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TEXAS INSURANCE LAW NEWSBRIEF

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FEDERAL COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER IN DISPUTE ARISING FROM A COMMERCIAL HAILSTORM CLAIM

Last week, a federal court in San Antonio granted summary judgment in favor of an insurer and dismissed a claimant's claims for breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code , the Texas Prompt Payment of Claims Act, and the Deceptive Trade Practices Act. Kahlig Enterprises, Inc. v. Affiliated FM Ins. Co., No. SA-20-CV-01091-XR, 2023 WL 1141876 (W.D. Tex.—San Antonio Jan. 30, 2023) arose out of an insurance coverage dispute between the claimant, Kahlig Enterprises, Inc., which was the named insured for multiple commercial properties (Kahlig"), and Kahlig's insurer, Affiliated FM Insurance Company ("AFM").

After a hail and windstorm caused substantial damage to Kahlig's properties, representatives of AFM met with the insured's public adjuster and sent a letter to notify Kahlig of potential coverage and to inform Kahlig that it was still investigating the scope and amount of the claim. Kahlig's public adjuster then sent a sworn proof of loss with supporting documentation to AFM and a letter calculating the replacement cost value at $885,936.59 and $856,547.54 as the actual cash value of the claim. AFM applied the $100,000 deductible and issued payment of $756,543.54 to Kahlig, which later contended that the estimate and payment were not enough to repair the damage to the properties, and demanded appraisal. But believing appraisal was premature, AFM declined to participate. Kahlig followed with pre-suit demand letter seeking an additional payment of $1,632,444.78 plus 10% per annum interest. A few months later, Kahlig filed its lawsuit in state court, which AFM removed to federal court.

AFM filed a motion to compel appraisal, which the court granted. Including $75,674.24 for code upgrades, the replacement cost value off appraisal award was $1,383,608.48 and the actual cash value was $1,245,215.63.

They day after the appraisal award was rendered, AFM tendered two payments to Kahlig: one for the replacement cost value of the appraisal award ($1,383,608.48) minus the code upgrades ($75,674.24), depreciation ($137,852.85), prior payments ($756,547.54), and the deductible ($100,000) for a total of $313,533.85; and another for the prompt payment penalties it calculated in the amount of $62,706.77.

Kahlig responded by immediately requesting $725,358.18, which it claimed represented the unpaid policy benefits from the replacement cost, the code upgrades, statutory and prejudgment interest, and attorneys' fees. Kahlig also amended its complaint to claim that AFM did not properly pay it for damages owed under the policy and the law for AFMs delays and "intentional low balling and delaying" of its claim. Kahlig therefore brought claims for breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code, Deceptive Trade Practices Act, and Prompt Payment of Claims Act. AFM's motion for summary judgment on all of Kahlig's claims followed.

As to Kahlig's claim for breach of contract, the Court agreed with AFM that, because it paid the appraisal award that measured the actual cost value of covered damages, it could not have breached the policy. Under the terms of the policy at issue, AFM was only obligated to pay the actual cash value when the property was not repaired within two years from the date of loss. In this case, Kahlig had not commenced repairs on the properties, so the Court held that Kahlig had paid all the damages owed under the policy, and there was no breach of contract. In doing so, the Court rejected Kahlig's argument that AFM had the burden to prove whether any repairs had been completed prior to the two-year deadline, instead agreeing with AFM that the insured bears such burden, which Kahlig failed to do. The Court also disagreed that the doctrine of "prevention," which excuses the performance of condition in a contract where one party wrongfully prevents the condition from occurring, applied in this case because courts have refused to apply this doctrine when an insurer has already paid the insured actual cash value or where the dispute occurred in a commercial setting with relatively sophisticated parties—which the Court determined to be the case here. Having concluded there was no breach of contract, the Court also quickly disposed of Kahlig's claims for breach of the duty of good faith and fair dealing and prejudgment interest.

The Court also quickly dismissed Kahlig's claims for breach of the Texas Insurance Code and Deceptive Trade Practices Act based on its conclusion that AMF's conduct did not cause Kahlig to lose any benefit under the policy, and Kahlig did not present any evidence of an independent injury (i.e., an injury other than the loss of policy benefits).

As to Kahlig's prompt payment claim, the Court emphasized that AFM presented evidence that it paid Kahlig the maximum amount of interest to which Kahlig would be entitled if AFM were found liable for violating the prompt payment statute. That is, based on Kahlig's sworn proof of loss as the date from which the clock began to tick for AFM's prompt payment obligations, AFM's payment for $62,706.77 satisfied AFM's obligations, and summary judgment was therefore proper.

