The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FEDERAL COURT RULES INSURED MAY PURSUE EC CLAIMS EVEN AFTER TIMELY PAYMENT OF APPRAISAL AWARD

Last Wednesday, a federal District Court judge in the Southern District of Texas found that timely payment of an appraisal award by an insurer did *not* prevent the insured from subsequently pursuing its claims for bad faith, including statutory claims under the Texas Insurance Code and Texas Deceptive Trade Practices Act. *Intermodal Equipment Logistics, LLC and Sea Train Logistics, LLC v. Hartford Accident and Indemnity Company*; Civil Action No. G-10-458 (S.D. Tex. – Galveston Div., April 18, 2012). The insurer, Hartford, moved for summary judgment on all claims brought by the insured after Hartford timely paid an appraisal award. District Judge Kenneth Hoyt referred Hartford's motion for summary judgment to Magistrate Judge John Froeschner of Galveston for report and recommendations. The parties have until May 2, 2012 to file written objections to the recommendations prior to Judge Hoyt making a final determination.

In this case, Intermodal Equipment Logistics, LLC (IEL) claimed that Hartford grossly, and in bad faith, undervalued its business income loss allegedly resulting from Hurricane Ike by only paying approximately $208,000.00. The case went through the appraisal process, resulting in an award issued in IEL's favor for $705,539.00. Hartford then moved for summary judgment, arguing that payment of the award constituted compliance with the policy and rendered Plaintiff's extra-contractual claims meritless.

The Court agreed that IEL's claims for breach of contract, prompt payment of claims act, and common law fraud should be dismissed. However, the Court denied Hartford's motion for summary judgment as to IEL's bad faith claims. Judge Froeschner recognized that "in most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract" but concluded that Texas law recognizes three exceptions to this general rule. First, a claim for breach of an insurer's duty of good faith and fair dealing may be established if an insured can prove that a carrier denied or delayed the payment of the insured's claim when it knew or should have known that it was reasonably clear that the claim was covered. *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 49 (Tex. 1987). According to *Republic Insurance Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995), "the duty of an insurer to timely investigate its insured's claims is an independent tort which could be pursued in the absence of a showing that the insurer breached the insurance contract."

Second, statutory claims under the Texas Insurance Code and the Deceptive Trade Practices Act require the same predicate for recovery as bad faith causes of action in Texas and are in addition to any other remedies permitted by law. *Higginbotham v. State Farm Mutual Auto Ins. Co.*, 103 F.3d 456, 460 (5th Cir. 1997) (*citing Emmeret v. Progressive County Mutual Ins. Co.*, 882 S.W.2d 32, 36 (Tex. App. -- Tyler, 1994, writ denied).

Finally, in the absence of proof of a breach of contract, an insured may recover tort damages if it is shown that an insurer committed some extreme acts that caused injury independent of the policy claim. *Stoker*, 903 S.W.2d at 341 (*citing Aranda v. Insurance Company of North America*, 748 S.W.2d 210, 214 (Tex. 1988)).

As such, the magistrate denied Hartford's MSJ on the common law and statutory bad faith claims.

TEXAS SUPREME COURT HOLDS HOMEOWNER NOT A "PREVAILING CONSUMER" AGAINST CONTRACTOR UNDER DTPA, BUT INSURER'S ORAL PROMISE TO PAY CONTRACTOR IS ENFORCEABLE

In *Cruz v. Andrews Restoration, Inc*., --- S.W.3d ---- (Tex. April 20, 2012), a DTPA dispute arose between a remediation contractor, (Andrews Restoration, Inc. d/b/a Protech Services and Rudy Martinez), a homeowner (Dr. Erwin Cruz), and the homeowner's insurer (Chubb Lloyds Insurance Company of Texas).

The remediation contractor sued the insurer and homeowner, seeking breach of contract damages and attorney's fees. The insurer counterclaimed for fraud. The homeowner counterclaimed for fraud, fraudulent inducement, negligent misrepresentation, and violations of the Texas Deceptive Trade Practice–Consumer Protection Act.

A jury found in the remediation contractor's favor, and the trial court rendered judgment against the homeowner and its insurer, jointly and severally. All parties appealed, raising numerous issues. The intermediate court of appeals held that despite the trial court's finding that the contractor engaged in a deceptive act, the homeowner was not entitled to restoration of consideration because he had failed to prove that he was entitled to any rescission. The court concluded that the insurer's oral promise to pay the contractor was unsupported by consideration and thus barred by the statute of frauds. Finally, the court held that the remediation contractor was not entitled to a new trial on attorney's fees, having waived its objection to the trial court's failure to submit a question on attorney's fees for preparation and trial.

