Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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HIDALGO COUNTY JURY FINDS IN FAVOR OF INSURER IN DISPUTED HAIL DAMAGE CLAIM

In a venue widely thought to be highly unfavorable to insurers, last week a Hidalgo County found that USAA did not breach the insurance contract, the duty of good faith and fair dealing or commit any statutory violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act in disputing coverage for additional claims asserted by the insured and their public adjuster. In *Salinas v. USAA Texas Lloyds Company*, No. C-1071-14-H, 389th Judicial District Hidalgo County, Texas, the insured presented a claim for hail damage to the insured residence arising from a March 29, 2012, hailstorm. USAA investigated the loss and paid to repair the roof, repair the stucco, replace the garage door and to repair the swimming pool equipment. And the insured ultimately completed the covered repairs for less than the amounts paid by USAA. But the insured disputed the amount owed and sought payment for a full concrete roof replacement, re-plastering of the swimming pool due to acid washing, repair of patio columns and replacement of the air conditioning unit among other damages.

When USAA confirmed its earlier findings and refused to issue additional payments, the insured filed a lawsuit in Hidalgo County alleging breach of contract, breach of the duty of good faith and fair dealing, statutory violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act and also sought exemplary damages. USAA was undaunted and presented the issues to a Hidalgo County jury. And last week, the jury returned a defense verdict in USAA's favor on all claims, both contractual and extra-contractual, confirming USAA's firm belief that it had satisfied the contract and met its duty of good faith and fair dealing in addressing its member's claim.

Editor's Note: Martin, Disiere, Jefferson and Wisdom congratulate USAA and its trial counsel, David Kinder and Larissa Fields and Victor V. Vicinaiz of Roerig, Oliveira & Fisher, L.L.P.

COURT ENFORCES "INSURED'S DUTIES AFTER LOSS" – ABATES LAWSUIT PENDING INSURED'S COOPERATION IN COMPLETING EUO, PROVIDING REQUESTED DOCUMENTS AND ALLOWING PROPERTY RE-INSPECTION

Last week, the U.S. District for the Northern District of Texas granted an insurer's motion to abate a lawsuit pending the insured's completion of an examination under oath (EUO), and other duties after loss, as conditions precedent for bringing a lawsuit alleging breach of contract, breach of the duty of good faith and fair dealing, DTPA and Texas Insurance Code violations. In *Cooper v. Metropolitan Lloyds Insurance Company of Texas,* 2018 WL 620206 (N.D. Tex. January 30, 2018), the insured presented a claim for wind and hail damage to their residence on April 11, 2016. The insurer investigated the claim and on April 25, 2016, it promptly paid $12,867.88 for covered losses based on its estimates. The following month, a public adjuster contacted the insurer but did not submit a damage estimate until September 2016. The insurer requested additional information and documents to support the claim and, to re-inspect the property. But those requests went unanswered and both parties retained counsel.

Finally, over a year after the date of loss, in May 2017, the insured agreed to submit to the EUO and was asked to bring documents related to the damage being claimed. But during the EUO, she refused or was unable to answer many questions regarding the items claimed and failed to provide the requested documents and information. The insured then ended the EUO, over the insurer's objection, before the insurer was through with its questioning. The insurer also requested the opportunity to re-inspect the property with the insured's public adjuster but was unable to do so before suit was filed. The lawsuit was removed to federal court and the insurer moved to abate the case pending the insured's cooperation and compliance with its "Duties After Loss" under the policy.

In response, the insured's attorney argued that the insurer could get the same information through discovery and abatement was not necessary. The court analyzed policy terms requiring the insured's cooperation with its duties after loss as a condition precedent to bringing a lawsuit and applying Texas law, determined that abatement of the lawsuit pending the insured's compliance with those duties was the proper legal remedy. Accordingly, the court ordered the case abated for "sixty (60) days to allow time for Plaintiff to fully cooperate with Defendant by completing an examination under oath, supplying the requested examination documents, and allowing Defendant to re-inspect the damaged property as required by the insurance policy."

SAN ANTONIO COURT OF APPEALS FINDS INSURED'S BREACH OF CONTACT AND EXTRA-CONTRACTUAL CLAIMS FAIL TO SURVIVE TIMELY PAID APPRAISAL AWARD

Last week, in a permissive appeal of a Webb County trial court's denial of an insurer's motion for summary judgment**,** and following review of the "five distinct but interrelated rules that govern the relationship between contractual and extra-contractual claims in the insurance context" recently propounded by the Supreme Court of Texas in *USAA Lloyds v. Menchaca*, 60 Sup. Ct. J. 672, 2017 WL 1311752 (Tex. Apr. 7, 2017 reh'g granted Dec. 15, 2017), the San Antonio court of Appeals found that the insured's contractual and extra-contractual claims did not survive the insurer's timely payment of an appraisal award.

