

TEXAS INSURANCE LAW NEWSBRIEF

JANUARY 27, 2014

AUSTIN FEDERAL COURT GRANTS NATIONWIDE MSJ DISMISSING EXTRA-CONTRACTUAL CLAIMS PLUMBING LEAK LITIGATION

A Federal District Court Judge in the Western District of Texas – Austin Division recently granted Nationwide’s Motion for Partial Summary Judgment in *Walker v. Nationwide Property and Casualty Insurance Co.*, 2014 WL 171246 (W.D. Tex.). This decision provides additional authority that 1) post-loss misrepresentations are not actionable absent evidence they were the producing cause of damages, and 2) an expert opinion *is necessary* to testify whether an insurer’s investigation was reasonable.

In addition, the Court held a HO-542-A policy does *not* provide coverage for plumbing leak damage without a dwelling foundation endorsement, the endorsement’s coverage sub-limit is enforceable, and there is no coverage for any cracking of walls, floors, and ceilings even if the damage ensues from foundation movement caused by a plumbing leak.

The insured owned a residence in Austin which was insured by Nationwide and made a claim that alleged his extensive foundation movement was the result of multiple plumbing leaks that had been discovered in his drain line. Nationwide investigated and retained an engineer who concluded the foundation movement was the result of other causes, not plumbing leaks. The insured did not dispute that the Dwelling Foundation Endorsement limited his coverage to 15% of his Dwelling coverage and was limited solely to the foundation damage, but he argued the HO-542-A policy itself provided coverage for any cracking of walls, floors, and ceilings where the damage *ensued* from foundation movement caused by a plumbing leak. The insured also alleged the Nationwide adjuster misrepresented the coverage to him during the investigation. Moreover, in response to Nationwide’s Motion for Summary Judgment, the insured presented his own affidavit that alleged several reasons why Nationwide did not conduct a reasonable investigation of this claim.

In its opinion, the Court dismissed the insured’s policy interpretation arguments and ruled the policy itself, without the endorsement, excludes coverage for plumbing leak damage. In addition, the Court ruled the Dwelling Foundation Endorsement only applies to damage to the foundation itself, and only in an amount equal to 15% of the Coverage A (Dwelling) limit of liability.

The Court then turned to the extra-contractual claims and dismissed all of them. Importantly, the Court ruled that alleged post-loss misrepresentations made by an insurance carrier or its adjusters are *not* actionable under the Texas Insurance Code or the DTPA *absent* evidence that the alleged misrepresentations were the producing cause of damages. And, finally, when addressing the insured’s affidavit that provided his opinion why Nationwide failed to conduct a reasonable investigation, the Court ruled an insured’s opinion on whether an insurance carrier violated the Texas Insurance Code by failing to pay a claim without conducting a reasonable investigation is irrelevant and thus inadmissible when the insured is not an expert on insurance investigations.

Editor’s Note: MDJW had the privilege of representing Nationwide in this case before the trial court. Nationwide’s counsel, Chris Martin, Patrick Kemp and Joe Matetich, wish to thank the carrier for the opportunity to protect its interests in this important case.

SHERMAN FEDERAL COURT DENYS INSURED'S MOTION TO REMAND AND DISMISSES ADJUSTER

In *Studer v. State Farm Lloyds*, 4:13CV413, 2014 WL 234352 (E.D. Tex. Jan. 21, 2014), the Federal District Court adopted a magistrate's recommendation holding the Plaintiff had improperly joined an insurance adjuster in an effort to defeat diversity jurisdiction. The case arose out of a June 21, 2011 hail storm that hit Denton County, Texas. Plaintiff alleged his home suffered damage as a result of the storm and he submitted a claim to State Farm. State Farm assigned adjuster Tommie Taylor to adjust the insured's claim and, in his subsequent bad faith suit, Plaintiff claimed both Taylor and State Farm conducted an inadequate and unreasonable investigation of his claim. Plaintiff vaguely alleged that his solarium was damaged during the hail event and claimed Taylor was "predisposed" to reject his claim due to the cost of the repairs without regard to the fact that Plaintiff's policy allegedly covered such damages.

