Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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SOUTHERN DISTRICT GRANTS SUMMARY JUDGMENT IN FAVOR OF THE INSURER AFTER PARTIAL APPRAISAL AWARD WAS PAID TO THE INSURED

Last week, in *Toney v. State Farm Lloyds*, Civil Action No. 7:13-CV-183 (S.D. Tex. July 21, 2014), a Federal District Court Judge in the Southern District of Texas dismissed all of the Insured's contractual and extra-contractual causes of action against State Farm.

The Insured filed a homeowner's insurance claim with State Farm for damages resulting from a wind and hailstorm that occurred on March 28, 2012 in the Rio Grande Valley. This suit was one of thousands of lawsuits filed in the state and federal courts of South Texas arising out of recent wind and hail storms in the Valley. In this claim, the Insured invoked the appraisal provision of the policy, and the appraisers agreed on an appraisal award on November 13, 2012. A portion of the appraisal award, totaling approximately $9,100, was allocated for new roof bracing, which consisted of a solid plywood understructure ("solid decking"), as a replacement for the then existing bracing consisting of a spaced plywood understructure ("spaced decking"). The spaced decking itself was not damaged.

Decking requirements for roof repairs are governed by the International Residential Code ("IRC"), as adopted by the State of Texas. On October 24, 2012, the City of Mission issued the first of two letters stating: "It has been confirmed by the IRC that the City of Mission, Texas requires solid decking for all wood frame construction…" On November 21, 2012, State Farm sent a letter to the Insured advising the insured that it was paying the appraisal award, but withholding the $9,100 pending investigation of the roof-replacement policy requirements. On January 22, 2013, the City of Mission issued a second letter stating: "if a roof has pre-existing spaced sheathing, the code does not require solid sheathing to be placed for a re-roofing project." Thereafter, on February 14, 2013, State Farm sent a second letter to the Insured advising that no coverage existed for the $9,100 cost associated with the more expensive solid decking.

The Insured filed his lawsuit against State Farm and the individual adjuster on March 5, 2013 in state court alleging both contractual and extra-contractual claims. State Farm removed the action to Federal Court, asserting that the adjuster was improperly joined. The Court agreed with State Farm that the adjuster was improperly joined and dismissed the adjuster from the lawsuit.

Afterward, State Farm filed its motion for summary judgment arguing its payment of the appraisal award was both proper and sufficient in light of the appraisal provision in the Policy. The Court agreed that coverage questions are not governed by appraisal awards, which leaves the question of liability for the courts. The parties did not dispute that "enforcement" was required in order to actuate liability; instead, the parties disputed when and whether "enforcement" occurred. State Farm asserted contractual compliance occurred because there was no evidence of enforcement. The Insured asserted that the enforcement condition was satisfied by the City of Mission's first letter requiring previously featured spaced decking to feature solid decking; as a result, arguing that the City was enforcing the solid decking requirement at the time the home was damaged.

The Court held that the October 2012 letter did not constitute "enforcement" and that the City had not effected enforcement of the requirement such that State Farm was liable for any of the cost of solid decking. Citing to a decision from District Court Judge Lyn Hughes out of the Southern District in 2007, the Court found that the Insured's allegations were devoid of any instance of the City taking affirmative action to "carry out the mandate or command" of the decking requirement, as the Insured set forth affidavit testimony containing legal conclusions not supported by facts. Further, the Court stated the parties' contractual intent was to avoid a circumstance which would potentially obligate an insurer to make a nearly $10,000 repair solely based on conjecture of enforcement, rather than actual enforcement. Therefore, the Court dismissed the Insured's breach of contract cause of action.

Finally, in light of the Court's determination regarding the breach of contract claim, the Court also found the Insured failed to raise a genuine issue of material fact for the essential elements of the remaining extra-contractual claims. As such, all of the extra-contractual claims were dismissed as well.

[**Editor's Note**: State Farm was represented in this case by Chris Martin, Todd Lonergan and Marilyn Cayce of our firm and we are grateful for the opportunity to defend State Farm in this case].

