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HOUSTON COURT OF APPEALS AFFIRMS JUDGMENT AWARDING $0 ATTORNEY'S FEES

The First Court of Appeals in Houston recently affirmed a judgment awarding Richard Crounse $0 attorney's fees for the prosecution of claims against State Farm in *Crounse v. State Farm Mut. Auto. Ins. Co.*, – S.W.3d –, 2010 WL 5186822 (Tex.App. – Houston [1st Dist.] 2010). On June 16, 2005, Crounse was driving his car when he hit an object in the road, causing damage to the underside of his car. The car was towed to the nearest repair shop in Fairfield, Texas, where extensive repairs were made. Crounse submitted a claim for the repairs to his automobile insurer, State Farm, which covered the repairs. The policy provided coverage for reasonable towing charges but Crounse did not make a claim for the towing charge at that time. The car worked until August 14, 2005, when it shut off and Crounse then claimed the car needed a new engine. Crounse made a new claim to State Farm, which was investigated and subsequently denied. Crounse later brought suit against State Farm for breach of contract, bad faith, unfair settlement practices, and attorney's fees under Civil Practice and Remedies Code chapter 38, as well as Insurance Code chapter 541.

After a three-day trial, the jury found that State Farm did not breach its contract regarding the repairs, did not engage in unfair or deceptive acts or practices, and did not fail to comply with its duty of good faith and fair dealing. The jury did find State Farm failed to comply with the insurance policy when it did not pay Crounse for the towing of his vehicle and awarded $100 in damages for his towing claim. It found that $0 was the reasonable fee for his attorney's necessary services in the case. On appeal, Crounse argued an award of $0 attorney's fees was against the great weight and preponderance of the evidence when a party recovers $100 actual damages on a breach-of-contract claim because, under chapter 38 of the Texas Civil Practice and Remedies Code, Crounse was a prevailing party entitled to recover attorney's fees if the requisite elements are proven showing the amount of his reasonable and necessary attorney's fees.

In rejecting Crounse's argument, the court held the jury could have reasonably concluded that Crounse was not entitled to recover any amount in attorney's fees for the prosecution of a lawsuit in which the sole legitimate claim would have been paid without suit being filed if Crounse had just turned in an insurance claim, or had just sent in the $100 towing bill to State Farm. Specifically, State Farm had put on evidence at trial that Crounse did not turn in a claim for towing, and never submitted the towing bill to State Farm. In contrast, Crounse testified that he asked State Farm to pay the towing bill, and he believed he sent the towing bill to State Farm. Crounse also testified that, after the lawsuit was filed, he handed the towing bill to one of State Farm's attorneys when Crounse was being deposed. State Farm responded to the jury that the Company could not pay a bill that was merely handed to one of its attorney's during a pretrial deposition. Thus, the court stated the jury heard conflicting evidence on whether Crounse had submitted a claim, or a bill, for the $100 towing charge to State Farm and the jury is the sole judge of the credibility of

witnesses and the weight to be given their testimony. Accordingly, the court affirmed the judgment of the trial court.

Editor's Note: Chris Martin and Levon Hovnatanian greatly appreciated the opportunity to represent State Farm in both the underlying trial and the appeal this matter.

BEAUMONT COURT OF APPEALS CONDITIONALLY GRANTS MANDAMUS RELIEF TO INSURERS FINDING REQUESTS FOR PRODUCTION SERVED BY PLAINTIFFS IN HURRICANE IKE CASE TO BE FACIALLY OVERBROAD

GMAC Direct Insurance Company, Ranchers & Farmers Mutual Insurance Company, and Homesite Lloyds of Texas were conditionally granted mandamus relief from a trial court's order compelling production of documents responsive to requests that were facially overbroad. In *In re GMAC Direct Ins. Co.*, 2010 WL 5550672 (Tex.App. – Beaumont 2010), Dennis and Jenele Carlson sued their insurers and others on various tort and contract theories in connection with the Carlsons' claim on their homeowners' insurance policy following Hurricane Ike. The trial court granted the Carlsons' motion to compel production, compelling compliance with certain requests for production and mandamus relief from the court of appeals was sought.

The Beaumont Court of Appeals found the Carlsons' request for "[a]ll computer files, databases, electronically-stored information or computer-stored information regarding property damage, hurricane damage, water damage and/or roof damage that have been [compiled], prepared and/or supervised by Defendant, whether or not they are in Defendant's possession or in the possession of another entity[,]" was not tailored to adjustment of the Carlsons' claim and instead asked for any electronically-stored information regarding any property damage without regard to time or geographical location. The Carlsons argued the request was designed to produce evidence of a company-wide business practice of "fraudulently adjusting" property-damage claims in an "outcome-oriented manner" so as to minimize the amounts paid out under the homeowners' policies they issued. This, the court stated, is precisely the sort of fishing expedition that harvests vast amounts of tenuous information along with the small amount of pertinent information that was used in adjusting the Carlsons' claim.

