

TEXAS INSURANCE LAW NEWSBRIEF

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FIFTH CIRCUIT CONCLUDES PROMPT PAYMENT CLAIMS DO NOT REQUIRE "MAGIC WORDS" AND DO NOT REQUIRE A SHOWING OF BAD FAITH

Last week, the United States Court of Appeals for the Fifth Circuit reversed a trial court and concluded that a claim for an 18% penalty was sufficient to plead a Prompt Payment claim and that no showing of bad faith is required. In *Agredano v. State Farm Lloyds*, 2020 WL 5543046, (5th Cir., Sept 16, 2020) the Agredanos sued their homeowners' insurance company after it denied their claim for windstorm damage to their home. The trial court granted summary judgment in favor of State Farm on other causes of action but allowed the breach of contract claim to be presented to a jury, which granted a verdict in Plaintiffs' favor. Although the Plaintiffs sought attorney's fees and "statutory interest of 18%[,] the district court ruled that the failure to specifically plead relief under Texas Insurance Code § 542.060 barred the requested relief and entered judgment only for the breach of contract damages found by the jury, with interest. The Agredanos appealed.

On appeal, State Farm argued Plaintiffs failed to plead a claim for the TPPCA interest under § 542.060 because Plaintiffs did not "specifically request" such a claim, that is, Plaintiffs did not cite the statute or quote the language of the statute. Relying on the unpublished decision in *Chavez v. State Farm Lloyds*, the district court reversed its original ruling and denied the § 542.060 relief. Plaintiffs argued they pleaded that they submitted their claim and that it was denied and entitlement to an "18% [p]enalty [i]nterest pursuant to Ch. 542" and "[a]ttorney's fees."

The Fifth Circuit Court of Appeals found that while the pleading "could have been more robust," the pleading standard does not require magic words or detailed facts in most cases. The court also noted that State Farm did not bring a Rule 12(e) claim that it did not understand the pleadings and was "clearly" aware of the claim because the Plaintiffs stated it in their discovery responses and State Farm argued in its summary judgment motion that the Plaintiffs sought "causes of action based upon Chapter[] ... 542 of the Texas Insurance Code[.]" Based on those facts, the court concluded the statutory interest claim was not improperly pleaded.

The court then addressed the recoverability of prompt payment damages in the absence of bad faith findings. They concluded *Chavez* was no longer good law based on subsequent Texas Supreme Court cases and that the district court erred in holding that the claims for the 18% penalty and attorney's fees under Chapter 542.5 were barred. The court reversed the decision and remanded the case to the trial court.

TEXAS SUPREME COURT EXTENDS RESTRICTIONS ON IN-PERSON JURY TRIALS TO DECEMBER

Last Friday, the Texas Supreme Court issued its 26th Emergency Order and pushed back in-person jury proceedings to December for justice and municipal courts and established a detailed protocol for district courts that want to try cases live before December. At the end of May, the court paused all proceedings until August, and has since postponed in-person jury proceedings to September, then October and now until December.

The latest Emergency Order sets up a series of requirements that district, statutory, constitutional county and statutory probate courts must meet in order to hold in-person jury proceedings. The local administrative district judge must submit a plan that is consistent with restrictions set by the courts, prove the proceeding will assist with coordinating resources or managing docket capacity, and consult with local health authorities no more than five days before the proceeding. The order also requires the court to consider on the record any objections or motions related to the proceedings at least seven days beforehand. The court also must establish communication protocols to ensure no participants have tested positive for the virus within the past 30 days, have symptoms or have been recently exposed to someone who tested positive.

In Harris County, for example, jury selection is being conducted in the large convention/ event space at NRG where the Houston Rodeo is traditionally held. Potential jurors are asked to complete a questionnaire about their potential exposure to COVID-19 and everyone has their temperature taken. Only cases with 2 parties which can be tried in one or two days are being allowed to proceed for now. Criminal, family, and small civil cases are the only ones being considered for trial right now in Harris County. Voir dire is being held in a very large convention hall and, once selected, the final jury is being asked to go to the courts building downtown on the following day to start trial. The large voir dire room has space for 60 panelists to be seated 8 to 10 feet apart with tables at the front for the judge, court staff and counsel. For trials, the courtrooms downtown have been configured to comply with the supreme court mandates with jurors being seated throughout the courtroom spread very far apart, face shields and masks being used by all participants in the courtroom and the movement of counsel being restricted. Multi-party civil cases, or cases taking more than two days to try, are still not being called to trial in Harris County given the voir dire and courtroom configurations at this time. As more

Texas counties do more with juries and trials we will continue to report on those developments.