The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT ENFORCES APPRAISAL DESPITE CAUSATION ISSUES

In a well reasoned decision, the Supreme Court of Texas has concluded that appraisal should go forward despite elements of causation and coverage, but did not reach the issue of whether any related award would be binding. In *State Farm Lloyds v. Johnson*, 2009 WL 1900538 (Tex. July 3, 2009), the insured homeowner's roof sustained hail damage but State Farm's investigation determined that the extent of damage was limited to the ridge vent. State Farm estimated the cost of repair to be $499.50. The insured disagreed and obtained their own estimate for the cost of replacing the entire roof. A declaratory judgment action was filed and the trial court granted summary judgment for State Farm finding that the parties' dispute over the *extent* of damage was a coverage dispute not subject to appraisal. The Dallas Court of Appeals reversed and concluded: "that if the parties agree there is coverage but disagree on the extent of damage, the dispute concerns the "amount of loss" and that issue is determined in accordance with the appraisal clause. Because the parties here agree that covered property sustained damage from a covered peril but fail to agree on the amount of loss, the appraisal clause applies." *See Texas Insurance Law Newsbrief* July 31, 2006.

The Supreme Court of Texas granted review to decide whether the dispute fell within the scope of the appraisal clause. After providing a brief history of appraisal clauses, the court observed that Texas courts are split on whether causation issues can be decided by appraisers. The court observed that determining the "cost of repairs" necessarily involves a determination of "price and number" and these issues regularly arise in appraisals. But on the record before it, the court could not determine whether the "dispute was about causation rather than something else." After discussing cases involving liability, damages and how causation related to both, the court concluded that "appraisers must always consider causation, at least as an initial matter" in order to "decide between damages for which coverage is claimed and from damages caused by everything else." Accordingly, appraisal was not to be avoided "because there might be a causation question that exceeds the scope of appraisal."

The court then examined the appropriate time to review appraisals and how this case came to them "in an unusual posture" before the appraisal process was completed. In four succinct points, the court observed in relevant part that: First, appraisal "is intended to take place before suit is filed" and the court has held that appraisal "is a condition precedent to suit." "Second, in most cases appraisal can be structured in a way that decides the amount of loss without deciding any liability questions." Third, appraisal itself generally resolves disputes about the scope of appraisal and litigating its scope before appraisal "is wasteful and unnecessary if the appraisal itself can settle this controversy." "Finally, even if an appraisal award is flawed, that can be easily remedied by disregarding it later." "If an appraisal is not an honest assessment of the necessary repairs, that can be proved at trial and the award set aside." Without deciding whether the appraisal conducted on remand will be binding, the court affirmed the Dallas Court of

Appeals decision compelling appraisal. Note: In light of this ruling, our comment made in the *Texas Insurance Law Newsbrief* July 31, 2006, remains sound: "Until such time that the Supreme Court of Texas resolves the issue, decision letters to insureds should clearly reference the wear and tear and any other applicable exclusions or policy language precluding coverage for any portion of damage for which payment is not being issued." In light of the comments from the Texas high court last week, insurers should also make sure any appraisals contain line item loss determinations so any post-appraisal disputes over coverage or causation can be specifically addressed by a court.

INDEPENDENT APPRAISER NOT LIABLE UNDER TEXAS DECEPTIVE TRADE PRACTICES ACT OR INSURANCE CODE – REMAND DENIED

The U.S. District Court in Dallas recently denied a motion to remand a lawsuit against an insurer and its appraiser to state court after finding that plaintiffs could not establish a cause of action against the non-diverse defendants. In *Woodward v. Liberty Mutual Insurance Company*, 2009 WL 1904840 (N.D.Tex. July 2, 2009), the insured homeowner suffered damage to the house and contents and a dispute arose over the cost of replacement. The insurer invoked the appraisal clause but the appraiser withdrew due to an inability to complete the process timely. The insured's appraiser went forward and the insured then demanded that the insurer pay based on their appraiser's findings. The claim remained unpaid and the insured sued the insurer and the appraiser. The lawsuit was removed to federal court on the insurer's assertion that the appraiser was fraudulently joined.

In response to the insured's motion to remand the court analyzed whether a state law claim could be asserted against the appraiser. The court observed that the appraiser could not have breached a contract with the insureds because there was no contractual relationship between them. Similarly, while the insured listed numerous causes of action under the Texas DTPA, none of the deceptive practices listed involve a delay in appraising an insureds claim. Lastly, the court considered the exception for lawsuits against "persons" under the Texas Insurance Code provided for an individual "who has no responsibility for the sale or servicing of insurance policies and no special insurance expertise" so as to "not engage in the insurance business." *See Liberty Mutual Insurance Company v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 486 (Tex. 1998). The court concluded that the adjuster fell within the *Garrison* exception. The court found that the insurer's appraiser's responsibilities were to the insurer, not the insured. And as a result, the appraiser was not engaged in the business of insurance. The motion to remand was denied.

AUSTIN COURT OF APPEALS HOLDS WORKERS' COMPENSATION INSURER HAS VALID INTEREST IN UM/UIM BENEFITS

Last Friday, the Austin Court of Appeals held that a workers' compensation insurer had a valid subrogation interest in uninsured motorist (UM/UIM) benefits provided by the employer. In *Resolution Oversight Corporation v. Garza*, 2009 WL 1981424 (Tex. App. – Austin July10, 2009), the court distinguished between "employer-purchased" and "employee-purchased" UM/UIM policies finding that only with the employee-purchased policies, the UM/UIM statute and case law preclude or limit a workers' compensation insurer's ability to subrogate. Because the employer purchased the policy, the worker's compensation insurer's subrogation interest was valid. Additionally, the statutory subrogation interest applied to the first dollar, regardless of whether the employee had been made whole. Summary judgment denying the worker's compensation insurer's subrogation interest was reversed and the case was remanded to address attorney fees.