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NORTHERN DISTRICT OF TEXAS COURT REFUSES TO REMAND HOMEOWNER'S CASE - FINDS ADJUSTER WAS IMPROPERLY JOINED

Recently, in *Messersmith v. Nationwide Mut. Fire Ins. Co.*, 3:13-CV-4101-P, 2014 WL 1347872 (N.D. Tex. April 7, 2014), Federal District Judge Jorge A. Solis denied Plaintiff homeowners' motion to remand this removed case to Texas state court. Plaintiffs filed suit against their Nationwide and an adjuster for denying an insurance claim regarding hail damage to the roof of their business premises. The Adjuster had inspected the damage to the roof, "but stated the damage was cosmetic" and Nationwide denied the claim. The insured contended that Nationwide and the adjuster violated Tex.Ins.Code sec. 541.060; the Prompt Payment of Claims Act, Tex.Ins.C. sec. 542.060; the Texas Deceptive Trade Practices Act ("DTPA"); breach of contract, negligence and fraud. Nationwide removed the case to federal district court based on diversity of citizenship and argued that the adjuster was "improperly joined," so her citizenship was irrelevant for purposes of determining diversity jurisdiction. The insured disagreed and filed a motion to remand.

In order to determine improper joinder of the adjuster, the Court examined the complaint under a Rule 12(b)(6)-type analysis as to "whether the complaint states a claim under state law against the in-state defendant." The Court concluded the insured could not recover against the adjuster for several reasons. First, the insured cannot have a claim against the Adjuster under the Prompt payment of Claims Act because the Act only applies to insurance carriers. Second, the insured had no contract with the adjuster, so there cannot be a breach of contract claim. Third, the insured had no negligence claim against the Adjuster. The insured further alleged that the Adjuster "owed a duty to Plaintiffs when Defendants took money from Plaintiffs for liability insurance, to provide Plaintiffs with the Insurance coverage purchased." The Court recognized the adjuster "would not have been involved in taking money for the insurance and consequently did not owe … the type of duty they allege here." Fourth, under the fraud claim, the insured alleged, "Defendants represented to Plaintiffs that if Plaintiffs gave money to Defendants, that Defendants would provide insurance to Plaintiffs." Again, the Court recognized that the adjuster was "uninvolved in providing insurance," and rejected the fraud claim. Fifth, the DTPA claims failed because they also "revolve around the sale and provision of insurance for hail damage" and the adjuster was unrelated to such transactions.

Finally, the Court recognized that Texas law allows adjusters to be held individually liable for violations of the Texas Insurance Code, but the adjuster must have "committed some act that is prohibited by the section and not just be connected to an insurance company's denial of coverage." The Court rejected the three Texas Insurance Code allegations against the adjuster. First, under Section 541.060(a)(1), a party is prohibited from "misrepresenting to a claimant a material fact or policy provision relating to coverage at issue." The Court noted the denial of damage or the representation "that the damage was only cosmetic" are not statements that relate to the coverage at issue. "The misrepresentation must be about the details of a policy, not the facts giving rise to a claim for coverage…. Here, the misrepresentation is not about the breadth or existence of coverage, it is about the facts that gave rise to a policy claim." Second, Section 541.060(a)(2) prohibits the "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement" of claims where the insurer's liability is reasonably clear." The Court rejected this claim because adjusters do not have settlement authority on behalf of the carrier. "[H]er sole role is to assess the damage." Finally, Section 541.060(a)(7) prohibits "refusing to pay a claim without conducting a reasonable investigation with respect to the claim." Again, the Court recognized that the Adjuster did not have authority to refuse to pay a claim. She simply investigates.

[**Editor's Note**: Martin, Disiere, Jefferson & Wisdom's attorneys Chris Martin, Patrick M. Kemp and Robert R. Russell represented all Defendants in this action and wish to congratulate our clients on this significant ruling and thank them for the opportunity to represent them in this matter.]

