Martin, Disiere, Jefferson & Wisdom

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TEXAS SUPREME COURT BRINGS CLARITY - NEW TRIAL MAY BE GRANTED ONLY FOR VALID REASONS EXPLICITLY STATED IN TRIAL COURT'S NEW TRIAL ORDER.

Prior to 2009, a trial court's order granting a new trial was effectively immune from appellate review in Texas. Since 2009, however, the Texas Supreme Court has sought to clarify the rules under which parties may challenge a new trial order in the courts of appeals, and such orders are now subject to correction by mandamus where they are granted for invalid reasons not supported by the record. In its latest opinion on the issue, the Texas Supreme Court sided with USAA and reaffirmed that new trial orders may be granted only for valid reasons that are supported by the record and that are explicitly set forth by the trial court in its order granting new trial. *In re Bent*, 2016 WL 1267580, No. 14-1006, ____ S.W.3d ___ (Tex. April 1, 2016).

In *Bent*, following a two week jury trial, the jury reached a verdict that USAA committed no breach of contract in its adjustment of a Hurricane Ike claim and rejected six of seven extra-contractual claims brought by the Bents. Rather than sign a judgment on the jury's verdict, however, the trial court entered an order granting the Bents a new trial. The court offered its reasoning that the evidence was factually insufficient to support the jury's breach of contract and extra-contractual findings, that USAA violated an *in limine* order in its closing arguments, that the jury's damages findings "seem[ed] arbitrary," and that jury erred in finding the Bents were not entitled to appellate attorneys' fees.

USAA sought mandamus relief in the court of appeals, asking the court of appeals to direct the trial court to sign a judgment. The court of appeals agreed that the trial court's order presented no legally valid basis to grant a new trial and conditionally granted mandamus relief instructing the trial court to enter a judgment. The Bents subsequently sought mandamus relief in the Texas Supreme Court, arguing that the court of appeals failed to properly apply the Texas Supreme Court's recent new trial precedents.

Elucidating on Texas law, Texas Supreme Court concluded that the court of appeals properly applied its precedents, holding that the trial court's order (1) failed to provide reasonably specific explanations tied to the evidence supporting its new trial order and (2) presented reasons that were contradicted by the evidence in the record. And, the Texas Supreme Court emphasized that, in such situations, a new trial order cannot stand. To properly grant a new trial, the trial court is required to "indicate that [it] considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings." Accordingly, the Texas Supreme Court's opinion instructs the trial court to vacate its order and enter judgment.

Editor's Note: USAA was represented by Levon Hovnatanian and Robert Owen in the court of appeals and in the Supreme Court of Texas. Martin, Disiere, Jefferson, & Wisdom, LLC congratulates and thanks USAA for the opportunity to help clarify Texas law on these important legal issues.

FEDERAL COURT CHALLENGES PLAINTIFF ATTORNEY TO PROVIDE "FACTUAL SUPPORT" FOR THEIR PLEADINGS OR FACE SANCTIONS - REPEAT VALLEY HAIL LITIGANTS LOSE AGAIN IN APPRAISAL BATTLE

Recently, federal Judge Micaela Alvarez once again granted summary judgment in favor of State Farm against repeat litigants Mark and Kelly Dizdar. The Dizdars, represented by the Mostyn Law Firm, filed at least eight separate lawsuits[1] against State Farm making similar allegations regarding wind and hail damage to properties the Dizdars owned in Hidalgo County. In *Dizdar v. State Farm Lloyds*, No. 7:14-CV-514, 2016 WL 1449248 (S. D. Tex. Apr. 13, 2016) (slip opinion) Judge Alvarez granted summary judgment in State Farm's favor for the fourth time, holding that "due to State Farm's compliance with the appraisal provision,

[1] Other similarly styled suits filed by the Dizdars include No. 7:14-CV-402 (reported at 2016 WL 427501); No. 7:14-CV- 445; No 7:14-CV-449, No. 7:14-CV-509, No. 7:14-CV-517, No. 7:14-CV-664 (reported at 2016 WL 695777, and No. 13-14-00391-CV (reported at 2014 WL 4402067).

Plaintiffs are estopped from asserting a breach of contract claim as a matter of law" and striking down their extra-contractual claims as well. We reported on prior rulings against the Dizdars on **February 19, 2016** and **March 11, 2016.**

This time, in addition to granting summary judgment and dismissing all claims, Judge Alvarez explicitly noted that the Dizdars' pleadings were "factually unsupported" and observed she had previously reminded their counsel of their obligation to comply with Federal Rule of Civil Procedure 11 (essentially that the claims have a legal basis, are not frivolous or filed for the purpose of harassment, etc.) in filing pleadings. She ordered Mr. Mostyn to appear for a show-cause hearing regarding possible sanctions under Rule 11.

