

TEXAS INSURANCE LAW NEWSBRIEF

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DALLAS FEDERAL COURT GRANTS PARTIAL SUMMARY JUDGMENT IN FAVOR OF STATE FARM IN APPRAISAL CASE

Last week, Judge Jane Boyle of the Northern District ruled in favor of most of State Farm's claims because of its prompt payment of an appraisal award. *Graber v. State Farm Lloyds*, No. 3:13-CV-2671-B, 2015 WL 3755030 (N.D. Tex. June 15, 2015), involved a dispute between policyholder Kenneth Graber and State Farm regarding the scope of hail damage to Mr. Graber's home. After State Farm completed an initial estimate of \$3,443.96 for repairs, it sent Graber the difference after deductions for depreciation and the deductible. Dissatisfied with this payment, Graber requested that State Farm send a different adjuster to reinspect the property. The second adjuster found damage to the front-porch flashing that was not addressed in the additional estimate, and State Farm issued Graber a supplemental payment of \$121.77.

After Graber retained counsel and sent State Farm a DTPA demand letter, State Farm inspected the property for the third time but did not find any additional damage. Graber filed suit and invoked the appraisal provision in the insurance policy. Both parties' appraisers agreed to an appraisal award of \$12,898.59, which State Farm paid three days later after making the appropriate deductions for previous payments and the deductible.

State Farm moved for summary judgment on the ground that Graber's participation in appraisal and State Farm's timely payment of the award estopped Graber from maintaining his claims against State Farm. The Court first rejected Graber's argument that State Farm breached the contract because the appraisal award exceeded its initial settlement. The Court relied on well-settled authority that the fact that an appraisal award is greater than the initial payment is not sufficient evidence to establish a breach of contract if the insurer timely pays the award. While not disputing this general rule, Graber made a number of arguments that the Court similarly rejected. For example, Graber argued that *Breshears*,^[1] another appraisal case relied on by the Court, was distinguishable because the plaintiffs in that case had accepted the insurer's initial settlement, whereas Graber had challenged every payment made by State Farm. The Court rejected this argument, noting that there were numerous other cases in which courts had relied on the general rule regardless of whether the policyholders had agreed to the initial settlement.

The Court also rejected Graber's argument that *Breshears* and other cases involved prompt-payment claims, whereas Graber had also asserted claims regarding State Farm's allegedly inadequate investigation. The Court found that even if this was true, Graber had introduced no evidence to support his claim that State Farm performed an inadequate investigation. Because Graber's only evidence was the fact that the appraisal award exceeded the initial payments, the Court granted State Farm's summary judgment on Graber's claims for breach of contract, common law bad faith, and statutory bad faith under the Texas Insurance Code.

Although the Court resolved most claims in State Farm's favor, it found that State Farm had not met its summary judgment burden on Graber's claims under Section 541.061 of the Insurance Code and Section 17.50(a)(1) of the DTPA, which prohibit misrepresentations regarding coverage and the claims-handling process. The Court did not necessarily find that Graber had introduced sufficient evidence to create a fact issue on these claims, but rejected State Farm's argument that these claims failed for the same reason that Graber's other bad faith claims failed.

Finally, the Court rejected State Farm's argument that the prompt payment of an appraisal award precluded Graber's entitlement to statutory interest under the Prompt Payment of Claims Act. The Court looked to the Fifth Circuit's opinion in *Higginbotham*,^[2] which held that an insurer is strictly liable for failure to promptly pay a claim, to conclude that State Farm could not rely on a "good faith" defense to avoid paying statutory interest. Although the Court did not expressly say so, this interest would presumably only apply to the difference between the original settlement amount and the amount that State Farm paid after the appraisal.

[Editor's Note: State Farm was represented by Christopher W. Martin and Ryan K. Geddie of Martin, Disiere, Jefferson & Wisdom, L.L.P. Martin Disiere congratulates them on their success in securing judgment on most of the plaintiff's claims].

^[1] *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 343 (Tex. App.—Corpus Christi 2004, pet. denied).

