

TEXAS INSURANCE LAW NEWSBRIEF

JANUARY 28, 2013

COURT OF APPEALS HOLDS TRIAL COURT ABUSED ITS DISCRETION BY DENYING INSURER'S MOTION TO COMPEL AN APPRAISAL

Last Thursday, a three-judge panel in the Beaumont Texas Court of Appeals held that a trial court abused its discretion when it denied an insurer's motion to compel appraisal. *In re GuideOne Mut. Ins. Co.*, 2013 WL257371, Cause No. 09-12-00581-CV (Tex.App.—Beaumont, Jan. 24, 2013). GuideOne Mutual invoked the appraisal clause of a commercial insurance policy in May 2012, several years after its insured, First Baptist Church of Silsbee ("First Baptist"), commenced litigation relating to property damages it allegedly sustained during Hurricane Rita. After GuideOne moved to compel appraisal, the trial court found GuideOne waived its appraisal rights by failing to demand appraisal within a reasonable time after the parties reached an impasse and that its failure prejudiced the insured. In reaching its decision, the trial court determined that impasse occurred no later than December 13, 2007 when GuideOne filed its answer to First Baptist's suit.

After reviewing the mandamus record, the Appellate Court held that GuideOne did not waive its right to an appraisal merely by waiting until May 2012 to invoke that provision in the policy. The Court noted that the parties had engaged in mediation in October 2011, indicating that they were still negotiating years after the suit commenced. The Appellate Court further held that First Baptist failed to identify specific expenses that would not have been incurred had the appraisal process occurred earlier and, therefore, the trial court erred in holding that the insured was prejudiced. In the per curiam opinion, the Court noted that a flawed appraisal award may be disregarded, but denying an appraisal altogether would deprive GuideOne of a contractual right that could not be remedied by appeal. As such, the Appellate Court conditionally granted a petition for a writ of mandamus, ordering the trial court to vacate its order denying an insurer's motion to compel and enforce the appraisal provision of the policy.

FIFTH CIRCUIT HOLDS REPLACEMENT VALUE WAS THE APPROPRIATE MEASURE OF DETERMINING DAMAGES FOR A WASTE TREATMENT FACILITY DESTROYED BY AN EXPLOSION

On January 23rd, the Fifth Circuit held that a district court did not err in finding that replacement value was the appropriate measure of damages for a destroyed waste treatment facility and did not abuse its discretion in permitting appraiser to provide expert testimony as to the replacement value. *Factory Mut. Ins. Co. v. Alon USA L.P., et al*, --- F.3d ---, 2013 WL 257134, Cause No. 11-11080 (Fifth Cir. Jan. 23, 2013.)

An insurer brought subrogation action against the owner and operator of an oil refinery plant seeking to recover damages for money paid to operator of waste treatment facility at refinery after explosion destroyed facility. The parties stipulated to liability and agreed that damages would be determined by the fair market value of the facility before the explosion, but they fundamentally disagreed as to how fair market value of the facility should be calculated. The insurer contended that it was entitled to the facility's replacement cost, *i.e.*, the cost of new parts and labor adjusted downward to account for the original plant's depreciation at the time of the explosion, since there is no market for the plant that can be used as a measure of value. The owner argued that the insurer was only entitled to the cost of the facility's component parts.

The United States District Court for the Northern District of Texas found that, even though there is a market for specific used components, there was no market for a used facility's system. Because the sum price of the system's components did not reflect the full value of the operational plant, the district court found that the fair market value was determined by the replacement cost adjusted for improvements in value beyond the destroyed plant and depreciation reflecting the remaining useful life of the plant before its destruction. Accordingly, the district court found the owner liable for \$3,790,391.96, plus interest.

The owner of the facility appealed, challenging the measure of damages and calculation of fair market value. In reviewing the district court's findings of fact for clear error, the Fifth Circuit determined there was ample evidence to support the district court's finding that no market existed for the facility's systems and thus, replacement cost was the appropriate measure of damages for the destroyed facility. The

Fifth Circuit further held that the district court did not abuse its discretion by permitting an appraiser to provide expert testimony as to replacement value of the facility.

FEDERAL DISTRICT COURT IN MCALLEN REMANDS CASE TO STATE COURT BECAUSE INSURER FAILED TO ESTABLISH IMPROPER JOINDER

Last week, Judge Micaela Alvarez of the District Court for the Southern District of Texas, McAllen Division, remanded a case to State court on the basis that the insurer failed to meet its burden to show that the independent adjusting company and adjuster were improperly joined by Plaintiff in an attempt to defeat federal diversity jurisdiction. *Espinoza v. Companion Commercial Ins. Co., et al*, 2013 WL 245032, Civil Action No. 7:12-CV-494 (S.D. Tex. – McAllen, Jan. 22, 2013).

Plaintiff, Dario Espinoza, sued Companion Commercial Insurance Company, Wellington Claim Service, and William Barker alleging delay and underpayment of insurance benefits related to a severe hailstorm on March 29, 2012. In November 2012, Companion removed the case to federal court on the basis of diversity of citizenship asserting that both conditions of 28 U.S.C. § 1332(a)(1) were satisfied because the non-diverse defendants (Wellington and Barker) were improperly joined.

Plaintiff subsequently filed a motion to remand arguing Defendants failed to show that the non-diverse defendants were improperly joined. After reviewing Plaintiff's original state court petitions, the Court determined that Plaintiff sufficiently alleged that Wellington and Barker violated provisions of Section 541 of the Texas Insurance Code and therefore were not improperly joined to the action. The Court found that Companion had not met its burden of demonstrating that all non-diverse defendants were improperly joined in the case. Thus, the Court held that it lacked jurisdiction over the matter because the parties were not completely diverse and remanded the cases to the State court for further proceedings.

MDJW UNIVERSITY: "FIRST FRIDAY" FREE WEBINAR TEXAS UM/UIM CLAIMS & LITIGATION UPDATE

Our next First Friday seminar will be held on **February 1, 2013** at noon Central. Joe Matetich of the firm's Austin office will present "Coverage 101: Texas UM/UIM Claims & Litigation Update." This course offers an overview of the last legal decisions and issues impacting the Uninsured/ Underinsured Motorists provisions of the Texas Automobile policy with a follow-up on the current state of Texas UM/UIM litigation and including recent Texas case law on the duties, strategies and traps arising out of both policy claims and extra-contractual claims made in these claims in Texas.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit. Insurance professionals accredited by the Texas Department of Insurance should have their adjuster number available during the training in order to request credit for the course.

Register for this webinar at: <https://student.gototraining.com/r/6007593343708217088>

After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar.

Note: If you have never participated in one of the MDJW webinars, or, if you have had trouble in the past connecting to a webinar, please use the following link to check your computer's connectivity: http://support.citrixonline.com/en_US/gotomeeting/all_files/GTM140010

If your work involves UM/UIM claims or lawsuits in Texas, we hope you will join us *this Friday* for our "First Friday" seminar.