

TEXAS INSURANCE LAW NEWSBRIEF

SEP 29, 2017

FIFTH CIRCUIT AFFIRMS SUMMARY JUDGMENT ON ALL CLAIMS AFTER PROMPT PAYMENT OF APPRAISAL AWARD AND CORRECTS THE ABERRANT GRABER DISTRICT COURT DECISION

The Fifth Circuit recently affirmed that timely payment of an appraisal award precludes contractual and extra-contractual claims under Texas law. In *Mainali Corp. v. Covington Specialty Ins. Co.*, No. 17-10350, 2017 WL 4172518 (5th Cir. Sept. 21, 2017), a fire damaged a gas station owned by Mainali Corporation. Mainali filed a claim with its property insurer. The insurer paid the claims based on an independent adjuster's estimates, but the insured thought it was owed more and filed suit for breach of contract, breach of the duty of good faith and fair dealing, fraud, and violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act. After completing the appraisal process, the appraisal award was less than what the insurer already paid under the policy. Nevertheless, the insurer paid an additional sum to make sure its payments were consistent with the appraisal panel's allocation of the losses. The district court in the Northern District of Texas granted summary judgment for Covington on all claims. The key issue considered by the appellate court is the application of the Prompt Payment of Claims Act to payments of an award pursuant to an appraisal process.

The court first addressed the breach of contract claim and the insured's argument that the appraisal award should be set aside because it failed to include all covered items. The insured made this argument despite the fact the award states that it "is inclusive of all FIRE damages sustained to the insured property". The court stated simply that the insured pointed to no evidence in the record that shows covered items were not included and affirmed the summary judgment as to breach of contract.

The court then turned to the prompt payment claim under Chapter 542 of the Texas Insurance Code. The insured argued that timely payment of an appraisal award should still be subjected to the penalties if paid after the statutory 60-day window. The court correctly noted that "no reported Texas case has ever subjected such a payment to the statute." The court then referenced a Texas case from earlier this year that held that "full and timely payment of an appraisal award under the policy precludes an award of penalties under the Insurance Code's prompt payment provisions." *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840 (Tex. App.—Houston [14th Dist.] 2017), reh'g denied (July 25, 2017). The insured's only supporting authority was an aberrant district court decision in *Graber v. State Farm Lloyds*, 2015 WL 3755030 (N.D. Tex. June 15, 2015). Finally putting the *Graber* rationale to rest, the court explained that *Graber* did not recognize an Erie court's duty to follow state courts' interpretation of state law rather than the interpretation the federal court thinks makes the most sense. The court further reasoned that the primary authority *Graber* relied on was the rejection of a "good faith" defense to the Prompt Payment of Claims Act in a non-appraisal case that did not apply to appraisal cases. The court concluded that the insurer was not trying to avoid payment of the claim; "it was invoking a contractually agreed to mechanism for assessing the amount it owed." The court concluded that the insurer did not violate the Prompt Payment of Claims Act and summary judgment was affirmed.

DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER BASED ON FAILURE TO PROVIDE PROPER NOTICE OF CLAIM, INCLUDING SUBSEQUENT SIMILAR CLAIMS.

On September 18th, Judge Amos L. Mazzant of the Eastern District of Texas adopted the report and recommendations of a magistrate and granted an insurer's motion for summary judgment based on failure to provide proper notice of a claim. In *Adi WorldLink, LLC v. RSUI Indem. Co.*, No. 4:16-CV-665, 2017 WL 4112112 (E.D. Tex. Sept. 18, 2017) the District Judge analyzed whether the insured's failure to provide notice on a "claims made" policy, precluded coverage.

