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TEXAS INSURANCE LAW NEWSBRIEF

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COURT FINDS INSURED'S LACK OF NOTICE OF CLAIM OR LAWSUIT UNDER AUTOMOBILE LIABILITY POLICY CONSTITUTES PREJUDICE AS A MATTER OF LAW

Last Thursday, the Austin Court of Appeals affirmed a trial court's grant of summary judgment in favor of an automobile liability insurer finding the insured's lack of notice of the accident or the lawsuit, prejudiced the insurer as a matter of law and precluded coverage under the policy. In *Victor Egly v. Farmers Ins. Exch. a/k/a Farmers Ins.*, Appellee, No. 03-17-00467-CV, 2018 WL 895043, (Tex. App.—Austin Feb. 15, 2018), Farmers insured, Ismael Hernandez, was driving an insured vehicle and was involved in a collision with Victor Egly. Egly sued Hernandez for negligence but Hernandez did not tender or notify Farmers of the lawsuit. Egly's attorney, however, sent several messages directly to Farmers informing them of the lawsuit and a possible default judgment to be taken against their insured. Farmers sent messages to Hernandez inquiring about the case, but Hernandez did not respond. Consequently, Hernandez never notified Farmers of the lawsuit or requested a defense.

After obtaining a default judgment, Egly sued Farmers, seeking payment of the judgment as a third-party beneficiary to the insurance policy. Farmers filed a motion for summary judgment, arguing that it had no duty to defend the lawsuit against Hernandez and, no duty to pay the judgment as a matter of law, because Hernandez never informed his insurer of the lawsuit as required by the policy. The trial court rendered a summary judgment in Farmers' favor, and Egly appealed.

In his appeal, Egly argued that the trial court erred because Farmers did not establish as a matter of law that it had no duty to defend the lawsuit. Farmers argued that it did not receive notice from Hernandez concerning the accident and Egly's lawsuit as required by the policy, and that it was therefore, prejudiced as a matter of law. Egly responded by asserting Farmers undisputedly had actual notice of the lawsuit against Hernandez, and therefore was not prejudiced. Citing the Texas Supreme Court's decision in *National Union Fire Insurance Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603 (Tex. 2008), the Austin Court of Appeals found that "an insurer is not required *sua sponte* to defend its insured when the insured has not informed the insurer of the lawsuit or asked the insurer for representation". The court concluded that because Hernandez never notified Farmers of the lawsuit or requested representation, and because Egly obtained a default judgment that it sought to enforce against Farmers, Farmers has established that it was prejudiced by this lack of notice as a matter of law. Accordingly, the trial court's final summary judgment in favor of Farmers was affirmed.

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

Last week, Houston's Fourteenth 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 *Haiquan Zhu v. First Cmty. Ins. Co.*, No. 14-16-00226-CV, 2018 WL 842350 ((Tex. App. – Houston [14th Dist.] Feb. 13, 2018), the insured presented a claim for storm damage to the insured residence. An independent adjuster inspected the loss and found damage that totaled $2,726.14. After applying the policy's deductible, First Community issued payment to the insured for $226.14. A few months later, Zhu filed suit against First Community asserting claims for breach of contract, violation of the Prompt Payment of Claims Act, violations of Insurance Code chapter 541, and violations of the Deceptive Trade Practices Act ("DTPA"). First Community invoked the appraisal provision of the policy and demanded appraisal of the amount of the loss. The two appraisers and the umpire issued an appraisal award in which they agreed that the amount of the loss was $17,384.30 in replacement cost, depreciation of $3,500, and an actual cash value of $13,884.30. First Community promptly issued a check to the insured for the actual cash value of the appraisal award, less the deductible and the prior payment.

After payment of the appraisal award, First Community moved for summary judgment on all of the insured's claims. The trial court granted the motion as to all causes of action and Zhu appealed. The appellate court began by noting that Texas courts have held that appraisal provisions in insurance contracts are binding and enforceable. The court held that because Zhu had not asserted one of the valid grounds for setting aside the appraisal award, First Community's payment of the appraisal award satisfied their contractual obligations under the policy. Further, the appellate court upheld the summary judgment on the prompt pay claims due to the timely payment of the appraisal award. Finally, the court also upheld summary judgment on the Chapter 541 and DTPA claims because Zhu had provided no evidence of an injury independent of the policy benefits.