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FEDERAL DISTRICT JUDGE DISMISSES EXTRA-CONTRACTUAL CLAIMS IN VALLEY HAIL CASES & ORDERS APPRAISAL

Addressing a raft of motions that led her to invoke both Greek mythology and Henry Wadsworth Longfellow, Judge Micaela Alvarez of the Southern District of Texas, McAllen Division, last week dismissed the bulk of a lawsuit arising out of one of the two major valley hailstorms of spring 2012. In *Heller v. Ace European Group Ltd.*, Civ. No. 7:12-CV-422, 2013 WL 6589253 (S.D. Tex. Dec. 16, 2013), the court was faced with eight motions (and seventeen associated briefs, responses, and replies) — three for summary judgment and the remainder concerning various discovery and appraisal matters. Judge Alvarez described the motions with "mix[ed] Herculean metaphors" including a "hydra-headed docket" and the court's effort to "clean out the Augean stables." The first section of the court's order addressed the summary judgment issues, and the latter addressed the remaining issues.

The court's summary judgment ruling disposed of all of the plaintiff's extra-contractual causes of action. First, the plaintiff's multiple misrepresentation claims asserted no more than mere breaches of contract (which cannot support a misrepresentation finding as a matter of law), were insufficiently alleged in the pleadings, or were conclusively disproved by the evidence. Similarly, the plaintiff's statutory and common law claims were either founded on a simple disagreement over the extent of coverage (which does not support extra-contractual recovery), or unsupported by evidence. Examples of the evidentiary deficiency of the plaintiff's case include the plaintiff's failure to adduce expert evidence concerning what constitutes a "reasonable insurance investigation." The court also identified pleading infirmities such as the plaintiff's failure to allege a violation of Section 541.060(a)(5) concerning other insurance, suggesting that the plaintiff's pleading and the thrust of the statutory prohibition "pass[ed] each other as ships in the night." (For this, the Court directly cited Longfellow's *Tales of a Wayside Inn*.) The court did not, however, agree with Ace's argument that the plaintiff's failure to designate experts defeated the plaintiff's contract claim as a matter of law and allowed that claim to proceed.

The court also granted the plaintiff's motion to compel appraisal. Ace argued that the plaintiff had waived appraisal by failing to timely invoke it and by "engag[ing] in protracted discovery aimed at claims which could not be resolved through appraisal." Following the Texas Supreme Court's opinion in *In re Universal Underwriters*, 345 S.W.3d 404, 411 (Tex. 2011), Judge Alvarez ordered the parties to appraisal, concluding that Ace could have invoked appraisal itself to any prejudice from the plaintiff's delay, and that some amount of litigation could still be avoided by pursuit of the appraisal process.

The remaining disputes before the court were resolved by an order that Ace update the court on the status of a deposition and inspection for which the plaintiff had been uncooperative and that the plaintiff pay Ace's costs in doing so; a denial of the plaintiff's motion to compel a deposition that Judge Alvarez found had not been diligently pursued; and, a denial of the plaintiff's motion for an extension of time to identify experts.

JUDGE IN MULTIFACETED SUIT BETWEEN HOMEOWNER, MORTGAGEE FINDS NO MISREPRESENTATION IN REFUSAL TO DISBURSE INSURANCE PROCEEDS

The proper disposition of $33,000 in homeowners' insurance proceeds was a minor issue in a dispute between a foreclosed homeowner and his mortgagee and Judge Joe Fish, in an order last Monday, adopted a magistrate's recommendation concluding the mortgagee's alleged refusal to release the proceeds or apply them to the amount owed on the mortgage was not actionable. In *Lucas v. Ocwen Home Loan Servicing*, Civ. No. 3:13-CV-1057-G (BH), 2013 WL 6620856 (S.D. Tex. Dec. 16, 2013), the insured alleged that Ocwen fraudulently withheld an insurance payment for repairs to fire damages. Ocwen did not address the portion of the plaintiff's claim relating to the insurance proceeds. The court, however, found the plaintiff had failed to state how or why Ocwen's failure or refusal to part with the insurance funds constituted fraud. The court therefore dismissed the claims of its own accord for failure to meet the heightened federal pleading requirements for fraud claims. Similarly, the plaintiff's bare assertion that the failure to apply insurance proceeds constituted a misrepresentation of "the character, extent, or amount of a consumer debt" was not plausible, and so was subject to dismissal for failure to state a claim.

UNANIMOUS U.S. SUPREME COURT UPHOLDS ERISA POLICY'S PROVISION TRIGGERING LIMITATIONS PERIOD BEFORE CAUSE OF ACTION ACCRUES

The Supreme Court last Monday, in a unanimous opinion authored by Justice Thomas, held enforceable an ERISA plan provision which the insured and the U.S. government had argued was an impermissible shortening of the statute of limitations. In *Heimeshoff v. Hartford Life & Accident Insurance Co.*, — U.S. —, 134 S.Ct. 604 (2013), an appeal out of the Second Circuit, the Supreme Court granted certiorari to resolve a split among the Courts of Appeals concerning a "common contractual limitations provision" that a judicial review of a denied claim must be initiated within three years after proof of loss is due. The insured contended the provision should be disallowed because of the general rule that statutes of limitations begin to run when a cause of action accrues, and because the provision was contrary to the two-step process envisioned by the statute.

The ERISA statute itself does not specify a statute of limitations. The Supreme Court, while recognizing the general rule that accrual of a cause of action triggers most statutes of limitations, held the general rule did not necessarily apply where the parties to a contract have agreed to a different rule. Because the plan language purported to set a limitations period, the only question was whether the period was reasonable, or whether a controlling statute precluded the application of the contractual provision.

The insured's appeal focused on the latter question of whether the provision was trumped by a controlling statute. Specifically, the insured argued the ERISA statute itself, despite not including a specific limitations provision, implicitly precluded the contractual limitations language. The insured and the government initially argued the internal review process set forth by the statute would be undermined by insureds rushing through to get to their judicial review, and, second, the judicial review process would be undermined by plan administrators delaying resolution of claims in order to unfairly limit insureds' access to the courts. The Supreme Court held both of these outcomes were dubiously speculative and contrary to the clear incentives of insureds and administrators. Concluding the limitations period described by the contract was neither unreasonable nor proscribed by a controlling statute, the Supreme Court upheld the lower courts' dismissal of the insured's action, which had been brought outside the applicable contractual period.