In *Wellington Insurance Company v. Banuelos*, 2018 WL 626534 (Tex. App. – San Antonio January 31, 2018), the insured presented a claim for storm damage to the insured residence. An independent adjuster inspected the loss and found minor damage to vents that totaled $902.40. And based on the adjuster's findings, the insurer denied coverage for the roof and a shed. No payment was issued because the damage was less than the deductible and the file was closed. The insured filed suit alleging breach of contract, breach of the duty of good faith and fair dealing and statutory violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act. The insurer then invoked the appraisal clause and through the process, an award was issued for $10,797.62, including damage to the roof and shed. After applying depreciation and the insured's deductible, Wellington timely paid the insured $8,946.70.

After paying the appraisal award, Wellington filed a motion for summary judgment which the trial court denied. But in light of recent case law developments, Wellington asked the trial court to allow a permissive appeal presenting the sole issue of "whether an insured's breach of contract and extra-contractual claims survive a timely paid appraisal award." After analyzing a series of recent decisions; *Ortiz v. State Farm Lloyds*, 2017 WL 5162315 (Tex. App. – San Antonio Nov. 8, 2017), *Garcia v. State Farm Lloyds*, 514 S.W.3d 257 (Tex. App. - San Antonio 2016, pet. denied); and the guidance recently provided by the Texas Supreme Court's *Menchaca* decision, the court held that the trial court erred in denying Wellington's motion for summary judgment and reversed the decision rendering summary judgment in favor of Wellington and the independent adjuster.

COURT FIND SALE OF SECURITIES EXCLUSION APPLIES, NO DUTY TO DEFEND AND GRANTS SUMMARY JUDGMENT TO INSURER

Recently, the Federal District Court, Sherman Division granted summary judgment in favor of a For-Profit Management Liability insurer, enforcing the broad "arising-out-of" exclusionary language of the policy. In *Gleason v. Markel American Ins. Co*., No. 4:17-CV-00163, 2018 WL 538324, *1 (E.D. Tex.—Sherman Division, Jan. 24, 2018, mem. op.), Tom Gleason and Julie Gleason ("the Gleasons") owned Oregon Ice Cream, LLC ("the Company") and entered an agreement to sell their interest to a third party. Subsequently, the third party brought suit against the Gleasons alleging that they made false representations in the purchase agreement and during the negotiations. The Gleasons prevailed on all the claims brought against them and were awarded attorney's fees and costs. Nonetheless, the Gleasons brought suit against their insurer, Markel American Insurance Company ("Markel"), for denying them a defense.

Markel denied coverage to the Gleasons pursuant to the policy provision excluding losses "based upon, arising out of or in any way involving the actual, alleged or attempted purchase or sale, or offer or solicitation of an offer to purchase or sell, any debt or equity securities . . . ." The Court agreed with Markel that coverage was excluded under the provision, stating: "[e]ven if the Gleasons [were] correct that some of the [third-party's] allegations [were] not caused by the sale of the Gleasons' interest in the Company, all of the allegations bore, at the very least, an incidental relationship to the sale of the their interest . . . ." The Court held that the third party's suit against the Gleasons fit into the exclusion, and affirmed summary judgment in favor of Markel.

TEXAS COURT OF APPEALS REFUSES TO ADOPT "EXHAUSTION DOCTRINE" TO IMPOSE LIABILITY ON UIM INSURER THAT CONSENTED TO INSURED'S POLICY-LIMIT SETTLEMENT WITH THE LIABILITY CARRIER

Recently, the Dallas Court of Appeals affirmed the trial court's dismissal of the insured's claims on the grounds that (1) the insured's claim for breach of contract was premature under *Brainard* even though the insurer consented to the insured's liability settlement, and (2) the insured's claim under the theory of the "exhaustion doctrine" failed to state a viable cause of action. In *Weber v. Progressive County Mutual Ins. Co*., No. 05-17-00163-CV, 2018 WL 564001, (Tex. App.—Dallas, January 26, 2018, mem. op.), the insured was injured in a motor vehicle accident. Thereafter, with Progressive County Mutual Insurance Company's consent, the insured settled her claim with the other motorist's insurer for the $30,000 policy limit. The insured then made a demand for the policy limit of her UIM coverage with Progressive. Progressive made a counteroffer, which the insured rejected. Next, the insured sued Progressive for breach of contract and for violations of the Texas Insurance Code. Progressive responded with two special exceptions, asserting that (1) the insured's claims were premature until she obtained a judgment establishing the liability of the other driver and the amount of her damages, and (2) the insured's claim under the "exhaustion doctrine" was not recognized in Texas and thus failed to state a viable cause of action. Based on the grounds asserted, the trial court sustained the two special exceptions and dismissed the insured's claims with prejudice.

