

TEXAS INSURANCE LAW NEWSBRIEF

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TEXAS APPEALS COURT AFFIRMS JURY VERDICT AGAINST BROKER FOR FAILURE TO PROCURE INSURANCE FOR A LAKE TEXOMA RESORT

Last Wednesday, in *Insurance Alliance v. Lake Texoma Highport, LLC*, No. 05–12–01313–CV, 2014 WL 6466851, the Dallas appeals court affirmed the Grayson County trial court judgment against Insurance Alliance and the take-nothing judgment against Bowood Partners, Ltd.

Highport owns and operates a large marina located on Lake Texoma. The property includes boat docks, a service center, a fuel station, an administration building, and multiple restaurants and bars. In 2005, Highport hired Insurance Alliance to perform a risk assessment on Highport's property. After doing so, Insurance Alliance recommended that Highport get blanket insurance coverage, where one limit covers all losses, with no coinsurance penalties or sublimits and with replacement-cost coverage. Highport hired Insurance Alliance to obtain the recommended coverage for 2005 and again for 2006. In 2007, Insurance Alliance acted as Highport's broker again, and Highport sought \$15 million blanket coverage. Several entities were involved in procuring the insurance policy. The insurance carrier was Lloyd's of London. Insurance Alliance used CRC Insurance Services Inc. as a middle broker. CRC's sister company, Southern Cross, hired Bowood, a London broker, to deal directly with Lloyd's.

In June 2007, during Highport's busy season, a flood damaged the marina, leaving some of its buildings completely submerged. After the flood, Highport learned it did not have the \$15 million blanket coverage it thought it had. Instead, the marina was covered by a \$15 million policy that had sublimits and coinsurance penalties. Highport sued its insurance broker, Insurance Alliance, and a London broker, Bowood Partners, Limited, asserting that the policy in place at the time of the flood was not the policy Highport had requested.

Highport's asserted various causes of action against Insurance Alliance and Bowood, including breach of contract, fraud, conspiracy, violations of the DTPA, and negligence. Highport's claims against these two defendants, and Insurance Alliance cross claims against Bowood, went to trial before a jury in April 2012. After a three-week trial, the jury found that Insurance Alliance agreed to procure for Highport an insurance policy with \$15 million in blanket coverage, with no sublimits and no coinsurance and with replacement-cost coverage, and that Insurance Alliance failed to comply with that agreement. The jury also found that Insurance Alliance and CRC, but not Bowood, made negligent misrepresentations and engaged in an unfair or deceptive act or practice that was a producing cause of damages to Highport.

The jury found that the amount of coverage that would have been available under the policy to repair and/or replace property damaged in the flood, less the amount of coverage that was provided by the actual policy, was \$8.3 million. The jury also determined that an additional \$438,598 should have been available to reimburse Highport's business interruption damages under the policy. And, that Highport's reasonable attorney's fees for representation in its claims against Insurance Alliance in the trial court were \$2,754,446, with additional amounts for representation on appeal.

After the verdict, Highport filed a Motion to Sign Judgment. At a hearing on the motion, the trial court indicated that if Highport elected to recover from Insurance Alliance on the contract, it was not entitled to recover against Bowood. Highport objected to being forced to elect. The trial court then stated that it would order judgment on Highport's breach of contract claim against Insurance Alliance because that claim afforded Highport the highest recovery. The court subsequently rendered judgment for Highport on its breach of contract claim against Insurance Alliance. The court ordered that Highport recover from Insurance Alliance \$8,738,598, plus court costs, pre- and post-judgment interest, and attorney's fees. The court rendered a take-nothing judgment on Highport's claims against Bowood and on Insurance Alliance's claims against Bowood.

Insurance Alliance appealed the damage awards on sufficiency of the evidence grounds. And the Court found that there was more than a scintilla of evidence to support the jury's answers regarding property and business interruption damages.

In a second issue, Insurance Alliance argued the attorney's fee award must fail because Highport did not segregate its fees between Insurance Alliance and Bowood, and that contrary to the evidence, the jury assessed all the requested fees against Insurance Alliance. In response, Highport presented evidence that it segregated those fees related to claims for which attorney's fees are not recoverable. The Court found that Highport's claims against Insurance Alliance and Bowood arose out of the same transaction, and Highport had a

single injury and that the jury could have determined that any fees Highport spent to get a final version of the policy from Bowood would have been incurred anyway to bring its claims against Insurance Alliance. The Court denied the second issue.

