

## TEXAS INSURANCE LAW NEWSBRIEF

FEB 22, 2017

## SOUTHERN DISTRICT RESOLVES "OTHER INSURANCE" DISPUTE BETWEEN PROPERTY MANAGEMENT COMPANY INSURERS

Last week, the United States District Court for the Southern District of Texas resolved a dispute between two insurers over the priority of insurance coverage for negligence claims against a mutually insured property management company. In *Scottsdale Insurance Company v. Steadfast Insurance Company*, 2017 WL 661520 (S.D. Tex. 2017), the Kaplan Management Company was covered under three policies: Scottsdale's primary and excess policies, and a Steadfast policy. A 5-year-old boy fell into the swimming pool at a Kaplan-managed apartment complex and suffered severe injuries. Scottsdale provided a defense in the lawsuit that followed but consistently maintained that Kaplan's other insurer, Steadfast, was required to participate in the defense. Steadfast refused maintaining that its coverage was excess. Scottsdale defended and settled the underlying lawsuit against Kaplan for \$1,950,000. Once the underlying suit was resolved, Scottsdale sued Steadfast alleging that Steadfast had issued a primary insurance policy obligating it to defend Kaplan and contribute to settlement. In addition, Scottsdale asserted that Steadfast's coverage took priority over Scottsdale's excess policy, requiring the Steadfast policy to be exhausted before Scottsdale would be required to contribute under its excess policy. Steadfast asserted that its policy was an excess policy and it was not obligated to defend or contribute to the settlement. The parties filed competing motions for summary judgment advancing their respective positions.

In ruling on the motions, the Southern District analyzed and interpreted the "other insurance" policy provisions to determine how coverage should be apportioned between the insurers. Scottsdale's primary policy contained a pro rata "other insurance" clause worded as follows:

If this insurance is primary, our obligations are not affected unless any other insurance is also primary. Then, we will share all that other insurance by the method described in Paragraph c. below [providing for pro rata apportionment].

In addition, Scottsdale's excess policy contained an excess "other insurance" clause stating that it would apply in excess of "any other collectible insurance available to the insured." Steadfast's policy stated that it was primary unless there was other insurance applying on a primary basis, and contained the following endorsement:

With respect to your liability arising out of your management of property for which you are acting as real estate manager this insurance is excess over any valid and collectible insurance to you.

Scottsdale argued that the "other insurance" clauses in the Scottsdale and Steadfast policies were conflicting and under Texas law, canceled each other out. And as a result, Steadfast should contribute pro rata to the cost of defense and settlement on a pro rata basis. Scottsdale also asserted that its excess policy "other insurance" clause required Steadfast's policy limits to be exhausted before Scottsdale's excess policy kicked in.

When the dust settled, Scottsdale lost its argument about primary coverage but won the day regarding its excess policy. In analyzing whether the other insurance clauses conflicted, the Southern District focused on Steadfast's policy endorsement designating its policy as excess for any liability arising out of Kaplan's property management activities. Steadfast argued that there was no conflict among other insurance clauses because the endorsement decided whether its policy was primary or excess based on whether the policyholder was a property management company—not on the presence of other insurance. The court agreed, noting that "[b]ecause Kaplan was a property manager, the endorsement in the Steadfast policy made [Kaplan's] Steadfast insurance excess, whether the Scottsdale policy existed or not." As a result, the Southern District held that the other insurance clauses did not conflict and concluded that the Scottsdale policy was primary and the Steadfast policy was excess.

The court then focused on the priority of coverage between the Scottsdale and Steadfast excess policies. On this point, the court found in favor of Scottsdale, holding that the language in its excess "other insurance" clause designated its policy as an umbrella policy with the lowest priority behind any other available insurance. With the competing policy provisions sorted out, Scottsdale was required to pay the costs of defense and exhaust its primary limit of \$1,000,000, and then Steadfast's excess policy limit of \$1,000,000 would need to be exhausted before Scottsdale's umbrella policy would have to contribute any settlement funds.

## SAN ANTONIO COURT OF APPEALS UPHOLDS SUMMARY JUDGMENT DISMISSING ALL CLAIMS AFTER TIMELY PAYMENT OF APPRAISAL AWARD

Recently, the San Antonio Court of Appeals agreed with other Texas courts in finding that an insurer's timely tender of an appraisal award satisfies its contractual obligations and precludes extra-contractual claims. In *Garcia v. State Farm Lloyds*, No. 04-16-00209-CV, 2016 WL 7234064 (Tex. App. Dec. 14, 2016), the insured submitted a claim for hail damage to their residence. State Farm found that any storm related damage claimed was below the deductible and no payments were issued. The insured disagreed and filed a lawsuit alleging breach of contract, breach of duty of good faith and fair dealing, as well as violations of the Texas Prompt Payment of Claims Act, the Insurance Code, and the DTPA. The parties then agreed to an appraisal for the purpose of determining the amount of the loss. After completion of the appraisal, State Farm paid the appraisal award and moved for summary judgment on all claims. Garcia then amended her petition to ask that the appraisal award be set aside. The trial court rendered summary judgment in favor of

State Farm disposing of all of Garcia's claims. Garcia appealed the trial court's summary judgment.

On appeal, Garcia first made the argument that summary judgment was improper because the original motion had not specifically addressed State Farm's estoppel defense asserted in response to Garcia's amended petition. The Court dispensed with this argument by noting that regardless of when Garcia raised this argument, the issue of whether the appraisal award should be overturned was a central issue in the summary judgment. Garcia also argued that the appraisal award was made without authority because it did not contain certain items that the original adjusters had included. The court found that the damage estimates prepared by Garcia's adjuster and by State Farm's adjuster no longer mattered once the appraisal process was complete and, Garcia's efforts to set aside the appraisal award for other reasons relying on the same early estimates, also failed.

Garcia next argued that her refusal to accept payment of the appraisal award prevented State Farm from establishing their estoppel defense. The court found the insurance policy clearly specified an appraisal process was the remedy for any disagreement regarding the amount of loss and that the decision reached by the appraisers and umpire "will set the amount of the loss" and "shall be the amount of the loss." Garcia chose to take advantage of the insurance policy's contractual, extra-judicial means of resolving the amount of loss; State Farm and Garcia participated in the appraisal process; and State Farm fully paid the amount of loss set by the appraisers. Accordingly, the court found that Garcia could not defeat an otherwise valid and binding appraisal award simply by rejecting payment of the award.

The court found that because State Farm timely tendered payment of the appraisal award, there was no breach of contract, and summary judgment was proper. As to the Chapter 542 Prompt Payment claims, the court followed a long line of cases holding that full and timely payment of an appraisal award under the policy precludes an insured from recovering penalties under the Act as a matter of law. As to the alleged common law breach of the duty of good faith and fair dealing, the Court found that summary judgment was proper because Garcia produced no evidence of an act so extreme that it caused injury independent of the policy claim. And because Garcia's statutory bad faith claims arose from the same theory, summary judgment was proper as to those claims as well. Accordingly, the court overruled all of Garcia's issues on appeal and affirmed the trial court's judgment.