Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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YET ANOTHER TEXAS COURT OF APPEALS AFFIRMS PROMPT PAYMENT OF APPRAISAL AWARD PRECLUDES FURTHER RECOVERY

The Amarillo court of appeals recently issued the latest opinion in a growing body of law confirming that an insurance breach of contract and bad faith suit is effectively over once the carrier pays an appraisal award. In Turner v. Peerless Indemnity Ins. Co., No. 07-17-00279-CV, 2018 WL 2709489 (Tex. App.—Amarillo June 5, 2018) (slip op.), an appraisal was conducted while the lawsuit was pending. Peerless promptly paid the resulting award and moved for summary judgment on all claims, which the district court granted. Turner appealed.

The court of appeals seemed genuinely mystified what Turner's alleged contractual damages could be when he had been promptly paid all he was entitled to under the appraisal award and the policy's appraisal clause. The court axiomatically rejected the idea that the difference between the carrier's initial claim payment and the amount of the appraisal award could constitute damages for a breach of contract, because the appraisal itself was a process provided for by the contract and the award was in compliance with the contract. Perhaps significantly, the court also held that the carrier's payment of the award 13 days after the award was issued, which included a delay of several days while the carrier sought confirmation of payment instructions, was timely and reasonable as a matter of law. Thus, there was no breach of contract the court could identify, and the court upheld dismissal of the contract claim

With regard to Turner's extra-contractual claims, the court noted "the independent injury rule is alive and well, as reiterated by the Texas Supreme Court in its recent Menchaca opinion…" Because Turner could not raise a fact issue implicating any injury that was genuinely independent of his failure to receive the policy benefits he wanted, the court found no independent injury and also upheld the dismissal of the extra-contractual claims.

FIFTH CIRCUIT AFFIRMS SUMMARY JUDGMENT IN WIND/HAIL CASE, ENFORCING CONCURRENT CAUSE DOCTRINE

The Fifth Circuit recently confirmed that in wind/hail cases, the insured must meet its burden of proof to establish not only that the reported hail damage occurred during the policy period, but also how much of the damage occurred during the policy period, and sent a message that federal courts can and should grant summary judgments on this issue. In Certain Underwriters at Lloyd's of London v. Lowen Valley View, LLC, N0 17-10914, 2018 WL 2727323 (5th Cir. June 6, 2018) (slip op.), the insured reported a hail claim, alleging a date of loss two years earlier. An engineering investigation revealed that there was a single hail event during the policy period which could have caused some of the damage, and the engineer admitted at one point that the date of loss alleged by the insured was the "most likely" date the observed damage occurred. However, there was also ample evidence that additional storms had occurred prior to the policy period and they almost certainly also caused some of the damage.

The trial court granted the carrier's motion for summary judgment based on the concurrent cause doctrine (i.e., when a covered and non-covered peril combine to cause damage, the insured bears the burden of demonstrating how much of the damage was caused solely by the covered peril). The Fifth Circuit agreed, stating, "Given the undisputed evidence of severe hail storms outside the coverage period, Lowen Valley's evidence does not afford the jury a reasonable basis on which to allocate the damage." The court went on to affirm the dismissal of the insured's extra-contractual claims as well, relying on Menchaca for the proposition that "an insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits."

Editor's note: This message that federal courts will enforce the Texas concurrent cause doctrine and require insureds to meet their legal burden of proof should make it easier, at least in federal courts, to obtain early resolutions of cases in which the policyholder sues without any reliable evidence that the alleged damage is in fact the result of a covered peril which occurred during the policy period.