USAA WINS PUTATIVE CLASS ACTION SUIT BASED TOTAL LOSS VALUATIONS AND THE FILING OF OWNER-RETAINTED REPORTS

Sunny Letot, a well-known Dallas judicial campaign consultant and descendant of a notable North Texas pioneering family, was involved in a rear end collision with an insured of USAA. She filed suit against the insured driver for negligence and then joined the carrier on multiple novel theories concerning USAA's attempted negotiation of a settlement with her which she alleged undervalued her vintage Mercedes automobile. She claimed the carrier's payment to her of the undisputed amount of her property damage claim and its subsequent filing of a statutorily-mandated Owner Retained Report (ORR) with TexDOT constituted a violation of the Texas Deceptive Trade Practices Act, tortious interference with her contract with the State to drive the public roads of Texas, "conversion" of her car, and "slander" of her car title. Her claims focused on the effect of the carrier's filing of the mandatory ORR as "stripping" her of the title of her car and requiring her to request a "salvage motor vehicle" title that she alleged effectively destroyed the value of her allegedly vintage car. Rather than apply for such a title, she physically destroyed the car, sold it for scrap, and then filed the class action lawsuit against USAA.

Ms. Letot made claims in the case as a putative class action against USAA regarding all other total loss auto claims in Texas in the past several years where the carrier filed an ORR with TexDOT regarding the value of the damaged vehicle. The Court initially tried the motor vehicle negligence case. A twelve-person jury in Dallas County found neither party was negligent. The Court entered a take nothing judgment on the tort claims last year.

The insurance and class action suit against USAA was then severed and transferred to a different court in Dallas County where Plaintiff initially sought a ruling on her class certification request. Shortly before the class cert hearing, the parties agreed to seek a ruling on the merits of the claims before proceeding with the class action certification hearing. Both parties then filed cross motions for summary judgment. After a lengthy hearing last month, Judge Craig Smith of the 192nd Judicial District Court took the motions under advisement. Last week, Judge Smith issued his rulings in *Sunny Letot, Individually and On Behalf of Other Similarly Situated v. United Services Automobile Association*, Cause No. 13-00156-E, in the 192nd Judicial District Court, Dallas County, Texas (July 22, 2014). Judge Smith granted USAA's motion for summary judgment and denied Plaintiff's motion. The Court then entered a final judgment in favor of USAA on all ground.

[**Editor's Note**: USAA was represented in this putative class action by a team that included Chris Martin, Levon Hovnatanian and Rob Owen of the firm's Houston office and George Lankford and Leslie Pitts of the firm's Dallas office. We are very grateful for the trust of USAA in defending a putative class action suit and appreciate the opportunity to defend it's interests in this significant case. In the suit against USAA on the insurance and class action issues, Letot was represented by attorney Jeff Tillotson and the Dallas law firm of Lynn, Tillotson, Pinker & Cox, LLP. This firm has received significant press coverage recently as the firm suing Lance Armstrong seeking to recover money previously paid to Armstrong for his *Tour de France* victories.]

SAN ANTONIO COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT IN FAVOR OF DRIVER OF VEHICLE BASED ON THE STATUTE OF LIMITATIONS IN LAWSUIT BROUGHT BY PASSENGER IN SAME VEHICLE

The San Antonio Court of Appeals in *Ellard v. Ellard*, Cause No. 04-13-00709-CV, 2014 WL 3605935 (July 23, 2014), upheld summary judgment in favor of driver of vehicle based on the two-year statute of limitations set forth under Texas law.

This case stemmed from personal injury damages sought in a cross-claim by one co-plaintiff against another following a single-car accident that occurred on January 14, 2010. William D. Ellard ("Father") was driving the vehicle and William B. Ellard ("Son") was the passenger in the vehicle. On December 13, 2010, Father and Son, as co-plaintiffs, filed suit against their insurance carrier, Farmers Insurance, for its failure to tender benefits under the personal auto policy.

Several years later, on October 30, 2012 (two years and nine months after the accident), Son filed a cross-claim against his father asserting damages arising from the manner and method that Father was operating the vehicle on the day in question. Father filed a traditional motion for summary judgment based on the statute of limitations under Section 16.003(a) of the Texas Civil Practice and Remedies Code ("CPRC"), which provides a two-year limitations period for tortious acts involving a motor vehicle. The trial court granted summary judgment in favor of Father.

Section 16.069 provides that if a cross-claim arising out of the same occurrence that is the basis of an action, a "party" to the action may file a cross-claim even though as a separate action it would be barred by limitations. On appeal, Son asserted Section 16.069(a) of the CPRC provides that his cross-claim is exempt from the normal statute of limitations bar, as Son is a "party." Father argued that the Son's theory was illogical because a cross-plaintiff could sue at any time during the pendency of the suit and that is not what the Legislature's intent was when drafting the statute. Citing to appellate decisions from sister courts, the Court of Appeals held that although the Legislature used "party" and not "defendant" in Section 16.069, the statute was intended to apply to "defendants" in a suit; not plaintiffs. Section 16.069 "extends limitations only if a defendant's action is a counterclaim against the original plaintiff, or a cross claim against an original co-party defendant."