On appeal, the court, relying on *Brainard v. Trinity Universal Insurance Co*., 216 S.W.3d 809 (Tex. 2006), affirmed the trial court's dismissal. In *Brainard*, the Texas Supreme Court ruled that a "UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist." Further, "neither a settlement with nor an admission of liability from the underinsured motorist establishes UIM coverage, because a jury could find that the underinsured

motorist was not at fault or award damages that do not exceed the [underinsured motorist's] liability insurance." As such, on this appeal, the Court of Appeals held that the insured failed to present a contract claim because she had not obtained a judgment prior to suing Progressive for UIM benefits, despite Progressive's consent to the insured's liability settlement.

As to the insured's claim of the exhaustion doctrine, she cited authority from other jurisdictions entitling UIM claimants to UIM bodily injury benefits upon (1) an agreement by insurer with insured; (2) providing the insurer with a judgment of damages by legal proceeding; or (3) settlement or judgment exhausting the policy limits of all liability policies. The insured urged the doctrine's application despite the fact she conceded that it had not been recognized in Texas. The court concluded that adoption of the doctrine would directly conflict with *Brainard*, and sustained Progressive's special exceptions. Notably, the court hinted it had some reluctance, or at the very minimum, a lack of enthusiasm, in affirming the dismissal, as it stated: "[w]hatever the virtues of a contrary rule might be, as an intermediate court, we are bound to follow the rule laid down in *Brainard* unless and until the supreme court reconsiders or revises it."

COURT REJECTS INSURED'S UNSUPPORTED CONTENTION THAT GOOD FAITH DISAGREEMENT AND GOOD FAITH INVESTIGATION ARE CONDITIONS PRECEDENT TO INVOKING APPRAISAL

Recently, the Federal District Court of the Sherman Division granted Safeco Insurance Company of Indiana's motion to compel appraisal, overruling the insured's argument that a good faith disagreement and good faith investigation of the claim are conditions precedent to invoking the appraisal provision. In *Adami v. Safeco Ins. Co. of Indiana*, No. 4:17-CV-574, 2018 WL 501093 (E.D. Tex.—Sherman Division, January 22, 2018, mem. op.), the insured made a claim with his insurer, Safeco, for water and foundation damage. In response, Safeco procured and provided an estimate to the insured. However, the insured believed the estimate was low, and sued Safeco for breach of the duty of good faith and fair dealing and violations of the DTPA and Texas Insurance Code. Safeco responded with a motion to compel appraisal. The policy's appraisal provision provided "[i]f you and we do not agree on the amount of the loss ... then, on written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand."

In response to Safeco's motion to compel appraisal, the insured contended that there must be a good faith disagreement and that Safeco should have engaged in a good faith investigation of the claim as conditions precedent to invoking the appraisal provision. The court disagreed, noting that the rules of contractual construction require Texas courts to give contractual terms their "plain, ordinary, and generally accepted meaning[,]" concluded that the only condition precedent was that the insured and Safeco did not agree on the amount of the loss.

The insured further contended that Safeco engaged in "bleak, pervasive inferior claims-handling" and, therefore, could not invoke the appraisal provision. The court again disagreed and concluded that "the degree or severity of the alleged wrongdoing was not the deciding factor, or even a factor at all in the consideration. The plain language of the contract was the determining factor."

In sum, the court held that "a good faith investigation and good faith disagreement [was] not a condition precedent to the appraisal provision." The court noted that its holding "does not interfere with the requirement that insurers 'deal fairly and in good faith with their insureds.'"

FEDERAL COURT REITERATES POSITION ON ADJUSTER LIABILITY IN UNFAIR SETTLEMENT PRACTICES FOR PURPOSES OF JURISDICTION

Recently, the United States District Court for the Northern District of Texas addressed joinder of an insurance adjuster based on a claim of unfair settlement practices. *Mary v. Allstate Lloyds*, No. 3:16-CV-3383-L-BN, 2017 WL 6462009 (N.D. Tex. Dec. 19, 2017) (slip op.) recognized adjuster liability under Texas Insurance Code Section 541.060 for purposes of the Federal court's jurisdiction. Plaintiff Margaret Mary moved to remand the case to state court based on joinder of Texas defendant, insurance adjuster John Spuriell. Mary alleged Spuriell was personally liable for unfair settlement practices under the Texas Insurance Code.

