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APPELLATE COURT SETS ASIDE APPRAISAL AWARD AND REVERSES INSURER'S SUMMARY JUDGMENT

Last week the Dallas Court of Appeals set aside an appraisal award in route to reversing Allstate's Motion for Summary Judgment. In *Richardson v. Allstate Texas Lloyds*, 2007 WL 1990387 (Tex. App.—Dallas July 11, 2007)(not designated for publication), Richardson's home experienced "catastrophic pressurized infusion of raw sewage spewed through every plumbing opening" in her home. After a dispute arose between Richardson and Allstate concerning the amount of Richardson's loss, Allstate sent a written notice to invoke the appraisal provision of the insurance policy. Even though Richardson complained about the impropriety of the appraisal award, she subsequently cashed Allstate's check.

Thereafter, Richardson filed a petition seeking to set aside the appraisal. In her suit against Allstate, Richardson asserted claims for breach of contract, breach of the duty of good faith and fair dealing, negligence, negligence per se, and violation of articles 21.21 and 21.55 of the Texas Insurance Code. Allstate twice moved for summary judgment and twice was denied; but upon Allstate's motion to reconsider, the trial court granted Allstate's second motion and dismissed Richardson's claims with prejudice. After a detailed analysis of the policy appraisal provision compared with the actions taken by the selected appraisers, the appellate court concluded that the appraisal award was not made in substantial compliance with the terms of the insurance policy. The court also reversed the summary judgment and remanded the case for further proceedings to address the remaining claims.

MANDAMUS RELIEF DENIED TO INSURER REQUESTING APPRAISAL

Recently, a Texas appellate court denied mandamus relief to Acadia Insurance Company who was seeking to enforce the insurance policy appraisal provision. In *In re Acadia Insurance Company*, 2007 WL 1976111 (Tex. App.—Amarillo July 9, 2007), the court first noted that waiver is a question of fact, and after reviewing the record, determined that the lower court resolved the waiver issue against Acadia. The court denied mandamus relief explaining that an appellate court may not resolve factual disputes in an original mandamus proceeding and further held that the trial court did not abuse its discretion in refusing Acadia's request for an appraisal.

APPELLATE COURT AFFIRMS SUMMARY JUDGMENT IN FAVOR OF RESIDENTIAL CONSTRUCTION MATERIAL SUPPLIER AGAINST HOMEOWNER

In *Pugh v. General Terrazzo Supplies, Inc.*, 2007 WL 2005063 (Tex. App.—Houston [1st Dist.] July 12, 2007), the Appellants (Plaintiffs below) challenge the trial court’s rendition of summary judgment for General Terrazzo Supplies, Inc. in a suit for damage to their home arising out of the use of an exterior insulated finishing system (“EIFS”). The Pughs contracted with Westbrook Building Company to build their home. In turn, Westbrook hired the EIFS applicator and General Terrazzo supplied the materials to the applicator. On appeal, the Pughs argued the trial court erred by deciding “the statute of limitations or lack of notice barred [their] breach of implied warranty claims” and the economic loss doctrine barred their negligence and strict liability claims. The Pughs also argued that, even the absence of a contract, General Terrazzo owed “a duty as a manufacturer and/or supplier of EIFS to supply a safe product.”

Instead of addressing the statute of limitations or lack of notice issue, General Terrazzo argued that the Pughs’ implied warranty claims were barred because Texas does not recognize the existence of any implied warranties of good and workmanlike service and habitability from a materials supplier or subcontractor to a homeowner with whom it has no direct relationship. The appellate court agreed with General Terrazzo and also pointed out that the Pughs offered no authority to support their assertion. Lastly, after a thorough analysis of the economic loss doctrine, the court concluded the doctrine applied to bar the Pughs’ claims for negligence and strict liability.

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