HOUSTON COURT OF APPEALS AFFIRMS TRIAL COURT'S DISREGARD OF JURY FINDINGS OF PRIOR BREACH AND, EVIDENCE OF EXCESSIVE DEMAND

Recently, the Houston Fourteenth Court of Appeals issued a memorandum opinion affirming a trial court's judgment that 1) disregarded a jury's finding that a policyholder had breached the policy first and 2) excluded trial evidence of the policyholder's excessive demand. In *State Farm Lloyds v. Fuentes*, No. 14-14-00824-CV, 2016 WL 1389831 (Tex. App. Apr. 7, 2016)(mem. op.) the dispute arose out of a claim for storm damage to the insured's home during Hurricane Ike. The home sustained exterior damage and the insureds claimed their home also sustained interior damage from water leaks. After the claim was reported, State Farm inspected the home and allowed for total replacement of the roof and covered damage to a backyard shed, fence, a window, and a screen. The adjuster also inspected the interior of the home and determined that the interior damage was not caused by Hurricane Ike. The adjuster provided the insureds with a check for $4,988.63 for the exterior damage, as well as a check for $350 in "food loss." State Farm closed its file on the same day. The insureds filed suit alleging breach of contract, Insurance Code violations, breach of the duty of good faith and fair dealing, and fraud. The case was assigned to the MDL court, which presided over pretrial matters, and was then transferred to the trial court.

A jury found State Farm liable and awarded damages as to each of the theories of liability asserted including breach of contract, violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and fraud. The jury also found that the insured failed to comply with the policy and did so first. The trial court disregarded these two particular findings and rendered judgment in the insured's favor on the remaining findings. The jury awarded damages for the underpayment of the claim as well as additional damages for knowing conduct and for attorney's fees.

On appeal, State Farm argued that the trial court erred by disregarding the jury findings regarding the insured's prior material breach of the policy because: (a) the trial court did not have the authority to reject the jury findings on its own initiative; (b) evidence supports the insureds committed a material breach; (c) evidence supports the insureds breached first; and (d) the findings were material to the verdict. State Farm also argued that the trial court committed reversible error in excluding evidence of the excessive demand and that the trial court erred in denying State Farm's motion for remittitur or new trial.

In their first issue, State Farm argued that the Court should not have disregarded the jury finding that the policyholder breached first. State Farm also argued that the evidence showed that the policyholder's prior breach was material. In rejecting this argument, the court relied on a comment in *Vail v. Tex. Farm Bureau Mut. Ins. Co*., 754 S.W.2d 129 (Tex.1988), for the proposition that even without a breach of contract an "insured is not precluded from bringing a cause of action for violations of the DTPA or the Insurance Code in addition to any breach-of-contract claim against an insurer." The court then relied on their own previous decision in *United Ant'l Ins. Co. v. AMJ Invs.*, LLC, 447 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd), for the proposition that when an insurer fails to pay the full amount of a claim as a result of an unfair-settlement practice the insured may elect to recover its damages under either a breach-of-contract or a statutory-violation theory even though the Supreme Court had previously granted a writ to review that decision.

Further, the court did not analyze or distinguish that the jury in *AMJ Invs.* also found that the insurer had breached the contract or address whether or not an independent injury was specifically required to recover under the extra-contractual claims as required by the Texas Supreme Court in *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189 (Tex. 1998). The court unfortunately sidestepped the independent injury issue and found that State Farm had failed to address the independent theories of recovery that could independently support a judgment. The court further found that, because State Farm had not specifically argued that breach of contract is a prerequisite to extra-contractual damages until their reply brief, they had waived the argument. State Farm argued that the insureds joined the issue when they brought it up in their response brief and they should not have to anticipate an argument contrary to Texas law, but the court did not agree. Based on this conclusion, without specifically addressing the trial court's disregard of the jury findings on breach, the appellate court concluded that because all independent grounds supporting the judgment had not been attacked on appeal, the first issue was overruled without further analysis.

In their second issue, State Farm argued that the trial court committed reversible error by completely excluding evidence of excessive demand. In November 2010, counsel for Plaintiffs sent a demand letter seeking $230,000.00 in economic damages (noting these could increase), $50,000.00 in mental anguish damages; and$112,000.00 for expenses, including attorney's fees (noted these fees will increase they prepare for trial). The demand letter further explained that it was a "conservative effort" to resolve the litigation and that if not paid within 60 days, Plaintiffs would seek actual damages, mental anguish damages, prejudgment interests, attorney's fees, and

treble damages and additional penalties. State Farm argued that the demand for $230,000 in economic damages when their policy limit was approximately $133,000 and when they only requested approximately $62,000 at trial was unreasonable on its face. State Farm also argued that the demand for $112,000 for attorney's fees and expenses was unreasonable and made in bad faith when the evidence at trial was only $240 in attorney's fees through the date of the demand letter. The trial court excluded this evidence at trial and refused to submit a jury question for excessive demand. The appellate court found that State Farm had failed to meet the "futility-of-tender" element of the excessive demand defense. Essentially, the court found that because the letter did not specifically say they would only take the full amount demanded, State Farm could not meet the futility element of the excessive demand defense and therefore any error in excluding the evidence was harmless. Consequently, the Court affirmed the trial court's judgment in full.

