Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

OCTOBER 19, 2015

JURY AWARDS $100,000 IN REPLACEMENT COST DAMAGES, $0 IN ACTUAL-CASH-VALUE DAMAGES – TAKE NOTHING JUDGMENT AFFIRMED

Last week, the Houston First Court of Appeals affirmed a trial court's take nothing judgment in favor of National Lloyds after a jury awarded the policyholder $100,000 in replacement-cost-value damages but $0 in actual-cash-value damages. The dispute in *John Davis v. Nat. Lloyds Ins. Co.*, No. 01-14-00278-CV, 2015 WL 6081411 (Tex. App.—Houston[1st Dist.] Oct. 13, 2015), arose out of a claim for damage from both Hurricane Rita and Hurricane Ike. John Davis, the insured who operated a barbershop out of his home, had bought the property in 1994. The property had been built in the 1960s. Davis first made a claim after Hurricane Rita caused the roof to leak. National Lloyds denied the claim based primarily on exclusions for wear and tear. In 2008, after Hurricane Ike struck Houston, Davis' roof began leaking again. A National Lloyds' adjuster found no storm-created openings on the roof, only minor wind damage to three shingles on the gabled portion of the roof and minor damage to the roof's siding and soffit. He estimated the total repairs costs to be $1,825, below Davis' $3,700 deductible.

In August 2010, almost two years after Hurricane Ike, a public adjuster named Christopher Fife inspected the property and determined that the hurricane damaged the roof. Davis filed suit the following month, alleging breach of the insurance contract, bad faith, and violations of the Texas Insurance Code. The case went to trial, and both parties introduced competing evidence regarding the cause and amount of damage. Davis' public adjuster estimated $108,038.75 to be the total cost of repairs, whereas National Lloyds experts attributed the damage to long-term wear and tear and found Davis' estimates to be overscoped and included damage not caused by a storm. The jury found that National Lloyds breached the insurance contract, engaged in bad faith, and violated the Texas Insurance Code. However, on the portion of the verdict that asked the jury to specify the "sum of money [that] would fairly and reasonably compensate John Davis for his damages," the jury answered $0 for actual-cash-value (ACV) damages and $100,000 for replacement-cost-value (RCV) damages.

National Lloyds filed a motion to disregard the jury's finding of RCV damages, arguing that the plain language of the policy provided for payment of claims on an ACV basis. The policy also stated that it would pay claims at RCV if this coverage was shown in the Declarations Page, which had a section stating, "Optional Coverages [RCV]—applicable only when entries are made in the schedule below." There were no entries in this schedule. The court rejected the insured's argument that an "X" placed in the schedule triggered this Optional RCV Coverage, finding this marking insufficient because the policy required the entry to include a premium number, building number, and other information identifying the type of optional coverage.

The Court next addressed the trial court's take-nothing judgment based on the jury's finding of no ACV damages. The Court noted that the policy expressly excluded damage from wear, tear, and deterioration, and did not cover damage from rain unless a storm created an opening that caused rain to enter the property. The court noted that the insured carried the burden of segregating covered from non-covered damage. Whereas National Lloyds introduced evidence of exclusions and the age and poor condition of the property, the court held that the insured failed to counter National Lloyds' evidence of depreciation. Given these factors, the Court of Appeals held that the evidence was sufficient to support the jury's finding of zero ACV damages.

Because of the jury's finding of no ACV damages, the Court affirmed the trial court's take-nothing judgment on the breach-of-contract claim. Although the jury found that National Lloyds breached the contract, the Court noted that a cause of action for breach of contract is premised on an insurer's failure to pay a claim due under the contract. Because the jury found that Davis was due no money under the only basis provided by the policy (ACV), it held that there could be no breach of contract. Noting that extra-contractual claims were also premised on a threshold finding that the insurer breached its contract, the Court also affirmed the take-nothing judgment as to these additional claims.

