



September 17, 2012

SAN ANTONIO COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT; INSURER OWES NO DUTY TO DEFEND INSURED AGAINST MISREPRESENTATION CLAIMS

Last Wednesday, in *Branham v. State Farm Lloyds*, 2012 WL 3985925 (Tex.App. – San Antonio, Sept. 12, 2012), the San Antonio Court of Appeals affirmed a summary judgment granted in favor of State Farm Lloyds. State Farm's insured, Wendy Rutherford Branham, argued State Farm had a duty to defend the claims against her for misrepresentations she allegedly made in selling her home. The purchasers of the home, the McCulloughs, alleged in the underlying lawsuit Branham falsely represented that, among other things, there was no previous flooding or water penetration into the home.

On appeal, Branham acknowledged that several sister courts have held that an insurance carrier has no duty to defend a homeowner who makes misrepresentations in selling a home. Branham argued the facts in those cases were distinguishable because she could have "negligently" forgotten about the prior damage and insurance claim in the instant case. In rejecting this argument, the court noted the McCulloughs did not allege she forgot about the prior damage; instead, the McCulloughs' factual allegations asserted Branham made false representations and made cosmetic repairs to conceal the prior damage for which she received insurance proceeds to repair.

The court also rejected Branham's argument that the prior decisions have questionable precedential value after the Texas Supreme Court defined "accident" in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex.2007). In rejecting this argument, the court stated the damages resulting from Branham's alleged misrepresentation of known facts were not unexpected but were the natural and expected result of Branham's design or plan to conceal the true facts. Moreover, the McCulloughs clearly alleged that Branham intended the injury.

Thus, based on the allegations in the McCulloughs' petition and the language in the policy, the court concluded State Farm did not have a duty to defend Branham.

FEDERAL DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER IN BAD FAITH LAWSUIT FILED AFTER INSURER COMPLIED WITH APPRAISAL PROVISION

Also last Wednesday, in *Mag-Dolphus, Inc. v. Ohio Cas. Ins. Co.*, C.A. No. 4:11-CV-1525; 2012 WL 4018001 (S.D.Tex., Sept. 12, 2012) (Harmon, J.), U.S. District Judge Melinda Harmon granted Ohio Casualty Insurance Company's motion for summary judgment on the grounds that the insureds' invocation of the appraisal provision in the insurance policy and Ohio Casualty's prompt compliance with the appraisal provision precluded Plaintiffs' claims as a matter of law.

The plaintiffs, Mag-Dolphus, Inc., and its owners, Gerald and Jan Maggard, are owners of an office building in The Woodlands, Texas that was damaged by Hurricane Ike. After Plaintiffs disputed Ohio Casualty's estimate of the covered damages, Plaintiffs invoked the policy's appraisal provision. The parties each selected independent appraisers who submitted estimates of the amount of covered loss. The two appraisers did not agree and they subsequently selected an umpire. The umpire awarded Plaintiffs \$191,594.16 in replacement costs, less depreciation, previous payments, and deductibles. Ohio Casualty Defendant sent Plaintiffs a notice of payment and a check for \$99,547.44, which was the amount due for the property damage claim based on the appraisal, less the amounts already paid and the deductible. Ohio Casualty subsequently sent Plaintiffs a second notice of payment and a check for \$52,759.81, which was for the recoverable depreciation on the repairs to the building. Several months later, Plaintiffs filed a lawsuit asserting a claim for breach of contract and extra-contractual claims for common law and statutory breach of the duty of good faith and fair dealing, for common law fraud, and for failure to promptly pay claims under the Texas Insurance Code.

In granting summary judgment, the court ruled that Plaintiffs, having accepted timely payment of the binding and enforceable appraisal award, are thus estopped from maintaining a breach of contract claim against Ohio Casualty. The court also concluded Plaintiffs' extra-contractual claims for common law breach of the duty of good faith and fair dealing, for statutory breach of the duty of good faith and fair dealing under the Texas Insurance Code's unfair settlement practices, common law fraud, and for failure to promptly pay claims under the Texas Insurance Code each failed. The court ruled that because Plaintiffs' breach of contract claim fails, and because Plaintiffs failed to show that Ohio Casualty either committed some act so extreme that it would cause injury apart from the policy claim or failed timely to investigate Plaintiffs' claim, Ohio Casualty was entitled to summary judgment on Plaintiffs' common law and statutory bad faith claims. The court also ruled Plaintiffs' failed to carry their burden of proof on their fraud claim in that they failed to introduce evidence of a material misrepresentation in the record and failed to demonstrate that they relied upon any alleged material misrepresentation. Finally, the court found no violation of the prompt payment statutes under the Texas Insurance Code.

FEDERAL DISTRICT COURT DISMISSES TEXAS INSURANCE CODE CLAIMS ASSERTED AGAINST A CO-PRIMARY INSURER

U.S. District Judge Xavier Rodriguez recently dismissed claims under section 542.003 of the Texas Insurance Code asserted by a co-primary insurer, Great American Assurance Company, against another co-primary insurer, Zurich American Insurance Company, in *Great American Assur. Co. v. Wills*, C.A. No. SA-10-CV-353-XR, 2012 WL 3962037 (W.D.Tex., Sept. 10, 2012).

The case involves a dispute between Great American and Zurich over the handling of a claim against their mutual insured. In 2009, the two insurers had an opportunity to settle a claim against their insured but Zurich refused to tender its pro rata share of the settlement demand because it considered the demand to be excessive at the time. Since Great American's insurance policy limit was insufficient to meet the settlement demand alone, the case proceeded to trial and a judgment was ultimately entered against the insured that forced both insurers to exhaust their policy limits.

Great American filed a lawsuit against Zurich asserting various claims, including a claim that Zurich's refusal to pay its pro rata share of the settlement demand violated section 542.003(b)(4) of the Texas Insurance Code because Zurich "failed to attempt in good faith 'to effect a prompt, fair, and equitable settlement of a claim submitted in which liability has become reasonably clear.'" Zurich had previously filed a motion to dismiss Great American's claim under 542.003, but the court denied that motion in part after finding that Great American's 542.003 claim, although it appeared to be unavailing, could not properly be dismissed because Great American was not given sufficient notice that the claim was subject to dismissal. Zurich subsequently filed another motion to dismiss asking the court to dismiss Great American's remaining claim under the Texas Insurance Code.

The court explained its concerns with Great American's claim under the Texas Insurance Code in its previous order. Specifically, the court noted that it was not clear that section 542.003 supports a private cause of action because the language of the Code, its legislative history, and court interpretations of the Code suggest that only the Texas Department of Insurance can bring a claim under section 542.003. Additionally, the court noted that even if a private cause of action were allowed, a cause of action would likely not be available to Great American. Since Great American brought its claim against Zurich as a third party to Zurich's contract with the insured, and since Great American cannot assert any of the insured's rights in subrogation against Zurich, the court reasoned that Great American would not have standing to assert a claim against Zurich for a violation of section 542.003.

Great American offered no arguments to refute the court's rationale. Nor did Great American offer any statutory law, case law or legal theories in support of its claim. Thus, the court concluded Great American's claim under the Texas Insurance Code could not plausibly entitle Great American to relief and consequently granted Zurich's motion to dismiss.

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