In its third issue, Insurance Alliance asserted that the evidence is legally and factually insufficient to support the jury's finding on the cross claim that Bowood was not liable to Insurance Alliance under the insurance code. The Court rejected this issue as well.

As cross-appellant, Highport contended it was entitled to its judgment against Insurance Alliance for breach of contract and to a judgment against Bowood for 10% of its damages on a negligence theory. Based on the jury's findings that Bowood was negligent and bore 10% of the responsibility for Highport's injury. At a hearing on the issue, the court asked Highport to elect and it did not, arguing it was entitled to recover from both Insurance Alliance and Bowood. After Highport refused, the trial court rendered the judgment that gave Highport its greatest recovery. It rendered judgment against Insurance Alliance on Highport's breach of contract claim and ordered that Highport recover \$8,738,598, plus court costs, pre- and post-judgment interest, and attorney's fees from Insurance Alliance. The court rendered a take-nothing judgment on Highport's claims against Bowood. Relying on *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 367 (Tex.1987) the appellate court found where the prevailing party fails to make an election, the trial court should use the findings affording the greatest recovery and render judgment accordingly.

SAN ANTONIO COURT OF APPEALS UPHOLDS UNINSURED MOTOR VEHICLE DEFINITIONAL EXCLUSION

In a memorandum opinion by Justice Rebeca C. Martinez the San Antonio Court of Appeals recently found that Texas law is well settled that the [definitional exclusion] unambiguously excludes vehicles owned by or furnished for the regular use of an insured or family member from the definition of uninsured motor vehicle and that such a limitation of coverage does not contravene public policy.

In *Mata v. State Farm Mutual Insurance Company*, 2014 WL 6474223, (Tex.App.—San Antonio, Nov. 2014), Andrew Mata and Oscar Mata sued State Farm Mutual Insurance Company after it denied their claim for underinsured motorist benefits. Melody Cavazos was driving her father's vehicle when she was involved in an automobile accident. The vehicle was regularly used either by Cavazos or her father. The Matas were passengers in Cavazos's vehicle which was insured by State Farm. The Matas and others first made liability claims against the policy, and State Farm paid out the policy limits on the liability claims. The Matas then made a claim for underinsured motorist benefits.

The Policy at issue contained four definitions of the term “uninsured motor vehicle.” The fourth definition defined an “uninsured motor vehicle” as including an underinsured motor vehicle, which is a vehicle covered by a liability policy where the limits of liability are not enough to pay the full amount the covered person is legally entitled to recover as damages. The Matas were covered persons and alleged that they were legally entitled to recover more in damages than the liability benefits State Farm paid to them. The policy also, however, contained a definitional exclusion which states, an “uninsured motor vehicle” does not include any vehicle “owed by or furnished or available for the regular use of [the insured] or any family member.” Because the vehicle in which the Matas were passengers was furnished for the regular use of Cavazos by her father, who was the insured under the policy, State Farm moved for summary judgment. The trial court granted State Farm's motion, and the Matas appealed.

The Matas argued that “The trial court granted judgment as a matter of law by ignoring the fourth definition [of uninsured motor vehicle], which covers the facts in this case.” The appellate court noted that although State Farm focused on the definitional exclusion in its summary judgment motion, the Matas never referenced this exclusion in their brief or provided any basis on which the exclusion should not apply to the facts in this case.

The Court found that “Texas law is well settled that the [definitional exclusion] at issue in this case unambiguously excludes vehicles owned by or furnished for the regular use of an insured or family member from the definition of uninsured motor vehicle and that such a limitation of coverage does not contravene public policy.” The Court also noted that State Farm cited specific legal authority supporting the application of the definitional exclusion; but the Matas did not discuss the relevant authority in their brief or explain why this well-settled law is inapplicable to their case.

The Court did footnote that in a previous case the San Antonio court of appeals refused to apply the definitional exclusion for public policy reasons under the facts presented in *Briones v. State Farm Mut. Auto. Ins. Co.*, 790 S.W.2d 70, 73–74 (Tex.App.—San Antonio 1990, writ denied). But further noted that the Matas failed to make any public policy argument for not applying the definitional exclusion to the facts in this case, and also noted that the Austin court of appeals rejected a public policy argument made in *Rosales v. State Farm Mut. Auto. Ins. Co.*, 835 S.W.2d 804, 805 (Tex.App.—Austin, 1992, writ denied).

The Court found that, based on well-settled Texas law, the trial court did not err in granting summary judgment in favor of State Farm because Cavazos's vehicle was not an uninsured motor vehicle; therefore, the Matas were not entitled to receive any underinsured motorist benefits and the trial court judgment was affirmed.