State Farm removed the lawsuit from state court in Denton County to Federal Court on the basis that Taylor was improperly joined in the lawsuit. The Plaintiff filed a motion to remand with a supporting affidavit regarding adjuster Taylor's conduct.

The Court correctly noted State Farm must prove that there is no possibility that the Plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the Plaintiff's pleading of jurisdictional facts. The Court stated State Farm did show that Plaintiff had *no possibility* of establishing a valid cause of action against adjuster Taylor and Plaintiff had only attempted to allege causes of action against Taylor for his alleged policy benefits, although his policy with State Farm and not Taylor individually. The Court held Plaintiff's breach of contract claims are against the insurer, not the adjuster. The Court noted Plaintiff failed to allege an independent ground for recovery against Taylor.

Importantly, the Court noted its decision applied the more stringent federal pleading standard. Unlike the Southern District of Texas that applies the less stringent Texas "notice" standard when reviewing these remand issues, the Eastern District of Texas applies the federal pleading-sufficiency standard when analyzing improper joinder. The Court noted the issue has not been decided by the 5th Circuit yet.

Additionally, the Court refused to consider Plaintiff's post-removal affidavits in support of Plaintiff's Motion to Remand. The Court held the affidavit did not clarify the claims actually alleged in the controlling petition, and it refused to consider the post-removal affidavit. As such, the Court noted that Plaintiff's petition offered nothing more than "conclusory allegations" against Taylor, denied Plaintiff's Amended Motion to Remand, and dismissed Taylor from the lawsuit.

Editor's Note: MDJW represents State Farm in this bad faith case. Counsel Chris Martin, George Lankford and Leslie Pitts wish to thank the carrier for the opportunity to protect its interests in this case in north Texas.

GALVESTON FEDERAL COURT HOLDS A FALSE PROOF OF LOSS PROHIBITS INSURED FROM RECOVERING UNDER FLOOD POLICY

Earlier this month, Magistrate Judge John Froeschner of the Galveston Division of the Southern District of Texas issued Finding of Facts and Conclusions of Law in favor of an insurer in a Hurricane Ike lawsuit. In *Donovan v. Fidelity National Property and Casualty Co.*, 2014 WL 50811 (S.D. Tex), Dr. William Donovan and his wife sued Fidelity National Property, their flood insurer, for damages caused by Hurricane Ike to their beach house. The Donovan's beach house was insured under a Standard Flood Insurance Policy ("SFIP") issued by Fidelity—a ("Write Your Own") WYO carrier under the National Flood Insurance Program.

The Donovan's notified Fidelity of their claim and an adjuster inspected the property. The adjuster estimated the recoverable building loss to be \$39,766 and the recoverable contents loss of \$1,200. The Donovan's signed a Proof of Loss for the net claim amount of \$38,766.88, and Fidelity paid the claim.

Unhappy with the amount, Dr. Donovan signed a second sworn Proof of Loss falsely claiming a net loss amount of \$318,900, the policy limits, allegedly upon the advice of his attorney. Fidelity refused to pay additional amounts, and Plaintiffs ultimately repaired their home for approximately \$66,000. They then sued Fidelity for breach of contract in an effort to recover the difference between the actual cost to repair and the amount paid by Fidelity.

The Policy contained numerous mandatory provisions addressing a proof of loss including the requirement not to misrepresent any material facts. Fidelity urged the Court to consider Plaintiff's submission of a false sworn proof of loss with falsely inflated claims. As such, the Court noted it would have liked to have taken a more lenient approach and allow Plaintiffs to recover the amount actually spent on their home repairs; however, the Court noted that federal law requires it to strictly construe and enforce the claims presentation requirements of the SFIP. As such, the Court refused to grant Plaintiffs any additional relief because of their misrepresentations in the sworn proof of loss.