[2] *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 460 (5th Cir. 1997).

FEDERAL COURTS REJECT INSURERS' IMPROPER-JOINDER ARGUMENTS REGARDING LIABILITY OF INDEPENDENT ADJUSTERS, AND REMAND CASES TO STATE COURT

In three recent cases decided on the same day by federal courts in Dallas and McAllen, the plaintiffs successfully remanded their lawsuits from federal to state court. The Dallas case, *Linron Properties, Ltd. v. Wausau Underwriters Ins. Co.*, No. 3:15-CV-00293-B, 2015 WL 3755071 (N.D. Tex. June 16, 2015), involved a commercial-property dispute related to storm damage and was heard by Judge Jane Boyle. Judge Nelva Ramos heard the two other cases that also involved storm damage but in the residential homeowner's context: *W. Ohio St. Condo Assoc. v. Allstate Ins. Co.*, No. 2:15-CV-192, 2015 WL 3756943 (S.D. Tex. June 16, 2015); *Garza v. Scottsdale Ins. Co.*, No. 2:15-CV-149, 2015 WL 3756917 (S.D. Tex. June 16, 2015).

In each case, the plaintiffs employed the common tactic of joining individual adjusters to their lawsuit against the insurer for the purpose of defeating federal diversity jurisdiction. Although the courts sided with each plaintiff, there are a few helpful points to take from these cases to assist in future efforts by insurers to challenge remand.

First, Judge Boyle acknowledged that other courts "have recently begun to question the appropriateness of holding an adjuster individual liable for unfair settlement practices..." These other courts have reasoned that because adjusters who merely investigate a claim generally do not have settlement authority and do not issue payments, they should not be liable under the prompt-payment statute. Judge Boyle rejected this reasoning, concluding that an inadequate or delayed investigation by an adjuster would necessarily affect the insurance company's settlement of the claim. Following this standard, she found that the plaintiff had sufficiently stated a claim against the adjuster because the plaintiff alleged that the adjuster (1) retained an engineer and contractor known to be biased towards insurance companies; (2) refused to identify covered damage; (3) and failed to respond to the insured's inquiries regarding payment. Although these allegations appear to be sufficiently detailed, insurers may be able to distinguish future cases when the allegations against the adjuster are so conclusory that they in no way state how an adjuster impeded prompt settlement.

Another point to take from these cases was the different results reached by Judge Boyle and Judge Ramos regarding the appropriate pleading standard in an improper-joinder analysis. Judge Boyle first observed that federal courts have traditionally used Texas' lenient "fair notice" standard to analyze whether a plaintiff's allegations against individual adjusters were sufficient. She noted, however, that the Texas Supreme Court had recently adopted Rule 91 that mirrored Federal Rule 12(b)(6). Because the federal rules imposed more stringent pleading standards, she found it appropriate to analyze the plaintiff's claims under this higher standard as well. Judge Ramos, on the other hand, cited a recent Fourteenth Court of Appeals case, *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App—Houston[14th Dist.] 2014, pet. filed), to conclude that Rule 91a had not caused "the Texas concept of 'fair notice' [to]...morph[]" into the Federal Rule of Civil Procedure 12(b)(6) standard..." Adopting the fair-notice standard, Judge Ramos held that the plaintiffs had stated a reasonable basis of recovery against the adjusters.

Although these cases appear to provide plaintiff's attorneys with more ammunition in avoiding federal jurisdiction as long as their allegations are sufficiently detailed, it is unlikely that plaintiffs with weak claims against adjusters—especially adjusters with little involvement in the investigation—will always be able to assert detailed allegations in good faith if the claims are questionable. Further, Judge Boyle noted a less-common way that insurers may be able to assert that adjusters have been improperly joined: by "piercing the pleadings" and elevating the improper-joinder analysis into a summary-judgment-type analysis. She cautioned that this approach is only appropriate when the "evidence reveals that the plaintiff has withheld facts relevant to the propriety of joinder," which may sometimes occur when plaintiffs add adjusters solely to defeat federal jurisdiction.