

TEXAS INSURANCE LAW NEWSBRIEF

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U.S. DISTRICT COURT GRANTS INSURER'S MOTION TO DISMISS BASED ON INSURED'S INADEQUATE PLEADING AND RELIANCE ON STATUTES HAVING NO PRIVATE RIGHT OF ACTION

Last week, the United States District Court for the Southern District of Texas granted the insurer's motion to dismiss based on the insured's failure to state claims upon which relief could be granted. In *Banda v. Allstate Property and Casualty Ins. Co.*, No. 4:19-CV-3418, 2020 WL 3972537 (S.D. Texas [Houston Division], July 14, 2020, mem. op.), an alleged underinsured motorist negligently caused a motor vehicle collision in which the Banda family were injured. After settling with the alleged underinsured motorist for \$45,000, the Bandas sued Allstate, their insurance carrier, seeking underinsured motorist benefits and asserting various extra-contractual claims (including allegations of failure to explain its decision, failure to attempt to settle a claim in good faith when liability was reasonably clear, and failure to conduct an investigation). In response, Allstate moved to dismiss all claims under Rule 12(b)(6) for "failure to state a claim upon which relief may be granted."

The District Court agreed with Allstate and dismissed all claims. In dismissing the Bandas' claim for UIM benefits, the court concluded that the Bandas did not demonstrate that they were "legally entitled" to UIM benefits. That is, they did not demonstrate that (1) they obtained a judgment establishing a third-party tortfeasor's liability and (2) their damages exceeded the recovery from the tortfeasor. The court, quoting *Wellisch v. United Servs. Auto. Ass'n*, 75 S.W.3d 53, 57 (Tex. App.—San Antonio 2002, pet. denied), stated that "an insurer has the right to withhold payment of UIM benefits until the insured's legal entitlement is established."

In dismissing the Bandas' claims under Chapter 541 of the Texas Insurance Code, the court concluded that the Bandas "failed to plead any facts showing a statutory violation caused them any injury independent of their right to receive policy benefits, and did not allege that any action of Allstate caused them not to seek a judgment establishing their legal entitlement to UIM benefits."

In dismissing the Bandas' claims under Chapter 542 of the Texas Insurance Code (Prompt Payment of Claims), the court concluded that "it [was] clear in this situation that prompt payment provisions cannot be violated until there is a judgment."

In dismissing the Bandas' claims under section 542.003 of the Texas Insurance Code (Unfair Claim Settlement Practices Act) and Section 21.203 of Texas Administrative Code (Unfair Claims Settlement Practices Rules), the court concluded that those statutes do not create a private right of action.

In dismissing the Bandas' claims under the Deceptive Trade Practices Act ("DTPA"), the court concluded that the Bandas failed to satisfy the heightened pleading requirements by "wholly fail[ing] to allege any facts specifying the statements (or omissions) considered to be fraudulent, the speaker, when and why the statements were made, and an explanation of why they were fraudulent."

Editor's Note:

The U.S. District Court's analysis should be met with caution; in particular, with regard to the District Court's declarations that "an insurer has the right to withhold payment of UIM benefits until the insured's legal entitlement is established" and "prompt payment provisions cannot be violated until there is a judgment." In *State Farm Mutual Automobile Association v. Cook*, No. 04-18-00729-CV, 2019 WL 4453763 (Tex. App.—San Antonio, September 18, 2019, mem. op.), the court concluded that an insurer may act in bad faith by insisting that the insured litigate liability and damages before paying UM/UIM benefits on a claim, as there are cases in which an insurer's liability to pay UM/UIM benefits is reasonably clear despite the fact that no judicial determination has been made. Further, "[t]o hold that a UM/UIM claim is not "reasonably clear" until the conclusion of the legal proceeding would effectively eliminate the bad faith cause of action."

The actual cause of action pled by the Bandas in seeking UIM benefits is unclear from the District Court's opinion. Under Texas law, insureds are permitted to institute declaratory judgment actions against their insurers to obtain a judgment establishing a third-party tortfeasor's liability and damages in excess of the recovery from the tortfeasor.

UNITED STATES DISTRICT COURT DISMISSES IMPROPERLY JOINED CLAIMS ADJUSTER FROM LAWSUIT

Last week, the United States District Court for the Eastern District of Texas concluded that the insured failed to state a claim against the adjuster under the Texas Insurance Code and dismissed the adjuster from the suit. In *Angelina's Mexican Restaurant v. Allied Ins. Co. of America*, No. 4:20-CV-278, 2020 WL 4001864 (E.D. Texas [Sherman Division], July 15, 2020, mem. op.), the roof of Angelina's Mexican Restaurant ("Angelina's") allegedly sustained wind and hail damage. Angelina's subsequently reported the loss

to its commercial insurance carrier, Allied Insurance. Mary Keefer (“Keefer”), an insurance adjuster for Allied Insurance, was assigned to investigate the loss and adjust the claims.

Angelina’s, believing that Allied Insurance was unreasonably delaying payment of benefits, brought suit against Allied Insurance and Keefer in state court alleging various contractual and extra-contractual causes of action. Allied Insurance removed the case to federal court, then Angelina’s sought remand to state court. In response to Angelina’s request for remand, Allied Insurance contended that Keefer was improperly joined and, therefore, should be dismissed from the suit, which would result in complete diversity and proper removal to federal court.

The U.S. District Court concluded that Angelina’s “failed to allege sufficient factual matter to state a claim against Keefer that is plausible on its face” and that Keefer was improperly joined to the action. The U.S. District Court reasoned that Angelina’s pleadings—that Keefer inspected Angelina’s property; ignored covered damages; performed a cursory inspection; failed to properly adjust and estimate the claim; failed to timely and properly report to Allied Insurance to address all the covered damages; made statements misrepresenting the policy terms; misrepresented material facts related to the coverage at issue; and prepared a report that failed to include all of the damages that she noted during the inspection of the property, which resulted in an undervaluation of the damages the property sustained—were “merely boilerplate legal allegations without factual matter supporting them.”

In sum, the U.S. District Court denied Angelina’s motion to remand and dismissed Keefer from the suit.