

TEXAS INSURANCE LAW NEWSBRIEF

JUNE 2, 2015

DALLAS COURT OF APPEALS AFFIRMS TRIAL COURT'S FRAUD FINDING AGAINST INSURED IN HAIL CASE & AWARDS DAMAGES TO INSURER

In *Fulgham v. Allied Prop. & Cas. Ins. Co.*, 05-14-00189-CV, 2015 WL 3413525, at *1 (Tex. App. May 28, 2015) the Dallas Court of Appeals affirmed a trial court's entry of judgment against an insured and in favor of the insurer after a jury found the insured committed fraud and was unjustly enriched by the insurers' payment of frivolous claims.

In July 2009, the insured made a claim under a commercial property insurance policy for damage to his roof he alleged was caused by a recent hailstorm. The insurance company inspected the exterior, estimated the cost of removing and replacing the roof, and issued payment. The insured contacted the insurer and claimed the repairs to the roof would cost more than the estimate. The insurer obtained a comparison estimate to repair the roof as the insured "had wanted it done" and paid an additional amount to repair his roof.

Six months later the insured alleged he had suffered interior damage to his building. The insurer inspected the interior and determined the insured had misrepresented the purpose of the building on the declaration form as commercial real estate when the building had no internal cooling or heating system. The insurer required a complete sworn proof of loss and then paid the insured for his claimed damages to the interior of his building.

Several months later, the insured submitted additional invoices for organizing, cleaning, and storing contents of the building despite previously claiming on several occasions that he was not making a claim for contents damage. The insurer inspected and determined that little, if any, work needed to be done to clean the contents. The insured later stated that the alleged "invoice" was an estimate, not an actual invoice. Nonetheless, the insured submitted additional invoices to support his contents claim and the insurer issued some additional payments. The insurer paid over \$899,160 in payments on the claim.

The insured then asserted additional damages related to his original claim, including debris removal, asbestos removal, and business interruption losses. The insured sued the insurer asserting contractual and bad faith claims. The insurer counter-sued the insured for fraud and unjust enrichment. The trial court dismissed all of the insured's claims prior to trial, the case went to trial on the insurer claims, and the jury awarded the insurer \$899,160 in damages — the entire amount previously paid to the insured.

The insured appealed the legal sufficiency of evidence and the Dallas Court of Appeals determined the insured waived any error in the jury charge for failing to object to the lack of distinction between fraud in the application and fraud in the claims process. The Court noted that the jury heard plenty of evidence that the insured's employees, at the insured's instruction, took numerous affirmative actions to hinder or hamper the insurer's investigation and to misrepresent both the existence of and extent of the claimed losses.

The Court concluded the record contained more than a scintilla of evidence indicating the insurer relied on the insured's representations and there was sufficient evidence from which a reasonable jury could have found fraud as charged. There was also evidence the insured hindered or hampered the carrier's investigation by covering up the physical evidence indicating the roof was not damaged when or as the insured claimed by directing employees to lie to the insurer's claims adjuster and by creating fraudulent invoices to support his claimed costs of repair, all of which the appellate court found a reasonable jury could find had prevented the insurer from discovering the fraudulent nature of the insured's claims at the time of the claims investigation.

FT. WORTH FEDERAL DISTRICT COURT FINDS CLAIMS ADJUSTERS IN THREE SEPARATE CASES IMPROPERLY JOINED

Federal District Court Judge John McBryde from the Ft. Worth Division of the Northern District of Texas issued a combined memorandum opinion and order resolving common improper joinder issues in three separate cases. Seemingly tired of the plethora of improperly joined insurance adjusters, Judge McBryde stated: “the joinder of a local claims adjuster in a state court action against a non-citizen insurance company in an attempt to avoid federal court jurisdiction apparently has become a popular tactic.”

The Court analyzed the state court pleadings of the Plaintiffs in the each of the following cases involving State Farm: *Gonzalez v. State Farm Lloyds*, 4:15-CV-305-A, 2015 WL 3408106, at *1 (N.D. Tex. May 27, 2015); *Ismael Arriaga v. State Farm Lloyds*, 4:15-CV-308-A, 2015 WL 3408106, at *1 (N.D. Tex. May 27, 2015), and *Milton Hershon v. State Farm Lloyds*, 4:15-CV-312-A, 2015 WL 3408106, at *1 (N.D. Tex. May 27, 2015). Judge McBryde concluded the claims adjusters were named as a defendant in each case for the purpose of attempting to defeat federal court jurisdiction. The Court concluded none of the claims asserted against the individual adjusters would survive a motion to dismiss for failure to state a claim upon which relief may be granted, and dismissed each of the claims adjusters.

DRI NATIONAL BAD FAITH LITIGATION CONFERENCE – JUNE 17th-19th IN CHICAGO

Please join some of the nation’s best in-house counsel and outside counsel who handle and manage bad faith cases across the country at the Insurance Bad Faith and Extra-Contractual Conference presented by the Defense Research Institute in Chicago on June 17th to 19th. Chris Martin of our firm is the Chair of this year’s national bad faith litigation conference, which is presented every other year by DRI. The conference will address many of the cutting edge claims and litigation issues impacting carriers who are sued for bad faith and other extra-contractual claims across the nation. States with unique exposures, cutting edge discovery strategies, winning trial techniques, and legal updates will be provided by prominent in-house counsel and outside counsel who have a history of winning bad faith cases across the country. We hope to see many of our friends and clients at this great event in Chicago in three weeks.

Speakers, topics and registration information can be found on line at: www.dri.org