This case arose from an insurance coverage dispute between RSUI Indemnity Company and its insured. The insured sought defense cost coverage from the insurer, for several claims made against the insured from 2014 through 2016. The insurer denied coverage and the insured sued alleging breach of contract and violation of various provisions of the Texas Insurance Code and the Texas Deceptive Trade Practices Act. In early 2014, two former employees filed a complaint against the insured before the American Arbitration Association, alleging that the insured failed to pay overtime for at least three years and improperly categorized employees as "exempt" employees. On or before August 11, 2014, the insured had notice the claim had been filed. Beginning around April 2015, other employees initiated arbitration proceedings for the same allegedly improper employment practices. The Court referred to these claims as the "2015 Claims." The insured notified its insurer of all the claims on September 16, 2015. The claims were denied on October 5, 2016 due to untimely notice and because each of the claims is "interrelated" such that they constitute a "single claim" under their policies. The insured had a Directors and Officers liability insurance policy for 2014 and a subsequent policy for 2015. Both Policies were "claims made" policies requiring prompt written notice as a condition precedent to the insurer's obligation to pay. The policies also required written notice if the insured "becomes aware of any facts or circumstances which may reasonably be expected to give rise to a Claim."

The insured filed suit seeking declaratory judgment and damages for breach of contract. The insurer moved for summary judgment

and the insured moved for partial summary judgment. After responses and replies had been filed the Magistrate Judge entered a recommendation that the insurer's motion for summary judgment be granted as to all claims. The insured objected to the Magistrate Judge's findings. The insured's primary objection with the Report and Recommendation was the finding that the insured's failure to report the first Claim precluded coverage of the 2015 Claims. The insured argued that *Gastar Exploration Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577 (Tex. App.—Houston [14th Dist.] 2013) (pet. den.) was directly on-point and required a different result. They also argued that the Magistrate's recommendation was based on a mistaken coverage analysis. The court affirmed the insurer's argument that *Gastar* was distinguishable because the denial of coverage in that case was based on an argument that the claims fell outside of the policy period and not on a notice provision. Citing *John M. O'Quinn P.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 33 F. Supp. 3d 756, 768 (S.D. Tex. 2014), the court further reasoned that under Texas law, an interrelatedness condition can be utilized to determine whether a claim made during the subject policy period should be deemed to have been first made at the time of an earlier claim. The Court agreed with the Magistrate Judge and found that *Gastar* was materially distinct from the present case. In their second objection, the insured asserted that the Magistrate Judge's findings against the insured's extra-contractual claims were predicated on an erroneous finding of no coverage. The Court observed that if there is no policy coverage, absent an extreme act, an insured's claims for failure to promptly to pay claims, failure to fairly investigate claims, and bad faith denial of claims all fail under Texas law. The Court noted that the Magistrate Judge correctly found there was no coverage in this case and then appropriately recommended dismissal of insured's extra-contractual claims. The Court then adopted the recommendations of the Magistrate Judge and dismissed all of the insured's claims.

EVERYTHING INSURANCE PROFESSIONALS NEED TO KNOW ABOUT THE NEW WIND/HAIL STATUTE IN TEXAS: HB 1774 AND WHAT IT MEANS TO YOU NOW.

WEBINAR RESCHEDULED DUE TO CHRIS MARTIN IN TRIAL; NEW DATE: October 20, 2017

If you have already registered for this webinar, you do not need to register again; your registration will be transferred to October 20, 2017

Effective September 1, 2017, Texas new law governing wind and hail claims submitted by Texas insureds (and their PAs, lawyers and other representatives) put new significant new requirements on those submitting property claims in Texas arising out of wind or hail events. On **Friday, October 20th at 12 noon Central** (1 p.m. Eastern, 10 a.m. Pacific), *MDJW University* will present a one hour webinar on this new legislation impacting every P&C carrier doing business in Texas. Certified for one hour of CE credit by the Texas Department of Insurance, this class will be taught by Chris Martin, founding Partner and the head of our Firm's Insurance Practice Group. Chris will cover the new legislation and how it impacts claims submitted now, and also the expected impact on future litigation arising out of Texas claims submitted after September 1st. The class is free and can be accessed from any computer with an internet connection or any phone line. To register, please use the following link:

<https://attendee.gototraining.com/r/1535096738752436481>. If you have any questions, please email Cynthia Glenney at: cynthiag@mdjwlaw.com or call her at 713-632-1737.