Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

JUN 25, 2020

TEXAS SUPREME COURT ADDRESSES PROPERTY APPRAISAL SUITS AGAIN

In a pair of brief, almost identical per curiam opinions issued last Friday, the Supreme Court of Texas reversed two different appellate courts who had previously granted summary judgment for insurers who promptly paid appraisal awards. In *Marchbanks v. Liberty Ins. Corp.*, 18-0977, 2020 WL 3393472, (Tex. June 19, 2020) and *Perry v. United Services Auto. Ass'n*, 19-0210, 2020 WL 3393470 (Tex. June 19, 2020) the Texas Supreme Court reaffirmed its commitment to allowing policyholders to pursue claims under Insurance Code Chapter 542 (Prompt Payment of Claims) after payment of an appraisal award, even though the payment of the award extinguishes all other claims. It appears that in the wake of *Barbara Technologies*, post-appraisal litigation may be here to stay, at least on a limited scope.

Editor's note: One alternative to post-appraisal litigation may be to calculate the Chapter 542 interest due and include it with the appraisal award. However, one problem to this approach, as occurred in at least one of these cases, is that the insured may allow considerable time to elapse before pursuing the claim or demanding appraisal, leaving a potential legal question whether the insured is entitled to accrue the financial benefit of the relatively high interest rates imposed by Chapter 542 after allowing the claim to lie fallow for many months. This may lead to arguments over whether the accrual of Chapter 542 interest should be tolled when the insured's inaction is the cause of a significant delay, particularly when the insurer is not aware there is a dispute.

ELECTING RESPONSIBILITY FOR ADJUSTERS UNDER 542A CONTINUES TO BE A MINEFIELD

Last week, a federal judge in Dallas remanded another insurer's attempt to remove a case to federal court after electing responsibility for its adjuster under Texas Insurance Code § 542A.006. In *Stowell v. United Prop. & Cas. Ins. Co.*, 3:20-CV-0527-B, 2020 WL 3270709 (N.D. Tex. June 16, 2020), plaintiff made a residential hail claim and later sued the insurer and its adjuster. The insurer made a 542A election of responsibility for its adjuster after being served with the suit, and removed the case to federal court, arguing the adjuster was improperly joined and should be dismissed. The Dallas court sided with what it characterized as the majority view, holding that improper joinder is determined at the moment the suit is filed, and therefore post-suit elections are ineffective to defeat remand.

It is not surprising that a Dallas court would follow a majority view led from the beginning by Northern District courts, but the court went further and openly disagreed with the minority view, arguing that examining the possibility of recovery against the non-diverse defendant is not the whole test, but merely a means to discerning whether the joinder was proper.

Editor's note: Although the court did not discuss it, there appears to be some question whether the insurer or adjuster actually received the pre-suit notice the insured allegedly sent 60 days before filing suit. In light of the growing majority view, receipt of the pre-suit notice has become a critical juncture because it will likely be the insurer's only pre-suit opportunity to make a 542A election. Future litigation on this issue may center on proof the insured sent the notice.