Editor's Note: It remains to be seen how this opinion might impact the excessive demand defense in first-party insurance cases where, as in this case, the demand from plaintiff's counsel was clearly excessive and intended to escalate fees in litigation rather than to promote settlement.

DALLAS APPEALS COURT AFFIRMS SUMMARY JUDGMENT GRANTED AFTER APPRAISAL IN FAVOR OF INSURER

A recent case out of Dallas reinforced the prevailing view in Texas that a completed appraisal bars a claim for breach of contract. In *Richardson E. Baptist Church v. Philadelphia Indem. Ins. Co.*, No. 05-14-01491-CV, 2016 WL 1242480 (Tex. App.—Dallas, Mar. 30, 2016), the insured was suing its carrier to recover damages for breach of contract, violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and conspiracy based on the handling of a claim for hail damage to the roofs on two of their buildings.

On April 23, 2013, the Church notified Philadelphia Indemnity that the roofs on two of the buildings were damaged during a hailstorm. The Church submitted an estimate of from a roofer for replacing the roofs on two buildings. The insurer assigned an independent adjusting company to investigate the claim. The adjuster inspected the property and determined the hail damage required replacement of one slope of one roof and repairs to the rest. The Church's pastor disagreed with the adjuster's findings and estimate and told the adjuster they had an expert examine the roofs and found more extensive damage. Philadelphia Indemnity instructed the adjuster to hire an engineer for an evaluation. The engineer issued a report stating the only hail damage was to the one slope of the roof. Although the engineer found less damage than the adjuster had found, Philadelphia Indemnity continued to offer to pay the Church based on the adjuster's original estimate. The adjuster reported that the insured continued to disagree with the findings and also stated in his report that the church "would option for the appraisal provision in the policy" but that the pastor "was still in the process of deciding who" the Church's appraiser would be.

On June 24, 2013, Philadelphia Indemnity issued a check to the Church for the adjusted amount. On July 1, 2013, the Church hired a public adjuster who estimated that after deducting the $2,500 deductible, the insurer owed the Church $33,872.58. The public adjuster also stated, "If we cannot reach an agreement then the insured is likely to invoke appraisal and name Loy Vickers." On July 23, 2013, the Church hired a law firm and also retained an "expert litigation adjuster, Art Boutin." On August 2, 2013, Boutin estimated the damage to the Church from hail was $112,077.32.

The Church filed suit on November 21, 2013. On November 25, 2013, before being served, Philadelphia Indemnity sent a written request for appraisal pursuant to the policy's provisions. The parties proceeded with appraisal and the appraisers issued a written determination of repair costs and the actual cash value of the damages. Four days later, Philadelphia Indemnity issued a check, which was the amount of the appraiser's award less the deductible and the amount previously paid.

In its suit, the Church alleged Philadelphia Indemnity breached the policy, engaged in unfair settlement practices prohibited by the Texas Insurance Code, and breached the duty of good faith and fair dealing. The Church also alleged the adjuster did not comply with the Texas Insurance Code and that they engaged in a civil conspiracy to underpay the claim. The defendants filed motions for summary judgment asserting both traditional and no-evidence grounds. The trial court granted the motions for summary judgment and ordered the Church take nothing on its claims.

In their claim for breach of contract, the Church argued that the insurer breached the contract by (a) refusing the Church's request for appraisal and misrepresenting the conditions precedent to the permissible invocation of appraisal, thereby unnecessarily delaying the resulting appraisal award; and (b) intentionally underestimating and undervaluing the Church's loss. The Church attempted to argue that its email stating it would "likely" demand appraisal was a pre-suit demand for appraisal that was refused. The court found that the emails were not a demand for appraisal. The Church further argued that the result of the appraisal served as evidence that the contract was breached. Citing *Breshears v. State*, 155 S.W.3d 340 (Tex. App.—Corpus Christi 2004, pet. denied), the court found that a later appraisal award that is higher than an initial payment does not prove that an insurer breached the contract when the insurer promptly pays the difference.

As to the extra-contractual claims, the court found that summary judgment was properly granted as to both defendants because there was no evidence that the defendants violated chapters 541 and 542 of the Insurance Code or to support a claim for breach of the duty of good faith and fair dealing or civil conspiracy. After overruling all of the Church's issues on appeal, the trial court's judgment was affirmed in full.