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TEXAS INSURANCE LAW NEWSBRIEF

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MOTION TO COMPEL APPRAISAL GRANTED TEN MONTHS INTO LAWSUIT - IMPASSE NOT REACHED UNTIL AFTER MEDIATION FAILED

Last week, the United States District Court for the Eastern District of Texas granted an insured's motion to compel appraisal, which was first invoked ten months after suit was filed and three days after the insurer sought summary judgment. In *Hamorsky* v. *Allstate Vehicle and Property Ins. Co.*, No. 4:19-CV-00084, 2020 WL 1929420 (E.D. Texas, April 21, 2020, mem. op.), Jennifer Hamorsky's home sustained wind and hail damage. Hamorsky presented a claim under her homeowners' insurance policy with Allstate Vehicle and Property Insurance Company ("Allstate"). Allstate investigated the claim and paid Hamorsky $31,614.47 for the loss. However, Hamorsky, relying on an independent contractor, believed she was entitled to $51,043.27.

In January 2019, Hamorsky filed suit against Allstate. In June 2019, the court referred the case to mediation and entered an amended scheduling order, with trial to occur in March 2020. In September 2019, the parties notified the court that mediation resulted in an impasse. In October 2019, Allstate filed a motion for summary judgment. Three days later, and ten months after suit was filed, Hamorsky invoked appraisal pursuant to the policy. Allstate opposed appraisal and, consequently, Hamorsky filed a motion to compel appraisal.

Under Texas law, since the policy did not include a time frame in which Hamorsky must request an appraisal, she needed to make the request for an appraisal within a reasonable time from the moment of impasse. "An impasse is reached when it becomes apparent to both sides that they disagree as to the damages and any further attempts to negotiate a settlement is futile. A court is not to measure the point of impasse by considering the first sign of disagreement between the parties because both parties must be aware that future negotiations would be futile. An impasse can exist despite the fact that the parties are engaged in continuing efforts to resolve their dispute, including mediation."

Allstate argued that the point of impasse occurred on January 8, 2019—the date the lawsuit was filed—and that Hamorsky waived her right to appraisal by "waiting until the end of litigation and the eve of trial to invoke appraisal."

The United States District Court for the Eastern District of Texas disagreed, concluding that the parties reached an impasse on September 10, 2019—the date that mediation failed—and that Hamorsky's approximate one-month delay in invoking appraisal after impasse was not unreasonable, and no waiver was committed. To that end, the U.S. District Court relied on cases concluding five-month and six-month delays from the point of impasse were not per se unreasonable. Further, the court reasoned the there was nothing in the record to evidence that Allstate believed that the parties were at an impasse prior to mediation or that Hamorsky acted in a manner that would constitute waiver prior to mediation. Further, "any argument that Allstate believed that the parties were at an impasse as early as January 8, 2019 was belied by the fact that the parties entered mediation following the filing of [the] suit." Lastly, "the filing of a lawsuit does not necessarily signify an impasse because the filing of a suit merely demonstrates that one party, the plaintiff, has unilaterally concluded that the parties were at an impasse."

In sum, although "appraisal is intended to take place before suit is filed" and "many of the benefits of appraisal are lost if a party is allowed to delay invoking the appraisal", the U.S. District Court granted Hamorsky's motion to compel appraisal, first invoked ten months into the lawsuit, because an impasse had not been reached until that time.

WINE BOTTLE FALLS AND PREMISES LIABILITY CLAIM FAILS - SUMMARY JUDGMENT AFFIRMED

Last week, the Austin Court of Appeals concluded that Wal-Mart had no duty to warn its customer about a bottle of wine that ultimately fell on the customer's foot during checkout, and affirmed summary judgment in favor of Wal-Mart. In *Sarah Kennedy v. Wal-Mart Stores Texas, LLC.*, No. 03-19-00587-CV, 2020 WL 1943357 (Tex. App.—Austin, April 23, 2020, mem. op.), when Sarah Kennedy was checking out her groceries at Wal-Mart, the checker put Kennedy's bottle of wine on its side on the carousel in a bag, unhooked from the carousel. When Kennedy spun the carousel counterclockwise toward herself, the bottle rolled off the carousel and fell on her right foot. Kennedy subsequently filed suit against Wal-Mart asserting a premises-liability claim.

During her deposition, Kennedy testified that (1) she saw the checker place the wine bottle in the plastic bag; (2) she saw the checker unhook the plastic bag from the metal stays; (3) she saw and was fully aware that the checker next put the bagged bottle on its side on the carousel; (4) she reached out and spun the carousel towards her, knowing full well where the bottle was on the carousel; and (5) if she had spun the carousel clockwise, rather than counterclockwise, the bottle would not have fallen on her foot.

Wal-Mart filed a motion for summary judgment asserting that it had no duty to warn Kennedy of a condition of which she had actual

knowledge. The trial court granted the motion.

On appeal, Kennedy argued that the bagged bottle of wine resting on the carousel in front of her, before she spun it, constituted an unreasonably dangerous condition that Wal-Mart was obligated to warn her of because it was a concealed or hidden danger. Alternatively, Kennedy argued that the "necessary use" exception –which applies when (1) it is necessary that the invitee use the premises and (2) the landowner should have anticipated that the invitee would be unable to take measures to avoid the risk– applied because she was standing in the only place available to retrieve her groceries from the carousel.

The Court of Appeals concluded that the danger Kennedy claimed to have existed was not hidden or concealed and, therefore, Wal-Mart had no duty to warn. The court reasoned that Kennedy was aware of the location of the bagged bottle of wine, lying horizontally and untethered on the carousel.

The Court of Appeals further concluded that because there was more than one way for Kennedy to retrieve the bottle of wine, which would have allowed her to avoid it falling on her foot, the "necessary use" exception did not apply. The court reasoned that the bottle would not have fallen on Kennedy's foot if she had chosen not to spin the carousel or if she had spun the carousel clockwise, rather than counterclockwise. Further, she could have simply asked the checker to hand her the bottle.