Upon granting petitions for review filed by the homeowner and contractor, the Texas Supreme Court affirmed the court of appeals' judgment with respect to the homeowner's DTPA claim holding the homeowner was not a "prevailing consumer" against the contractor because the jury awarded no damages and there was no finding of reliance. The court also held that under the "restoration" remedy in the DTPA, the homeowner could not recover the amount that he and the insurer paid to the contractor. Finally, and most importantly, the insurer's oral promise to pay the contractor *was enforceable* under the "main purpose" exception to the statute of frauds, because the main purpose of the insurer's oral promise was to benefit the insurer, not to pay for the homeowner's debt to the contractor.

HOUSTON COURT OF APPEALS HOLDS INSURER FAILED TO CONCLUSIVELY NEGATE BORROWER'S STATUS AS A THIRD-PARTY BENEFICIARY UNDER "FORCE-PLACED" INSURANCE POLICY

The Houston 1st Court of Appeals recently held an insurer moving for summary judgment failed to carry its burden of conclusively negating a borrower's status as a third-party beneficiary under an insurance policy. *Alvarado v. Lexington Ins. Co.*, --- S.W.3d ---- (Tex. App. –Houston [1st Dist.] April 19, 2012).

The appellant, Javier Alvarado, sued Lexington Insurance Company ("Lexington") for breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code and the Deceptive Trade Practices Act ("DTPA") after Lexington rejected Alvarado's claim for property damage following Hurricane Ike. The trial court rendered summary judgment in favor of Lexington. On appeal, Alvarado contended the trial court erred in rendering summary judgment because Lexington did not conclusively negate Alvarado's status as a third-party beneficiary under the "force-placed" insurance policy issued by Lexington to Alvarado's mortgage lender. The court of appeals agreed and reversed the trial court's decision.

The appellate court noted that Lexington itself raised the issue of Alvarado's third-party-beneficiary status by arguing in its summary judgment motion that Alvarado did not qualify as a third-party beneficiary to the Policy and therefore lacked standing. Alvarado responded to the issue in his summary judgment response. Because it was Lexington's burden, as movant for summary judgment, to prove its entitlement to summary judgment against Alvarado as a matter of law, the appellate court held Lexington failed to carry its burden of conclusively negating Alvarado's status as a third-party beneficiary to the Policy and reversed the trial court's decision.

MDJW SOUTH TEXAS INSURANCE SEMINAR - MAY 11 AT THE HOUSTON CLUB

Martin, Disiere, Jefferson & Wisdom UNIVERSITY

Adjusters, claims managers, litigation managers, and in-house counsel should mark your calendars for the 2012 MDJW South Texas Insurance Seminar which will be held in downtown Houston on **Friday, May 11th at the Houston Club from 9:30 a.m. to 3:30 p.m**. This FREE program will feature some of the state's leading insurance lawyers from our firm who will be providing updates on the latest decisions and latest legal trends across multiple liability and property topics including Stowers problems, inadequate limits issues, primary and excess conflicts, bad faith update, appraisal issues, construction defect coverage, homeowners and auto update, and much more. Chris Martin, Dale Jefferson, David Disiere, Kenni Lucas, Andrew Schulz, Mark Dyer and several other partners in the firm will teaching on cutting edge issues impacting those who handle claims or insurance litigation in Texas. 6 hours of CE and CLE credit will be provided. Lunch will be provided as well.

To register, please send an email with your name, employer, and work address to: ce@mdjwlaw.com OR call 713-632-1737 with the same information. Following receipt of a registration request, we will reply with more detailed information regarding the location of The Houston Club and the program. We hope to see many of our friends from the insurance industry on May 11th in Houston!

COMMERCIAL HURRICANE IKE TRIAL IN HOUSTON

In a Hurricane Ike case tried in Houston two weeks ago, eleven members of a Harris County jury rendered a verdict for the Plaintiff, AMJ Investments ("AMJ"), against Defendant United National Insurance Company ("United") awarding a total of $1,600,000 in damages (before attorney's fees and costs). The jury deliberated between for five hours.

The jury found United failed "to comply with its agreement with AMJ" and awarded $300,000 as compensation owed for Hurricane Ike damage that was covered by the policy but not paid by United. The jury also found United failed to (1) "attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when [its] liability has become reasonably clear" and (2) attempted to "enforce a full and final release of claim from a policyholder when only a partial payment has been made…" For these Insurance Code violations, the jury awarded $300,000 as "policy benefits for repair or replacement of AMJ's property due to damage…covered under [the] policy." The jury also found these unfair practices under the Insurance Code were engaged in 'knowingly' by United for which it awarded AMJ $1,000,000. The jury then awarded attorneys' fees of $79,300 for preparation and trial of the case, an additional $30,000 in the event of appeal to the Court of Appeals, and another $30,000 in the event of an appeal to the Supreme Court of Texas.