INSURER WINS SUMMARY JUDGMENT ON HOMEOWNER WIND/HAIL CLAIMS

Recently, in *Stevenson v. Nationwide Property and Cas. Ins. Co.*, 3:12-CV-4564-L, 2014 WL 1356504 (N.D. Tex. April 7, 2014), Federal District Judge Sam A. Lindsay granted Nationwide Property and Casualty Insurance Company's motion for summary judgment on a claim for water, hail, windstorm and mold damage arising out of strong storms and tornadoes. The insured contended the Nationwide's adjuster failed to properly adjust the claim, denied a portion of the claim without an adequate investigation and failed to compensate the insured adequately under her insurance policy. They also claimed Nationwide misrepresented that her damages were not covered, failed to explain to her its reason for offering an inadequate settlement and failed to affirm or deny coverage of her claim within a reasonable time. Nationwide removed the case to federal district court and filed a motion for summary judgment which the Court ultimately granted.

The Court noted that the Nationwide's motion for summary judgment argued that they paid over $150,000 in policy proceeds on the claim and that "no genuine dispute of material fact exists as to any additional amount that is due or owed." The Court further noted that the insured never filed a response to the motion for summary judgment and that the burden of producing evidence opposing a no evidence summary judgment rests with the Plaintiff. However, the Court could not procedurally enter a "default" summary judgment.

The Court granted the no evidence summary judgment because "a court, however, is permitted to accept the movant's facts as undisputed when no response or opposition is filed." Herein, the Court accepted Nationwide's "facts and evidence as undisputed." "Nationwide … contends there is no genuine dispute of material fact regarding any additional amount that is due or owed to Plaintiff. In other words, Defendant acknowledges that it paid a portion of the claim and did not pay some parts of the claim. Therefore, from what the court can ascertain, there is no dispute that defendant has not paid all that Plaintiff requested." On the other hand, "Plaintiff did not file a response indicating the amount that she believes would lead to full compensation and, therefore, she has filed nothing to dispute Defendant pointing out the absence of evidence to support her claims." 'Therefore, Defendant's motion for summary judgment will be granted, as there is no genuine dispute of material fact regarding any of Plaintiff's claims."

PHRASE "DOMESTIC EMPLOYEE" NOT AMBIGUOUS IN BUSINESS AUTOMOBILE POLICY WHEN READ IN CONTEXT OF REGULATORY FRAMEWORK

In *Melvin West v. Southern County Mut. Ins. Co.*, No. 05-13-00012-CV (Tex.App. Dallas April 10, 2014), the Dallas Court of Appeals affirmed a summary judgment favoring Southern County Mutual Insurance Company ("Southern County") on an exclusion in a business automobile insurance policy ("auto policy.") West was employed by Super Surface, Inc. ("Super") to drive concrete trucks. He was injured when the truck rolled over. Super was a workers compensation insurance nonsubscriber. Super filed an insurance claim for West's injuries under their auto policy with Southern County. Super and West then settled, and Super assigned its insurance claim to West. West sued Southern County. Southern County filed a motion for summary judgment on the basis that the following exclusion applied to West's bodily injuries:

Bodily Injury to:

A. An employee of the insured arising out of and in the course of employment by the insured …

But this exclusion does not apply to bodily injury to domestic employees not entitled to workers' compensation benefits or to liability assumed by the insured under an insured contract.

West opposed the summary judgment on the grounds that "domestic employee" in the exception to the exclusion was ambiguous "because it could refer either to employees who work in a household or to employees who are citizens of the United States." As a result, West argued it should be construed in favor of coverage; that is, "all employees who are within the United States are excepted from the bodily-injury exclusion."

Southern County argued "the full phrase 'domestic employees not entitled to workers' compensation benefits' is unambiguous and refers to a class of employees who both work in a household and are not covered by workers' compensation." Southern County argued that West's injuries were not covered because he fell under the bodily-injury exclusion, and that the domestic-employee exception did not apply to West because he is not a household employee who is not entitled to workers' compensation insurance. The trial court granted the summary judgment.

The Dallas Court of Appeals affirmed the summary judgment and followed the Fort Worth Court of Appeals in concluding "the 'domestic employee' exception unambiguously referenced employees who work in the home." The full phrase in the exception "refers to a specific class of employees referenced on the Texas Workers' Compensation Act (TWCA) and the Texas Motor Vehicle Safety

Responsibility Act (TMVSRA)." "We conclude this is the only reasonable meaning." Thus, "considering the contract as a whole and the regulatory framework, we conclude 'domestic employee not entitled to workers' compensation insurance' unambiguously refers to employees who work in a home. We overrule West's sole issue." Summary judgment in favor of the insurer was affirmed.