

# TEXAS INSURANCE LAW NEWSBRIEF

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## FEDERAL COURT RULES PARTIALLY IN FAVOR OF INSURER ON COMPETING MOTIONS TO STRIKE EXPERTS AND INSURER'S MOTION FOR PARTIAL SUMMARY JUDGMENT IN ONGOING HURRICANE HARVEY COVERAGE DISPUTE

Last week, the United States District Court for the Western District of Texas in Victoria granted in part an insurer's motion to strike the insured's insurance claim handling expert and its motion for summary judgment in a coverage dispute arising from Hurricane Harvey. *The Jesus Church of Victoria Texas, Inc. v. Church Mutual Insurance Company*, 6:19-CV-00093, 2022 WL 4242242 (S.D. Tex.—Victoria Sept. 13, 2022) involved a dispute between a church and its insurer over how the insurer handled the church's claim for property damage allegedly sustained during Hurricane Harvey, including the payment the church received and the time it took to receive the payment.

### *Competing Motions to Strike*

To serve as its expert on insurance claims handling, the church designated Phillip Spotts. Conversely, the insurer designated the engineer who inspected the church's property, a couple of the insurer's independent adjuster, and the insurer's claims supervisor. The insurer argued Mr. Spotts' opinions were unreliable, unsupported, and impermissible conclusory statements. The church argued that the insurer failed to comply with the rules regarding reporting requirements for testifying experts.

Mr. Spott opined that the insurer failed to meet minimum industry claim handling standards because it provided an inadequate inspection, unreasonably delayed payment, exercised insufficient oversight of the claim, and relied on a database to value that claim that predated significant labor and materials price increases, and also that the claim was not so complex as to require the assistance of an engineer.

The Court concluded the only opinion in Mr. Spott's report that was sufficiently supported by data was his claim that the Xactimate Database used by the insurer contained data that predated the well-known increase in labor and materials that followed Hurricane Harvey, which led to the insurer undervaluing the church's claim. In doing so, the Court emphasized that an objective, independent validation of Mr. Spott's methodology existed because Mr. Spott's report contained a bulletin from Xactimate from the end of 2017 that described and included the data on the price increases to which Mr. Spotts referred. The remainder of Mr. Spott's opinions, however, were unreliable because they were not supported by sufficient data or information. For example, in opining that the church failed to meet minimum industry standards for claim handling, Mr. Spott did not state what the standards were or how the insurer violated them. To the extent Mr. Spotts did include information about claims handling standards, the Court held there was too great an analytical gap between the standards and Mr. Spott's opinions. Therefore, the Court denied the insurer's motion to strike as to Mr. Spott's testimony on the Xactimate database but granted it as to all of Mr. Spott's other opinions.

Turning to the church's argument that the insurer failed to comply with reporting requirements for testifying experts, the Court agreed with the insurer that the insurer's experts were "non-retained" experts that were not retained or specially employed to provide expert testimony. Instead, the insurer's experts had personal involvement in the events giving rise to the church's lawsuit and non were retained for the sole purposes of providing expert testimony. As such, the insurer was not required to comply with the stringent reporting requirements for retained testifying experts, and the Court accordingly denied the church's motion to strike.

### *Insurer's Motion for Partial Summary Judgment*

Based on its dissatisfaction with how the insurer handled its Hurricane Harvey claim, the church sued the insurer for breach of contract, violations of the Ch. 541 and Ch. 542 of the Texas Insurance Code, and breach of the duty of good faith and fair dealing (i.e., bad faith). The insurer subsequently filed a motion for partial summary judgment on the church's claims for bad faith and violations of Ch. 541 of the Texas Insurance Code (commonly known as "unfair settlement practices").

After ruling on evidentiary objections, including agreeing with the insurer that the affidavit of Mr. Spott relied on by the church in its response to the insurer's motion was conclusory and therefore inadmissible, the Court turned to the substantive issues in the insurer's motion.

First, the Court disagreed with the insurer's contention that the church could not assert a bad faith or unfair settlement practices claims due to the church not suffering an injury independent from the loss of benefits. Instead, the Court held that no independent injury was required to assert extra-contractual claims.

Next, the Court held the insurer provided sufficient evidence to show that it had a reasonable basis for its coverage determination, the

payment it issued, and the time it took to issue the payment, as it was reasonably based on multiple investigations, reports, and estimates. For example, the insurer acknowledged the claim two days after it was received and issued an advance payment one month later until the parties could determine the agreed scope of repairs. Because the church's adjuster disagreed with the scope and valuation of damages, the investigation continued, with the insurer's independent adjusters ultimately determining a replacement cost value. Five months after receiving the claim, the insurer issued payment to the church based on the information provided by its independent adjusters. With regard to the five-month gap, the insurer pointed to letters it sent to the church requesting additional time to investigate the claim due to the heavy volume of Hurricane-Harvey related claims and evidence that the church's own adjuster delayed in submitting required information. Moreover, the Court agreed that the insurer's reliance on an Engineer's Report to partially deny the church's claim was reasonable, and the only evidence provided by the church regarded whether the Engineer's Report was accurate and whether the insurer's valuation of the claim was correct, which the Court stated only showed a "bona fide coverage dispute," not bad faith.

Finally, the Court addressed the church's unfair settlement practices claims. Because one of the claims was based on the same allegations as the bad faith claim, the Court quickly dismissed it. As to the remaining claims, which were based on the insurer's alleged failure to promptly provide a reasonable explanation for the denial and to provide a coverage decision or a reservation of rights letter to an insured within a reasonable time, the Court held that a genuine issue of material fact existed because the evidence showed the insurer did not provide an explanation for its partial denial of the church's claim prior to litigation (despite the insurer's claim that it never denied the claim).

Given the above, the Court granted the insurer's motion for partial summary judgment as to the church's claims for bad faith and unfair settlement practices claim based on a theory of bad faith and the church's claims for additional damages based on these contentions, but denied the as to the church's other claims.