

TEXAS INSURANCE LAW NEWSBRIEF

MAY 11, 2018

FORTH WORTH COURT OF APPEALS FINDS WAIVER OF CONTRACTUAL RIGHT TO APPRAISAL

Last week, in a mandamus action the Fort Worth Court of Appeals upheld a trial court finding an insurer had waived its right to appraisal. In *In re Allstate Vehicle & Prop. Ins. Co.*, No. 02-17-00319-CV, 2018 WL 2069185, (Tex. App.—Fort Worth, May 3, 2018) the court found the trial court did not abuse its discretion by finding that the insurer waived its right to invoke its policy's appraisal provision. The insured made two claims for roof damage on two separate dates under her homeowner's policy with Allstate. Allstate did not issue payment on either claim because the covered damage observed did not exceed the policy's deductible. The insured filed suit pursuant to the expedited action provisions of Texas Rule of Civil Procedure.

The court noted that prior to invoking the appraisal provision set forth in the policy, Allstate had conducted at least six inspections of the insured's roof; had removed the case to federal court—the federal court remanded it to state court three months later; had taken the insured's deposition; had conducted discovery; had agreed to a trial setting; sought and had obtained an order compelling a seventh inspection of the insured's roof in order to prepare for the upcoming jury trial; and had obtained an extension of time to the expert designation deadline in order to designate the new expert conducting the seventh inspection. After the inspection was completed, Allstate made a second offer to settle the case that was rejected by the insured. The day after the rejection of the second settlement offer, Allstate made a written demand for appraisal under the terms of its policy. When the insured refused to participate, Allstate filed a motion to compel appraisal and abate the lawsuit.

The trial court conducted a hearing on Allstate's motion to compel an appraisal and motion to abate. Allstate argued that a point of impasse had been reached when the insured rejected the second settlement offer and that, consequently, Allstate's demand the next day was timely. The insured argued that Allstate had waived its right of appraisal by conduct inconsistent with that right and that she would suffer prejudice from Allstate's attempt to invoke the appraisal clause. At the hearing on Allstate's motion, the trial court noted that the parties had been preparing for trial and the insured had asked for an extension of deadlines in order to prepare for trial. The trial court found the insurer had waived the right to invoke the appraisal provision and denied the request for the appraisal. This mandamus action followed.

The appellate court began its analysis by noting the standard for mandamus relief is a showing of clear abuse of discretion and no adequate remedy by appeal. The court then found that whether the party's delay in invoking an appraisal clause is reasonable or unreasonable depends on the time between the “point of impasse” in the parties' negotiations concerning the amount of loss and the time the appraisal clause is invoked. The court defined impasse as the point when it becomes apparent to both sides that they disagree as to the damages and that further negotiations are futile. The court also found that other factors or circumstances are pertinent in determining whether a party has waived by conduct, its right to an appraisal and that the party challenging the enforceability of an appraisal clause bears the burden of establishing waiver by conduct of the party and, prejudice. The court found that the point of impasse had been no later than the day the insured rejected the initial settlement offer and reasserted her demand. The insurer failed to demand appraisal for more than three months after that date. Based on the facts and circumstances of the case, the court found it was within the court's discretion to find the insurer delayed and acted inconsistent with the right of appraisal and, therefore, waived that right. The court also found that the policy did not contain a “nonwaiver” clause barring the trial court from finding waiver by conduct. The writ of mandamus was denied and the stay of the underlying case was lifted.

FEDERAL COURT FINDS NO VIABLE CAUSE OF ACTION AGAINST ENGINEER AND DENIES MOTION TO REMAND

Last week, a magistrate in the Western District of Texas recommended that a motion to remand be denied and motion to dismiss granted in favor of an insurer. In *8000 Del Donore HOA-8000 Inc. v. Mid-Century Insurance Co.*, No. 5:17-CV-01226, (W.D. Tex. April 30, 2018), the insured filed a motion to remand based on lack of diversity. An engineering firm that had been added as a party also filed a motion to dismiss.

The insured originally filed an action in Bexar County, Texas, concerning an insurance claim related to Plaintiff's property. The insured claimed the property was severely damaged by a windstorm/hailstorm. The insured submitted a claim to Mid-Century under to the Policy and Mid-Century assigned the claim to an adjuster. The adjuster inspected the Property with the assistance of two employees of an engineering firm. After the inspection, an employee of the engineering firm prepared a report. After the claim was denied, the insured sued Mid-Century for breach of contract, violations of the Texas Insurance Code, and breach of the common law

duty of good faith and fair dealing. The insured also sued the engineering firm and the engineer for “aiding and abetting” violations of Texas Insurance Code and Civil Conspiracy.

The insured brought an action to remand the action back to state court. The insurer opposed remand and asked the Court to dismiss the engineer and engineering firm as improperly joined. Analyzing Texas law, the magistrate found that the insured could not state a claim for aiding and abetting or civil conspiracy against the engineer for inspecting the roof or authoring the report. The magistrate also concluded the insured cannot state a claim against the engineering firm for vicarious liability and those claims should also be dismissed. Lastly, the magistrate recommended the District Judge deny the motion to remand and dismiss all claims against the engineer and engineering firm.