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TEXAS INSURANCE LAW NEWSBRIEF

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PUBLIC ADJUSTER ONLY ENTITLED TO RECOVER COMMISSION ON SUPPLEMENTAL PAYMENTS, NOT GROSS PAYMENT

In a decision that is of interest to all carriers who handle claims with public adjusters involved, the Fort Worth Court of Appeals recently examined a dispute between an insured and his public adjuster (PA) over how much the PA was entitled to be paid. In *Dan Dilts Construction, Inc. v. Weeks*, No. 02-17-00373-CV, 2018 WL 5668530 (Tex. App.—Fort Worth Nov. 1, 2018) (slip op.), the insured, Dilts, made a hail claim on several properties. After being dissatisfied with the insurer's initial claim valuation of $351,000, Dilts hired public adjuster Weeks to assist him in seeking reconsideration of his claim. The insurer recalculated the claim and found the new gross claim to be $611,000. The PA demanded payment of 10% of the gross replacement cost claim, or $61,100. The insured contended the PA was only entitled to 10% of the supplemental payments that the PA obtained after his retention.

The court held that under the terms of the contract (and the controlling provisions of the Texas Insurance Code), the most the PA was entitled to recover was 10% of the amount collected, adjusted, or otherwise received ***as a result of the PA's services***. Therefore, the PA was not entitled to recover 10% of the gross payment, but only 10% of the supplemental claim that was re-adjusted after his retention.

FEDERAL DISTRICT COURTS DIVERGE ON CORRECT WAY TO DISMISS AN ADJUSTER UNDER NEW INSURANCE CODE 542A

Texas Insurance Code § 542A.006, enacted September 1, 2017, allows an insurer to accept liability for the acts of its adjusters and achieve early dismissal of adjuster defendants, theoretically making it easier to remove lawsuits against insurers to federal court. However, litigants and courts appear to be still feeling out the procedural logistics of this provision and its interplay with existing Fifth Circuit removal law. In June 2018, a Houston federal court rejected a removal after the insurer obtained dismissal of its adjuster in state court under 542A and then removed the case after the adjuster was dismissed, holding this method violated the "voluntary-involuntary rule." *See Massey v. Allstate Vehicle & Prop. Ins. Co.*, No. CV H-18-1144, 2018 WL 3017431 (S.D. Tex. June 18, 2018) (slip op.).

In August 2018, we reported on another case in which a San Antonio federal court approved a different approach – immediately removing the case under an improper joinder theory, without attempting to dismiss the adjuster in state court, and allowing the federal court to conduct a traditional improper joinder analysis. *See Electro Grafix, Corp. v. Acadia Ins. Co.*, No. SA-18-CA-589-XR, 2018 WL 3865416 (W.D. Tex. Aug. 14, 2018) (slip op.), Article

Last week, the San Antonio court considered the approach previously rejected in *Massey*, and approved it. In *Flores v. Allstate Veh. & Prop. Ins. Co.*, No. SA-18-CV-742-XR, 2018 WL 5695553 (W.D. Tex. Oct. 31, 2018) (slip op.), Allstate accepted responsibility for the adjuster and obtained the adjuster's dismissal in state court. Two days later (and still within 30 days after being served), Allstate removed the case on diversity grounds, but did not expressly invoke improper joinder because the adjuster had already been dismissed.

In the resulting remand battle, the court considered facts similar to those in *Massey*, but concluded that improper joinder is a recognized exception to the voluntary-involuntary rule, and applies whether the improperly joined defendant is still in the suit or has already been dismissed. Thus, the outcome was the opposite of *Massey*, despite similar facts. The key factual difference between the two was that in *Flores*, Allstate was able to get the adjuster dismissed within the first 30 days and thus could argue that the case was removable from the beginning because of the improper joinder. In contrast, in *Massey*, the dismissal of the adjuster took more than 30 days, and thus in order for the removal to be timely, Allstate had to argue the suit was originally not removable, but had been rendered removable by the adjuster's dismissal. As acknowledged by the court in the *Flores* opinion, this was the very argument that sank the removal effort in *Massey*.

HOUSTON FEDERAL COURT REMANDS HARVEY CASE SUA SPONTE

In another recent improper joinder case, a Houston federal district court found plausible claims for relief alleged against the adjuster, and remanded the case. In *Murray v. Allstate Veh. & Prop. Ins. Co., No.* CV H-18-3411, 2018 WL 5634949 (S.D. Tex. Oct. 30, 2018) (slip op.), what makes the remand noteworthy is that the plaintiff did not file a motion to remand. Rather, the court observed that even though the plaintiff had not moved to remand, it must still ensure its own subject-matter jurisdiction, even if it means remanding the case *sua sponte*. The court then went on to conduct a standard improper joinder analysis, and found that although the complaint closely tracked the language of the Insurance Code and the DTPA, it also alleged specific acts of the adjuster that were sufficient to state a facially plausible cause of action, and thus overcame the improper joinder threshold, defeating diversity jurisdiction.