

# TEXAS INSURANCE LAW NEWSBRIEF

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## FEDERAL COURT FINDS ALLEGATIONS AGAINST EMPLOYEE ADJUSTER SUPPORT INSURANCE CODE ALLEGATIONS – REMANDS CASE TO STATE COURT

Last week, a Federal District Court in Houston, Texas analyzed allegations against an employee adjuster and held the allegations were sufficient to support causes of action alleged against the adjuster, so as to defeat diversity jurisdiction and remanded the case to state court. In *Sarkar Investments, Inc. d/b/a Palace Inn – Tomball v. Travelers Property Casualty Company of America*, WL 706471 (S.D. Tex. February 5, 2018), the insured presented a claim for wind, hail and water damage alleging a 2015 storm damaged the insured property. Travelers assigned its adjuster who was responsible for retaining experts, investigating and adjusting the claim. Unhappy with the findings, the insured brought suit in state court against Travelers and the adjuster. Travelers removed the case to federal court alleging that the adjuster was improperly joined to defeat diversity jurisdiction. The insured, believing they had sufficiently stated causes of action against the adjuster, filed a motion to remand the case to state court.

The court noted that it could make the improper joinder determination in two ways, a Rule 12(b)(6) review of the pleadings to determine if the allegations state a claim on which relief may be granted, or the court could look beyond the pleadings and conduct a summary inquiry. But it could not do both. So choosing to analyze the pleadings, the court observed several, specific allegations such as assertions of a biased investigation, retaining biased experts, overlooking wind and hail damage, underestimating and misrepresenting “the actual cost to repair or replace the under scoped wind and hail damage...particularly with respect to the necessary costs of materials, labor, taxes, and contractor overhead and profit” and similar allegations. Applying federal pleading standards, and analyzing the Texas Insurance Code allegations, the court held that the insured’s “allegations contain adequate detail to reach the threshold of facial plausibility and thus to state a claim on which relief can be granted under Texas Insurance Code § 541.060(a)(2)(A)” against the adjuster. Accordingly, diversity jurisdiction was defeated and the case was remanded to state court.

**Editor’s Note:** This case illustrates the merits of an insurer electing to take responsibility for its own employee / agent’s actions in handling wind and hail property damage claims under Texas Insurance Code § 542A.006(a) and then being able to seek dismissal of any related causes of action under § 542A.006(b).

## CERTIFICATE OF SUBSTANTIAL COMPLETION DOES NOT FULFILL SURETY’S OBLIGATIONS UNDER PERFORMANCE BOND

Last week, the Texarkana court of appeals held a certificate of substantial completion on a construction project was not enough to relieve the contractor’s surety of its obligations under a performance bond. In *Wolfe City, Texas v. American Safety Cas. Ins. Co.*, No. 06-17-00075-CV, --- S.W.3d. --- (Tex. App.—Texarkana Feb. 9, 2018), a construction company contracted to install an automatic water meter system in Wolfe City. American Safety provided a performance bond to the contractor. The city’s engineer supervising the project signed a certificate of substantial completion. Afterward, significant problems with the meter system were found, and there was testimony the system was never fully functional. The city’s engineer testified that if he had known about the problems that were later discovered, he would not have signed the certificate.

In the resulting lawsuit, American Surety moved for and won summary judgment in the trial court on the ground that the certificate of substantial completion absolutely relieved it of any duty under the performance bond. American Surety also won a no-evidence summary judgment on the ground that there was no evidence the problems which occurred after the certificate of completion was signed were the result of any construction defect rather than a design defect in the products supplied under the project’s specifications.

However, the court of appeals applied the time-honored Texas rule which requires the parties and the court to examine the contract itself to determine the parties’ obligations. The contract expressly specified that the contractor’s obligation to complete the work in accord with the contract was absolute, and a certificate of substantial completion would not release the contractor from its obligations. American Surety had relied on a line of cases in which the certificate of substantial completion set the date on which the one-year statute of limitations for suit on a performance bond begins to run, but the certificate itself is not equivalent to full performance of the contract unless the contract states that it is... which this contract did not. To the contrary, the contract expressly imposed additional duties on the contractor (and by extension, on the surety company) to correct problems discovered within one year of substantial completion.

Having concluded the certificate of substantial compliance was not definitive proof of full performance of the contract, the court of appeals also reversed American Safety’s no-evidence summary judgment. The court held there was some evidence the contractor had breached its contract because of the numerous problems discovered after the certificate was signed, and which the contractor had an

obligation to correct. The contract exonerated the contractor of any responsibility for a design defect in the project resulting from the negligence of the city or the engineer, and the contractor argued that because the project specifications required the contractor to use a specific brand of meters, the defects in those meters were the city's fault and not the contractor's. However, the contract provided that the contractor was responsible for supervising all work performed by subcontractors, and the subcontractor who provided the defective meters was under the contractor's supervision.