

TEXAS INSURANCE LAW NEWSBRIEF

FEBRUARY 19, 2013

INSURED CHURCH OVERCOMES SUMMARY JUDGMENT MOTION EVEN THOUGH INSURER INVOKED APPRAISAL AND PAID AWARD

Federal judge Sam Lindsay of the Northern District of Texas, Dallas Division, rejected an insurer's motion for summary judgment last Monday, concluding that the insurer's payment of an appraiser's award was insufficient to defeat the insured's breach of contract claim, and that the insured's statutory and common-law bad faith claims remained viable as well. In *Church on the Rock North v. Church Mutual Insurance Company*, Civ. No. 3:10-CV-0975-L, 2013 WL 497879 (N.D. Tex. Feb. 11, 2013), the insured, a Dallas house of worship known as the North Church, had sued over Church Mutual's handling of a claim for damages arising out of an April 2010 thunderstorm. The parties agreed on the cost of a number of repairs, but differed on others, including the amount to be paid for replacement of the North Church's roof. Church Mutual invoked the appraisal process, and while appraisal was ongoing, North Church sued.

Church Mutual removed the lawsuit to federal court, and the case was administratively closed (subject to a potential future motion to re-open) so that appraisal could be completed. Based on the umpire's award, Church Mutual issued two checks, one for the remaining unpaid balance of the loss owed, and a second releasing depreciation. Church Mutual later moved to re-open the lawsuit and for summary judgment on North Church's claims for breach of contract, common law bad faith, and violations of the Texas Insurance Code and the Deceptive Trade Practices Act. According to Judge Lindsay's order, "[b]oiled down to its essence, [Church Mutual's] contention is that without a viable contract claim, North Church's other claims necessarily fail, and North Church cannot succeed on its contract claim because it is estopped by the alleged binding appraisal award and [Church Mutual's] timely payment of that award from pursuing a contract claim[.]"

In a lengthy memorandum opinion, Judge Lindsay rejected Church Mutual's position in all respects. Specifically, he concluded that Church Mutual had failed to establish as a matter of law that the appraisal award was binding and enforceable, but only assumed that it was true. Moreover, Church Mutual did not present sufficient evidence to prove that North Church intended to be bound by the award, failed to prove that its payments were timely, and did not establish as a matter of law that its calculations of deductible, depreciation, and prior payments were correct. Thus, Church Mutual's motion for summary judgment on the contract claims was denied.

The court's denial of summary judgment on the contract claims resulted in a denial of summary judgment on all extra-contractual claims, since Church Mutual's theory was that extra-contractual claims could not succeed absent an underlying breach of contract. However, Judge Lindsay went further and observed that mere payment of an appraisal award, without more, did not preclude an award for pre-appraisal violations of the Insurance Code. He also noted that North Church's statutory claims were based on timing of payment and purported misrepresentations, not allegedly wrongful underpayment or denial of policy benefits, so the statutory claims would not stand or fall with the common-law bad faith claim. In closing, Judge Lindsay expressly stated that he was not commenting on the strength or weakness of North Church's case, but only that Church Mutual had not met its summary judgment burden.

COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT IN FIRST PARTY CASE ALLEGING FRAUD BASED ON CHANGE IN CLAIMS-HANDLING PRACTICES

On Thursday, the Corpus Christi Court of Appeals affirmed summary judgment in favor of Allstate Insurance Company in a lawsuit where Allstate's insured alleged a change in claims handling practices that, if the insured had known about it, would have caused him not to purchase his Allstate policies. In *Juan M. Espinosa v. Allstate Ins. Co.*, No. 13-12-00509-CV (Tex. App.—Corpus Christi Feb. 14, 2013) (mem. op.), the plaintiff had sued claiming that Allstate had a business practice of treating its insureds less favorably if they retained legal counsel, but paying less on average to policyholders who did not retain attorneys. The court of appeals quoted the plaintiff's petition as claiming that Allstate's claims handling put the plaintiff "in a 'damned if you do and damned if you don't' position, with respect to employing legal counsel in connection with obtaining policy benefits." The plaintiff sought restitution of his premiums and exemplary damages.

The trial court granted summary judgment against the plaintiff, and the Court of Appeals affirmed the trial court's ruling. In a brief opinion, the Court of Appeals did not address the truth of the plaintiff's claims about Allstate, but observed that the plaintiff failed to demonstrate any economic loss based on the alleged fraud. The plaintiff had received the benefit of coverage, and did not show that he had suffered "a distinct tortious injury with actual damages." Since there was no injury, the trial court correctly granted judgment as a matter of law.

CLAIMS ASSERTED AGAINST INSURANCE AGENT DEEMED INSUFFICIENT, LEADING TO AGENT'S DISMISSAL AND DENIAL OF MOTION TO REMAND

In an order dismissing an insurance agent and denying an insured's motion to remand last Monday, Judge Gray Miller concluded that an insured failed to assert plausible claims against an insurance agency that sold the relevant policy because the petition failed to differentiate between the claims against the agency and the claims against the insurer. In *The Landing Council of Co-Owners v. Federal Ins. Co.*, Civ. No. H-12-2760, 2013 WL 530315 (S.D. Tex. Feb. 11, 2013), the plaintiff, a non-profit manager of a condominium facility, had been sued by a number of parties alleging mishandling of matters relating to Hurricane Ike. Federal denied demands for coverage as excluded by the Council's policy, and the Council sued Federal and the Higginbotham Insurance Agency in Texas state court alleging breach of contract, negligence, fraud, common law bad faith, and violations of the Texas Insurance Code. Federal removed to federal court.

The Council moved to remand, and Higginbotham filed a motion to dismiss. The court denied the former, and granted the latter. Higginbotham was included in the petition by generally referring to "Defendants." The court observed that all Higginbotham did was sell the Council's policy; there was no contract between Higginbotham and the Council that could be breached, and that Higginbotham had nothing to do with the denial of coverage that was the subject of the suit. Finally, the Council failed to "sufficiently allege[] the who, what, when, where, and how" to sufficiently allege a fraud claim against Higginbotham.

For the same reasons, the Court concluded that because "[t]he only allegation specific to Higginbotham is that Federal wrote the insurance policy 'through' Higginbotham," the Council had failed to state a claim against Higginbotham. Thus, the agent was improperly joined. Because complete diversity of citizenship existed between the Council and Federal, the Council's motion for remand was denied.

SOUTH TEXAS INSURANCE LAW SEMINAR – FEBRUARY 21 & 22nd IN HOUSTON

The South Texas College of Law will host its annual insurance CLE and CE program on Thursday and Friday, February 21 and 22nd in Houston. Chris Martin is the Chair of this year's program and the Planning Committee has put together an incredible program with dynamic speakers covering all of the latest issues in Texas Insurance Law. The program will cover the latest case law changes and strategy updates dealing with Stowers, auto and homeowners insurance, commercial liability coverages, bad faith and Insurance Code allegations, agency problems, insurance mediations and trial strategy considerations. The program will feature some of the best insurance lawyers in the state and each will focus on the latest updates and practical considerations of interest to insurance lawyers and insurance professionals.

For more information on the program, please go to:

http://www.stcl.edu/cle/17th_annual_tx_insurance_law.html.

We hope to see you in Houston this Thursday and Friday for the 2013 South Texas Insurance Law Symposium.