Defendants, in an attempt to keep the lawsuit in Federal court, argued that Mary's joinder of Spuriell was improper as she had no reasonable basis to recover against him, since, as a matter of law, insurance adjusters cannot be held personally liable for unfair settlement practices. The Court disagreed stating, "this court and others have concluded that an insurance adjuster may be held personally liable for engaging in unfair settlement practices under § 541.060(a)(2) of the Texas Insurance Code because the adjuster can effect or bring about the settlement of an insured's claim." The basis for the potential liability of an adjuster is that Chapter 541 of the Insurance Code includes adjusters in the definition of "person" and does not distinguish between the roles of insurers and adjusters. Furthermore, liability for unfair settlement practices is not limited exclusively to conduct involved in settlement, but covers "a broader swath of conduct *related* to settlement." The Court concluded that the "better approach" is to construe § 541.060(a)(2)(A) as not precluding claims against adjusters as a matter of law, but instead considering their liability on a case by case basis. As a result, the Court remanded the case as Defendants could not show that Spuriell was improperly joined in the lawsuit.

Editor's Note: The Court did not address the merits of the claim against the adjuster or the potential scope of the adjuster's liability. The burden for proving wrongful joinder is steep, the standard being whether the defendant has demonstrated there is no possibility for recovery against the improperly joined party. This holding simply states that adjusters are not insulated from liability as a matter of law in allegations of unfair settlement practices. The court must look at the particular facts of each case to make such a determination.

WESTERN DISTRICT OF TEXAS DENIES SUMMARY JUDGMENT ON ISSUES OF PROMPT NOTICE OF CLAIM

Recently, the United States District Court for the Western District of Texas denied summary judgment on issues surrounding an Insured's prompt notice of a claim to the Insurer. In *GuideOne Specialty Mutual Ins. Co. v. Fellowship at Forest Creek*, No. AU-16-CA-597-SS, 2018 WL 298788 (W.D. Tex. Jan. 3, 2018) (slip op.) the Court addressed motions for summary judgment on several issues including the diligence of the Insured's notice of claim to the Insurer. Based on the existence of various issues of material fact, the Court denied summary judgment to both parties.

The case arose from a dispute relating to a hail/wind damage claim between the Fellowship at Forest Creek (FFC) in Round Rock, Texas, and their insurance company, GuideOne Specialty Mutual Insurance Company ("GuideOne"). Staff at FFC noticed considerable leaking in one of FFC's building in 2014/2015 whenever it rained. Upon investigation by maintenance staff and a parishioner with experience in roofing, FFC determined the cause of the leaking was previous hail damage. FFC hired a public adjuster who, through engineers, determined the hail damage occurred in May 2012. After a five month investigation, FFC submitted a claim to GuideOne in January 2016. GuideOne hired an engineer who investigated and concluded the damage stemmed from a storm in May 2009. As a result, GuideOne denied FFC's claim and filed an action for declaratory judgment that the damage was not covered by GuideOne's policy. FFC counterclaimed, alleging breach of contract and violation of the Texas Insurance Code. Both parties subsequently filed motions for summary judgment.

The Court considered the concept of "prompt" notice of a claim and when "reasonable" notice is made—meaning if prompt notice is evaluated in the time elapsed from the date of loss or from the date that the insured learns of the loss. Considering conflicting case law, the Court opted "to consider the diligence and timeliness of the insured in discovering the damage as proper factors in evaluating whether the notice was reasonably prompt." An additional factor in denying liability based on failure to provide prompt notice is whether the insurer was prejudiced as a result of the insured's delay in providing notice.

The Court denied summary judgment for both parties based on the existence of several fact issues including: (1) dispute as to when the hail damage occurred; (2) dispute as to when FFC first learned of the hail damage; and (3) dispute as to whether FFC reported the claim within a reasonable period of time. The denial was based on several key pieces of evidence including the experts' disagreement on the date of the loss, which is material in determining whether FFC gave reasonably prompt notice. In its denial, the Court rejected GuideOne's assertion that FFC's five month investigation was unreasonable as a matter of law.

Editor's Note: This case underscores the importance in evaluating the insured's diligence in discovering the claim damage. Careful consideration should be directed to the underlying policy and to whom notice is required—whether it is sufficient for an agent of the insured to discover the loss, or whether it necessitates the knowledge of the insured's officers.