The court found the request for "[a]ny and all correspondence from Defendant to and from vendors regarding any instructions, procedures, changes, training, payments and billing for property, property damage, hurricane, flood and catastrophe claims for 2000 through the present, including but not limited to computer disk, e-mails, paperwork and manuals [,]" to be similarly expansive, noting that it encompassed all correspondence to and from all vendors over a ten-year period, concerning anything remotely connected to property damage claims, without regard to any geographic location. The court stated that although the information might reveal that the insurers failed to adequately train their agents, the request was not tailored to include only the evidence that may be relevant to this case.

The court noted that the request for "[a]ll documents and communications, including electronic, between any engineer(s) or engineering company(s), used to evaluate this Plaintiffs' claim(s), or other person(s) used in handling Plaintiffs' claim(s) and Defendant in the last five years regarding, in any way, the investigation of a homeowners residence, commercial building or church involving damages to the structures or its contents," at least mentioned the plaintiffs, but stated it goes on to include any investigation of damage to any building. The Carlsons argued that if the representatives had a history of improperly valuing claims or applying faulty analyses, it would not be reasonable for the insurers to rely on their work. The court stated that although the Carlsons can imagine some use for the vast amount of information they are seeking, the request was not tailored to include only the evidence relevant to the

case. Thus, the Beaumont Court of Appeals concluded the trial court abused its discretion in ordering compliance with the overly broad requests for production and conditionally granted the petition for writ of mandamus.

FIFTH CIRCUIT FINDS LIABILITY INSURER HAD NO DUTY TO DEFEND OR INDEMNIFY CONTRACTOR

Recently, the Fifth Circuit determined a commercial general liability insurer did not have a duty to defend or indemnify its purported insured after finding the underlying lawsuit did not allege a covered occurrence of property damage within the effective period of the relevant CGL policies. In *VRV Development L.P. v. Mid-Continent Cas. Co.*, – F.3d –, 2011 WL 48897 (5th Cir. January 7, 2011), the Fifth Circuit affirmed a summary judgment entered against VRV Development L.P. on the ground that, even if VRV Inc.'s rights to defense and indemnity transferred by operation of law to VRV L.P. when it converted its organizational form, which was disputed, the underlying lawsuit did not allege a covered occurrence of property damage during the effective period of the relevant CGL policies.

VRV Inc. entered into a contract to develop residential lots in Dallas County upon which K. Hovnanian Homes-DFW, LLC ("Hovnanian") eventually built new homes and sold them to individual homeowners. During the development process, VRV Inc. purchased a CGL policy from Mid-Continent effective May 25 2004 to May 25, 2005, which was renewed from May 2005 to May 2006. VRV Inc. hired subcontractors to design and build retaining walls on the residential lots, which were located within the property lines of four individual homeowners. A homeowner's inspection conducted sometime between May and July 2006 identified a crack in a retaining wall. In January and March 2007, after periods of heavy rainfall, the retaining walls collapsed, damaging the four homeowners' backyards and undermining support for a public utility easement owned by the City of Dallas. In April 2007, Hovnanian sued VRV for negligence and breach of contract. The four homeowners and the City of Dallas intervened and sued VRV. Mid-Continent rejected VRV's demand for defense and indemnity and filed a declaratory judgment action.

In reviewing the underlying pleadings, the court found that the Hovnanian plaintiffs alleged the retaining walls were damaged during the policy period, and that the homeowners' backyards and the City's easement were damaged when the retaining walls collapsed in 2007, after expiration of the policy period. The court found that these allegations did not support a claim for coverage. First, although the alleged property damage to the retaining walls occurred during the policy period, the damage was excluded from coverage under the "your work" exclusion, which precluded coverage for damage to work completed by VRV and its subcontractors. The Hovnanian plaintiffs alleged that the retaining walls were built by VRV and its subcontractors. Second, the alleged damage to the homeowners' backyards and the City's easement occurred only when the retaining walls collapsed in 2007, well after the expiration of the CGL policies in May 2006. The court rejected VRV's argument that the damage to the homeowners' backyards and the City's easement occurred at the same time as the underlying damage to the retaining walls, stating that "property damage" does not necessarily "occur" at the first link in the causal chain of events giving rise to that property damage. Citing *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 24, 29-30 (Tex. 2008), the court stated its focus was on the time of the actual physical damage to the property, and not the time of the negligent conduct or the process that later results in the damage.