The case was tried before the Honorable Dan Hinde of the 269th Judicial District Court by Gravely & Pearson of San Antonio (representing AMJ) and Tucker, Taunton, Snyder & Slade of Houston (representing United National Insurance Company).

Witnesses testifying on behalf of Plaintiff were Art Boutin, an Independent Adjuster who prepared an estimate of damages to the property, Mike Krismer, certified indoor environmental consultant and licensed mold consultant, Peter dela Mora, P.E. and AMJ's Public Adjuster Gary Crone. Matt Pearson testified regarding plaintiffs' attorneys fees. Plaintiffs also called one of United's Property Claim Directors and Independent Adjuster in their case in chief. (Mr. Krismer is from Corpus Christi and has two decades of experience testifying for plaintiffs in foundation, mold and other water damage cases.)

Witnesses testifying on behalf of United were Ron Kelm, P.E., John McReynolds, contractor/adjuster expert, Steve Grossman, Architect, and Craig Koehne, P.E. – all from the Houston area. United also called its Property Claim Director and adjuster in its case in chief.

During the claim, United retained Rimkus Consulting to assist with the investigation of claims for roof damage, additional structural damage, and specifically the exterior window system. Three engineers from Rimkus provided United forensic assistance during the claim.

During the handling of the claim United issued payments to the insured for water damage extraction and remediation of approximately $1 million and additional payments for property damage repairs of approximately $1.4 million. During the claim, AMJs Public Adjuster and United reached an agreed upon scope of loss and claim settlement amount for all the claimed property damage to the seven story structure, with the exception of the roof and window damage. During the lawsuit and trial, AMJ argued their prior agreement to the scope and amount of the basement water damage was inaccurate.

As of press time, a final judgment has not been entered.

Editor's Note: Because the jury charge instructed the jury that the covered property damage was also the measure of damage for any Insurance Code violations (in addition to the measure of the damage for the contract claim), this portion of the jury verdict may not withstand appellate scrutiny. The plaintiffs may be required to make an election of remedies on this issue given the submission. Likewise, the "knowing" finding under the Insurance Code is an exceptionally high standard tantamount to an intentional tort which is typically very hard to sustain on appeal.

STATE FARM WINS HURRICANE DOLLY TRIAL IN THE VALLEY

A jury in federal court in Brownsville spent portions of the last two weeks trying a Hurricane Dolly case involving State Farm. The Mostyn Firm tried a residential property damage claim arising from Hurricane Dolly and involving issues of "lifted shingles" in a breach of contract case to a 5 man/ 1 woman jury in Brownsville federal court. The jury returned its verdict on April 16 in the case of *Oscar and Irma Salinas vs. State Farm Lloyds.*

Greg Cox of the Mostyn Law Firm and Gilbert Hinojosa of the Hinojosa Firm represented the plaintiffs at trial. David Stephens of Lindow, Stephens & Treat and Rene Oliveria of Roerig, Oliveira & Fisher represented State Farm at trial. State Farm made a substantial offer of judgment early in the case. The Mostyn Firm rejected the offer but attempted to revive the offer after Judge Hilda Tagle struck Plaintiffs' extra-contractual causes of action before trial.

Loss Solutions' Jim Wesselski gave expert testimony for the plaintiffs at trial contending that strong winds from Hurricane Dolly and a "A-1" policy required the complete "gutting" and re-sheetrocking of the entire house which he alleged had interior damage from water intrusion due to lifted shingles. The claim was adjusted timely by State Farm and the observed damage was found to be below the deductible. Plaintiffs asked for substantial sums in contract damages for the allegedly needed repairs which they claimed were extensive. The jury found State Farm failed to comply with the policy but it only awarded $5,000 in damages - far less than Plaintiffs sought in damages and several times less than the offer of judgment State Farm made early in the case. Significantly, the jury also found Plaintiffs failed to substantially comply with their duties under the policy and such failures prejudiced State Farm's ability to investigate and pay for any loss caused solely by Dolly. In addition to the failure of the plaintiffs to comply with the conditions precedent in the policy, the jury found certain policy exclusions applied as well.

As of press time, a final judgment had not been issued. Congratulations to State Farm and its trial team on this victory in The Valley.