ALLEGATIONS AGAINST INDEPENDENT ADJUSTERS SUFFICE TO STATE A CLAIM - MOTION TO REMAND GRANTED

Last week, a federal court in Houston held that an insured property owner had stated a claim against an independent insurance adjuster, requiring remand of the case to state court. The claim in *Leidy v. Alterra Am. Ins. Co.*, No. CIV.A. H-15-2497, 2015 WL 6039741 (S.D. Tex. Oct. 15, 2015), arose out of alleged property damage from a hailstorm on August 16, 2013. Dianne Leidy, the insured, made a claim to Alterra American Insurance Company, which assigned independent adjuster Synergy Adjusting Corporation to inspect the property and adjust the claim. One of the adjusters obtained a hail report that did not show any hailstorms affecting the property in August of 2013. Alterra denied the claim on this basis, and the opinion is unclear whether there was any other basis for denying the claim, such as observed wear and tear on the property.

After Leidy sued both Alterra and the Synergy adjusters, Alterra removed the case to federal court, alleging that Leidy improperly joined the Synergy adjusters as a non-diverse defendant to defeat federal diversity jurisdiction. Judge Nancy Atlas analyzed whether the adjusters were improperly joined, which requires a showing that pleadings show no possibility of recovery against the non-diverse defendant under Texas law. Alterra argued that the pleadings against the adjusters lacked specificity and were "mere recitations" of the Insurance Code statutes. Judge Atlas rejected this argument, finding sufficient allegations that the adjuster "conducted a substandard, results-oriented inspection of the Subject Property," "failed to discover covered damages," performed an inspection that lasted "approximately one hour," and "misrepresented material facts." Interestingly, the court also considered allegations in plaintiff's Motion to Remand that the coverage decision based on the hail report was incorrect because there were several publicized reports of heavy storms in the area on August 16, 2013. This consideration of facts that "amplify or clarify facts alleged in the state court complaint," appears to be a departure from other federal court decisions that advise against looking outside of the pleadings in an improper-joinder analysis.

Finding that Leidy had sufficiently pleaded causes of action against the adjusters under the fair-notice standard, Judge Atlas remanded the case to state court.

AMARILLO FEDERAL DISTRICT COURT HOLDS MARINE-INSURANCE CLAIM EXPRESSLY EXCLUDED FROM INSURANCE CODE PROMPT PAYMENT ACT

Last month, a federal court in Amarillo dismissed a Prompt Payment claim under Chapter 542 of the Insurance Code. In *Beef Source Int'l, LLC v. Certain Underwriters at Lloyd's London*, No. 2:14-CV-104-J, 2015 WL 5666716, at *1 (N.D. Tex. Sept. 24, 2015), Beef Source International had attempted to ship beef by sea from Texas to Chile when the beef partially spoiled because of a refrigeration malfunction on the vessel. Brit PLC, the Lloyd's underwriter that subscribed to 100% of a marine-insurance contract covering multiple shipments of the beef, denied the claim. Beef Source sued for breach of the insurance contract and extra-contractual claims, including violations of the Prompt-Payment statute. Brit PLC filed a motion to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6).

Beef Source argued that Brit PLC violated the Prompt Payment statute because it failed to accept or deny a claim within 15 days as required by Chapter 542 of the Texas Insurance Code. The court held that claims under this Chapter were expressly excluded under Chapter 542.053, which excludes from the Insurance Code claims under "marine insurance as defined by Section 1807.001." Because Beef Source's pleadings asserted claims under a marine-insurance policy, which fell under the Insurance Code's definition of "marine insurance," the Court held that the pleadings failed to state a Prompt Payment claim under Chapter 542.

Editor's Note: This case is a helpful reminder that not all types of insurance are subject to the usual insurance-code penalties and provisions that apply to real property or auto insurance. Other exceptions under Chapter 542.053 are claims under (1) workers' compensation insurance; (2) mortgage guaranty insurance; (3) title insurance; and (4) fidelity, surety, or guaranty bonds.