erred in granting Liberty Mutual's motion for summary judgment. The Court disagreed and affirmed the trial court decision.

Leis is a heating and air conditioning contractor insured by Liberty Mutual. The policy provides coverage for "bodily injury" or "property damage." Leis was sued in two separate actions by Faisal Saleh. Saleh alleged he called Leis in June 2016 to have his thermostat fixed and left a voicemail which a Leis employee returned the next day. Saleh requested pricing information which the employee indicated they would obtain, however Saleh alleged the employee never responded. Saleh then sent an email to Leis and "mentioned that he plans to sue [Leis] in court for discrimination unless [Leis] pays a settlement out of court." Leis did not respond to Saleh's email or subsequent phone calls and Saleh filed suit. Saleh's suit alleged Leis discriminated against him based on his name and alleged "Defendant does not tell the average American customer that it will call him back then neglect him completely and refuse to pick up when he calls..." Saleh alleged four counts of discrimination "based on race, religion and/or ethnic background..." and demanded damages of \$150,000.00.

Saleh's second suit named Leis, Leis' attorney, and a private process server. Saleh alleged the process server filed a defective return of service, amended the document after being informed about the errors, and "intentionally put incorrect information on there again." Saleh further alleged Leis and Leis' attorney paid the process server to put defects in the return of service to prevent Saleh from collecting a default judgment.

Leis asked Liberty Mutual to defend the lawsuits, but Liberty Mutual found no allegations of "property damage" or "bodily injury" and was unable to extend coverage. Ultimately Leis retained its own counsel and dismissed the Saleh suits; but thereafter sued Liberty Mutual for breach of contract and alleged violations of Chapters 541 and 542 of the Texas Insurance Code. Both parties filed cross motions for summary judgment; Leis argued that Liberty Mutual was required to provide defense under the terms of the policy, while Liberty Mutual argued that the Saleh suits did not plead covered occurrences under the policy. The trial court denied Leis' motion and granted Liberty Mutual's. Leis then appealed.

Applying the relatively strict, Eight Corners' Rule applicable to the duty to defend in Texas, the Court noted that an insurer's duty to defend is determined by the four corners of third-party plaintiff's pleadings, considered in light of the four corners of the policy provisions, without consideration for the truth of the allegations. Analyzing the allegations in Saleh's petitions, under the coverage afforded by the policy, the Court found that Liberty Mutual had no duty to defend Leis. The court observed that in the first lawsuit, Saleh alleged discrimination based on his race, religion or ethnic background causing damage; while the second suit alleged damages due to conspiracy in filing a false return of service. Because neither suit asserted claims which constituted "bodily injury" or "property damage" as defined and covered under the terms of the policy, Liberty Mutual had no duty to defend Leis. Because there was no duty to defend, Liberty Mutual did not breach the contract or violate the Insurance Code and was entitled to summary judgment as a matter of law.

COURT GRANTS INSURER'S WRIT OF MANDAMUS TO ENFORCE RIGHT OF APPRAISAL

Last Thursday, the Beaumont Court of Appeals of Texas granted Allstate Vehicle and Property Insurance Company's petition for mandamus relief compelling an appraisal of residential storm damage. In *Re Allstate Vehicle and Property Insurance Company*, No. 09-18-00024-CV, 2018 WL 10033794 (Tex. App.—Beaumont Feb. 22, 2018) the Court addressed the insurer's right to enforce the underlying policy's appraisal provision after the insured filed suit. The court found, among other things, that the policy set no time limit to invoke the appraisal clause and Allstate did not waive its right to appraisal. Accordingly, the court granted Allstate's petition and ordered the trial court to vacate its order denying Allstate's motion to compel and to enforce the appraisal clause.

Pamela Bailey's home was insured by Allstate when it was damaged by a storm in April 2015. Bailey submitted an estimate for repairs to Allstate totaling \$13,776 while Allstate determined the home suffered only \$2,766 in damages. After applying Bailey's deductible, Allstate indicated it would pay \$766 to Bailey based on its damage calculation. Accordingly, Bailey's attorney wrote Allstate a letter in July 2017 demanding payment of \$11,776—the Insured's estimate less Allstate's prior payment and the deductible.

Counsel for Bailey further demanded Allstate pay penalties of \$3,405 as well as \$3,533 in attorney's fees. The letter stated if Allstate wished to invoke the policy's appraisal clause, they were to identify an appraiser within 20 days of receipt of the letter. Forty days following receipt, Allstate responded by declining the demand, however the response was silent on the issue of appraisal.

Bailey filed suit in August 2017 alleging breach of contract, misrepresentation, failure to promptly pay her claim, and breach of the duty of good faith and fair dealing. Allstate answered and then invoked the appraisal clause in November 2017, notifying Bailey's counsel of its chosen appraiser. When Bailey failed to respond, Allstate filed a motion to compel an appraisal. In her response, Bailey asserted that by waiting until after suit was filed, Allstate waived its right to appraisal. Bailey further argued that Allstate's appraisal was an impermissible request to compel specific performance under the policy. The trial court denied Allstate's motion to compel.

