

TEXAS INSURANCE LAW NEWSBRIEF

AUGUST 12, 2014

COURT FINDS SETTLEMENT OBLIGATIONS TO PAY MORTGAGOR ARE NOT DISCHARGED BY SENDING CO-PAYABLE CHECK TO INSURED

Last Thursday, in *Viewpoint Bank v. Allied Property and Cas. Ins. Co.*, 2014 WL 3867810 (Tex.App.-Dallas August 7, 2014), the Dallas Court of Appeals examined the insurer's duty to pay a mortgage company in relation to the settlement of an insurance claim arising out of Hurricane Ike. Allied Property and Casualty Insurance Company issued settlement checks jointly payable to the Insured, Optimum Deerbrook and its mortgagor, Viewpoint Bank. The checks were delivered directly to the insured who deposited the checks without the consent or endorsement of the bank. And the bank never received payment. The bank then sued the insurer for breach of contract. The trial court granted summary judgment in favor of the insurer finding that it was no longer obligated on the checks or under the insurance contract based on its delivery of the jointly payable checks to the insured.

The Dallas Court of Appeals disagreed and reversed the summary judgment rendered in favor of the insurer. The court held that the insurer still owed payment to the bank because neither joint payee, acting alone, was entitled to negotiate the checks, thus payment to one (the insured) does not discharge the obligation to pay the bank (the mortgagor).

The Court of Appeals further held that the bank was entitled to summary judgment as a matter of law because the checks had been improperly paid despite missing the bank's endorsement. The court found that the insurer's remedy is to sue another bank that improperly paid the checks without all the necessary endorsements.

ALLEGATIONS AGAINST INSURANCE AGENT WERE SUFFICIENT TO DEFEAT REMOVAL BASED ON FRAUDULENT JOINDER - CASE REMANDED

Last Tuesday, in *Oldham v. Nationwide Insurance Company of America*, 2014 WL 3855238 (N.D.Tex. August 5, 2014), United States District Judge Jane Boyle granted Plaintiff's motion to remand a case removed to federal court based on diversity of citizenship and the alleged fraudulent joinder of a non-diverse defendant. Plaintiff Zac Oldham (a Texas citizen) sued six out of state Nationwide Defendants and one Texas citizen - Nationwide's insurance agent Mark Dehning. The insured alleged that the Defendants misrepresented certain provisions of the agreement, wrongfully terminated the agreement and filed suit alleging breach of contract, common law fraud and seeking a declaratory judgment on coverage. But the insured's only claim against the only Texas citizen, the agent, was common law fraud. Nationwide removed the case to federal court and asserted that the agent was fraudulently joined to defeat diversity jurisdiction.

The federal district court recognized that the law is unsettled regarding whether to apply the Texas "fair notice" or, federal pleading standards when examining the Plaintiff's petition for adequately pleading claims, so the Court stated it would apply the more liberal Texas "fair notice" standard until the Fifth Circuit Court of Appeals clarified the issue. The Court then held that the insured pleaded sufficient facts against the agent as to each of the elements that make up a fraud claim such "that there is a reasonable possibility that he will be able to recover" against him:

First element – "material" misrepresentation. Plaintiff alleged Dehning misrepresented that Plaintiff had met his performance goal during an initial trial period under the agency agreement, and that such misrepresentation would induce a reasonable person to alter his course of conduct with regards to the development and focus of his business, thus making them "material" misrepresentations.

Second element – "false" representations. The Court held that the allegations under element 1 also met element 2.

Third and fourth elements – misrepresentations were made knowingly or recklessly, and with intent. The Court held it was sufficient for the Plaintiff to allege that Dehning knew the representations to be false, made them recklessly, as positive assertions, and without knowledge of their truth, and they were made with the intent that Plaintiff act on them.

Final element – reliance. The Court held Plaintiff's allegation sufficiently demonstrated "reliance" when he alleged, "that Plaintiff relied on these representations by, including but not limited to, concentrating on certain aspects of his agency and not other (sic.)"

The Court then held, “based on the foregoing allegations, the Court cannot infer that there is no possibility that Oldham will recover against Dehning under Texas law ... and therefore Defendants’ claim of improper joinder fails.” The motion to remand was granted.

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- Texas Expedited Trials, Dismissal of Baseless Claims, and New Pleading Rules - a Sea Change or Business as Usual?
- Forensic Accounting: Using Internet Resources to Investigate Behind the Numbers
- Dealing with Multiple Insurers and “Other Insurance”
- Advertising Injury Coverage
- Stowers Doctrine Update
- Rule 167 – Offers of Settlement
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Irving Convention Center
500 W Las Colinas Blvd
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Registration: 7:30 a.m. – 9:00 a.m.

Seminar: 9:00 a.m. – 5:00 p.m.

6 Hours of CE or CLE Credit
Continental Breakfast and Lunch Provided

Free Parking