

TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS SUPREME COURT HOLDS TRIAL COURT ABUSED DISCRETION BY COMPELLING INSURANCE COMPANY TO PRODUCE OTHER INSURED'S CLAIM FILES

On Halloween, the Texas Supreme Court issued a scary opinion for plaintiff's lawyers seeking to employ overly broad discovery tactics, by granting an insurer's petition for writ of mandamus to overturn a discovery order compelling the production the unrelated claim files of other insureds. In *In Re National Lloyds Insurance Company* No. 13-0761, Plaintiff, a homeowner, filed a lawsuit against her homeowner's insurer for breach of contract, breach of duty of good faith and fair dealing, fraud, conspiracy to commit fraud, and DTPA and Insurance Code violations arising from an allegation that the insurer undervalued the insured's insurance claim for damages that allegedly occurred from two separate storms in the Dallas area.

During discovery, the insured requested production of all claim files from the previous six years involving three individual adjusters. She also requested all claim files from the past year for properties in Dallas and Tarrant Counties involving Team One Adjusting, LLC, and Ideal Adjusting, Inc., the two adjusting firms that handled the insured's claims. The trial court ordered production of the files for claims handled by Team One and Ideal Adjusting. The trial court also limited the order to claims related to properties in Cedar Hill and to the storms that caused the damage to the insured's residence.

The insured argued that the claim files of other insureds were necessary so she could compare National Lloyds' evaluation of the damage to her home, with National Lloyds' evaluation of the damage to other homes, to support her contention that her claims were undervalued. The Texas Supreme Court stated, "we fail to see how National Lloyds' overpayment, underpayment, or proper payment of the claims of unrelated third parties is probative of its conduct with respect to Plaintiff's undervaluation claims at issue in this case." The Court further stated, "scouring claim files in the hopes of finding similarly situated claimants whose claims were evaluated differently from Erving's [Plaintiff] is at best an impermissible fishing expedition." The Court agreed with the Insurer that the trial court's order compelling discovery of such information is necessarily overbroad.

OBLIGATIONS UNDER CONSTRUCTION CONTRACT MUST EXPAND INSURED'S DUTIES BEYOND THOSE ALREADY OWED, FOR CONTRACTUAL-LIABILITY EXCLUSION TO APPLY

Recently, in *Crownover v. Mid-Continent Cas. Co.*, No. 11-10166, 2014 WL 5473084, at *1 (5th Cir. Oct. 29, 2014) the Fifth Circuit reversed its previous June 2014 decision and then reversed the trial court's order granting summary judgment in favor of Mid-Continent Casualty Co. on the basis that the order conflicted with two Texas Supreme Court decisions regarding the contractual-liability exclusion.

Plaintiffs contracted with Arrow Development to construct a house for them. Arrow performed defective work, and then failed to promptly correct the work. The parties went to arbitration and the arbitrator found that Arrow was liable to Plaintiffs for breach its expressed warranty to repair non-conforming work and awarded them damages. However, because Arrow filed for bankruptcy, Plaintiffs were limited to what they could recover from Arrow's insurance policies.

Therefore, Plaintiffs sued Mid-Continent, Arrow's insurer, for the damages owed to them from Arrow's defective work. Both sides moved for summary judgment, and the district court determined that the contractual-liability exclusion in Arrow's policy with Mid-Continent prevented indemnity and granted summary judgment in Mid-Continent's favor. In June, the Fifth Circuit affirmed the trial court's decision. Plaintiffs; however, asked the Fifth Circuit to reconsider its ruling based on the order conflicting with the Texas Supreme Court decisions in *Ewing v. American Insurance Co.*, 420 S.W.3d 30 (Tex. 2014) and *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010).

Specifically, the Plaintiffs argued that the Fifth Circuit should reconsider its previous order where it found that Arrow's liability to perform its work in a workmanlike manner was solely derived from the requirements under the construction contract with Plaintiffs.

In *Gilbert and Ewing*, the Supreme Court of Texas determined that the contractual-liability exclusion does not bar coverage for claims that a builder violated a contractual obligation to perform construction in a “good and workmanlike manner” because the obligation existed independently of the contract. More specifically, the court noted that it is not the presence of the language in the contract, but whether the contractual language expands an insurer’s obligations to provide coverage beyond the insured’s common law obligation to perform its work in a good and workman like manner that triggers the policy exception. In sum, the Texas Supreme court maintains that for a contractual liability exclusion to apply, the insurer must prove the contractually-assumed duty expanded liability beyond what is already owed under common law.

The Court noted that the Arbitrator in this case determined that Arrow violated an express duty to repair work that did not conform to the requirements of its construction contract with Plaintiffs. Further, because Mid-Continent did not offer evidence that the arbitration award was based on liability greater than that dictated by general law, the contractual-liability exclusion from coverage did not apply.

The Court acknowledged that there were three elements in the construction contract that could have potentially triggered the contractual-liability exclusion under the Policy (1) it constituted an express rather than implied warranty; (2) it was a duty to repair rather than construct; (3) it referred to performance in conformity with the contract documents rather than simple competent performance. However, the Court noted that none of these factors were dispositive, and not one of them extended Arrow’s liability beyond its liability under general law.

Since there is a general law duty to perform the terms of a (construction) contract with reasonable care, the Court concluded that it is unclear how Arrow’s express duty to repair, without a showing that the “requirements of the Contract” exceeded its common law duties, could constitute an expansion of Arrow’s obligations beyond what it already owed under general law. The Fifth Circuit further determined that none of the other policy exclusions alleged by Mid-Continent applied, and rendered summary judgment in favor of the Plaintiffs.