Finally, the Court dismissed Kahlig's claim for attorneys' fees because the Insurance Code provides that a claimant can only recover

attorneys' fees if it either recovers at least 20% of the amount it alleges to be owned under the claim, and since AFM paid the full amount of policy benefits and interest owed under the prompt payment statute, the amount to be awarded in a judgment on Kahlig's prompt payment claim was zero—which was less than 20%. Even if the Court applied the approach used by other courts, which considered the amount of the pre-suit demand letter instead of the amount of a judgment, and it used the appraisal award ($313,533.85) as the numerator and Kahlig's pre-suit demand ($1,631,444.78) as the denominator, the result is still less than 20%. Consequently, Kahlig was not entitled to recover attorneys' fees under either approach.

Having found that AFM was entitled to summary judgment on all of Kahlig's claims, the Court granted AFM's motion in full and ordered that all of Kahlig's claims be dismissed.

FORUM-SELECTION CLAUSES REIGN SUPREME, EVEN OVER PRINCESSES' PREFERENCES

The Southern District of Texas recently held that an insurance policy's forum-selection clause overrode even the Texas Insurance Code's prescription that insurance contracts payable to Texas residents are subject to Texas law. In *Ralph Eads, III et al. v. Spheric Assurance Company, LTD,* 2023 WL 417477, the *Princess Alia*, a Jamaican yacht, caught fire and sunk in port in Mexico. Its owners were Texas residents that filed for coverage with Spheric, their insurance company. Spheric denied coverage based on technical breaches of the policy under British Virgin Island law, citing the policy's forum-selection of the British Virgin Islands. Under Texas law, there would be no such breaches, so the owners sued Spheric, seeking court-endorsed Texas forum selection.

They argued that Texas Insurance Code § 21.42 required Spheric to use Texas law and therefore pay the policy. The Court disagreed, stating that while that provision has been interpreted to be a choice-of-law rule, that only applies in the absence of a valid forum selection clause. Because there was a forum selection clause in this case, Spheric was entitled to a dismissal of the case.

DESCRIBING YOUR COVERAGE IS NOT A MISREPRESENTATION

The United States Western District of Texas recently issued a decision addressing the implication of an insurance agent's statement, "yes, you have that coverage" without referencing applicable exclusions. In *Finger Goil & Gas Inc. v. Mid-Continent Casualty*, 2023 WL 581650, Finger Oil was drilling for natural gas in Jackson County, Texas when a valve failed and the well blew out. Finger Oil notified its insurance agent, who contacted Mid-Continent, and asked whether it had Blow Out and Cratering Coverage. Mid-Continent and the agent replied that the policy did have those coverages, so Finger Oil thereafter hired contractors to repair the well. However, the policy also had an exclusion for "Damage to Property," that included damage to property Finger Oil owned and repaired, and costs or expenses incurred in connection with controlling any well. Mid-Continent denied coverage, claiming this exclusion, and Finger Oil sued for misrepresentation, Deceptive Trade Practices Act violations, breach of contract, and failure to timely investigate.

Mid-Continent argued that it had accurately provided a general statement of the policy's coverage, not given a misrepresentation of the policy's terms. In fact, it was helpful for Mid-Continent's case that the agent had included the disclaimer "[p]lease note that each claim is based on its own merit." The Court agreed and granted Mid-Continent a dismissal, holding that Mid-Continent had accurately described what coverage the policy had, while not leading Finger Oil to wrongly believe the policy protected against a particular risk that was in fact excluded.

PLEAD YOUR CASE, PARTICULARLY FRAUD, WITH SPECIFICITY OR ELSE

Recently, the United States Southern District of Texas held Michael and Tiffany Sanderson to their burden to follow the federal pleading rules in *Michael Sanderson et al. v. Allstate Fire and Casual Insurance Company,* 2023 WL 417478. A storm damaged the Sanderson's home, they requested coverage from Allstate, and Allstate denied coverage. The Sandersons sued Allstate for fraud, misrepresentation, Insurance Code violations, and Deceptive Trade Practices Act violations. Allstate moved to dismiss the case, stating that the Sandersons filed a boilerplate, conclusory petition. The Court agreed, especially noting that Federal Rule of Civil Procedure 9(b) requires allegations of fraud or mistake to particularly state the circumstances constituting fraud or mistake. "The 'who, what, when, and where' required by Rule 9(b) is missing" said the Court, and it thereafter required the Sandersons to properly re-plead their case or face dismissal.