In its mandamus action, Allstate alleged the trial court abused its discretion in denying its motion to compel. Allstate further argued Bailey was not prejudiced by a delay in its appraisal request, since Bailey herself could have demanded an appraisal before filing suit. Allstate further argued that the trial court's denial was improper by interfering in its right to defend against Bailey's claims that Allstate breached its policy obligations. Bailey countered that mediation and trial would be more efficient than appraisal. Bailey further asserted that the trial court had basis to deny Allstate's motion based on her incurred attorney fees and expenses in filing suit and that additional fees incurred in appraisal and trial would hinder her ability to make repairs to her home. Bailey claimed Allstate waived its right to appraisal as it failed to invoke the right before engaging in litigation. Finally, Bailey asserted Allstate waived its right to appraisal by failing to allege that Bailey had not submitted her property damage claim to the appraisal process.

The Court noted an appraisal clause binds the parties to have the loss amount determined in a particular way and waiver requires either the intentional relinquishment of a known right or intentional conduct inconsistent with claiming the right. Notwithstanding the demand letter, the Court found that the policy did not place a time limit on invoking the appraisal and the attorney letter cannot unilaterally change Allstate's rights. Accordingly, the trial court did not have discretion to re-write the policy requiring Allstate to invoke the right to appraisal prior to Bailey filing suit. The Court further concluded that the record did not support that Allstate unreasonably delayed or that Bailey was prejudiced by the alleged delays. Specifically, the policy did not contain a time limit on invoking the appraisal clause and Bailey herself could have invoked the clause prior to filing suit. Lastly, the Court rejected Bailey's argument that Allstate failed to file the proper pleading—rejecting the notion that filing a motion to compel arbitration is analogous to attempting to enforce an arbitration award; “a party's right to appraisal may be accompanied by filing a motion to compel appraisal which is the procedure that Allstate followed here.” Because Allstate followed the correct procedure and did not waive its right to appraisal, the Court ordered the trial court vacate its order denying Allstate's motion to compel and to enforce the appraisal clause.

WESTERN DISTRICT OF TEXAS FINDS JOINDER OF NONDIVERSE ADJUSTER PROPER—DESTROYING DIVERSITY JURISDICTION

This past week, the United States District Court for the Western District of Texas addressed the jurisdictional issue of diversity when a plaintiff joined a non-diverse adjuster as a defendant in *Nelson v. State Farm Lloyds*, Case. No. A-17-CA-962-SS, 2018 WL 992049 (W.D. Tex. Feb. 20, 2018) (slip op.). The suit arose out of alleged damage caused to Plaintiff Melvin Nelson's Leander, Texas home on April 20, 2016. Nelson filed a claim with his insurer, State Farm Lloyds, who assigned defendant Shane Fordham to adjust the claim. After adjustment, Nelson proceeded to file suit in state court alleging Fordham violated Texas Insurance Code Section 541.060 by improperly evaluating the property and failing to include the true cost of repair in the adjustment. Nelson further alleged State Farm failed to review the adjustment and improperly denied coverage thereby breaching the insurance contract, breaching the duty of good faith and fair dealing and violating multiple sections of the Texas Insurance Code. State Farm removed the case to Federal court on the basis of diversity jurisdiction and alleged Fordham was improperly joined as there was no reasonable basis for recovery against him. Nelson subsequently filed a motion to remove the case back to state court.

Under 28 U.S.C. § 1332(a) Federal Courts have diversity jurisdiction over civil actions between citizens of different states when the amount in controversy exceeds \$75,000.00. This section requires “complete diversity” of the parties meaning citizenship of every plaintiff must be different from that of every defendant. However, the parties must be real and substantial parties to the controversy and the court must disregard nominal or formal parties for jurisdiction, relying on the citizenship of the real parties to the controversy.

The primary issue addressed was whether Fordham was properly joined; if not, the Court would possess subject matter jurisdiction. In considering whether joinder was proper, the Court applied a 12(b)(6) analysis—the same analysis applied in considering a motion to dismiss in which the court accepts as true all factual allegations in the complaint. Applying the analysis to the insured's allegations against Fordham, the Court determined Fordham was properly joined. The court noted that insurance adjusters may be liable for Texas Insurance Code violations and the insured's allegations that Fordham conducted substandard investigations, misrepresented the size of the roof, failed to include the true cost to repair interior damage, among others in violation of Insurance Code § 541.060, stated a plausible claim for relief. Accordingly, Fordham, a Texas citizen, was properly joined and diversity jurisdiction was destroyed which required the Court to remand the case to the Texas State Court.