Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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TRIAL COURT ABUSED DISCRETION BY APPOINTING ATTORNEY AS UMPIRE IN HOMEOWNERS INSURANCE APPRAISAL DISPUTE – MANDAMUS CONDITIONALLY GRANTED

Last Wednesday, the Corpus Christi Court of Appeals determined that a trial court's appointment of an attorney to serve as umpire in a property damage dispute, was improper, not in compliance with Policy terms and thus, conditionally granted the insurer's petition for writ of mandamus. In *In re State Farm Lloyds*, 2023 WL 2029148 (Tex.App. – Corpus Christi, February 15, 2023), the insured and State Farm were unable to reach an agreement over the amount of damage to the insured residence caused by a July 25, 2020, hurricane. The insured invoked appraisal under the Policy, but the two appraisers were unable to agree on the amount of loss or on an umpire. So, the insured petitioned the trial court to appoint an umpire. State Farm responded to the request arguing that it was "procedurally improper" and that the umpires recommended by the insured lacked the training and experience required by the Policy. Following a hearing, the trial court appointed Derek Salinas, an attorney to serve as umpire and then rejected State Farm's motion to reconsider. State Farm then filed a petition for writ of mandamus with Corpus Christi Court of Appeals.

The Court of Appeals carefully analyzed Texas case law on policy appraisals and the policy language at issue in this case which required in part that to qualify as an umpire, they must be either an engineer, architect, an adjuster or public adjuster, or a contractor "with experience and training in the construction, repair, and estimating of the type of property damage in dispute." And the court found no evidence in the record that Salinas, an attorney, meets the qualifications required by the Policy. State Farm also argued that because the request to appoint and umpire is not a lawsuit and the order is not a final judgment subject to appeal, it lacks a remedy by appeal. After considering the favored status and implications of proceeding with appraisal under these circumstances, the court found that State Farm lacked an adequate remedy by appeal to address the error. Accordingly, the Corpus Christi Court of Appeals conditionally granted the petition for writ of mandamus and directed the trial court to vacate its order appointing Salinas and, to appoint a new umpire in compliance with the Policy terms.

Editor's Note: This decision emphasizes the need to closely monitor and promptly address issues and concerns which arise during the appraisal process to help keep the process on track. MDJW coverage lawyers are well versed in these issues available to assist as needed.

REINSPECTION AND SUPPLEMENTAL PAYMENT ON HAIL DAMAGE CLAIM FAILS TO SUPPORT UNFAIR CLAIM HANDLING ALLEGATIONS – PARTIAL SUMMARY JUDGMENT GRANTED

Last week, the U.S. District Court in El Paso considered an insurer's motion for partial summary judgment arising from two reported hail damage claims and found that the insurer's actions in reassessing it's damage findings and issuing a supplemental payment would not support claims alleging unfair claims handling. In *Kazanjian v. State Farm Lloyds*, 2023 WL 2034441 (W.D. Tex. February 15, 2023), in the summer of 2021, the insured's home was in the path of two hailstorms that were four days apart. After the first storm, State Farm issued payment for the damage observed. After the second storm, State Farm inspected the property and found hail damage to three roof turbines and three window screens, but no covered damage to the modified bitumen or clay tile portions of the roof. The insured's hired an attorney who sent a demand letter seeking $57,980.78 to replace the modified bitumen and clay tile portions of the roof. State Farm reinspected the property and found that the wind turbines could not be replaced without disturbing a portion of the modified bitumen portion of the roof. So State Farm revised its estimate finding $9,858.43 in damages and after applying the deductible and recoverable depreciation, issued a supplemental payment for $4,731.16. State Farm also made an additional payment of $150.36 it determined was owed under Texas' Prompt Payment of Claims Act. The insured's attorney filed suit alleging a variety of common law and statutory bad faith claims. State Farm removed the case to federal court and filed a partial motion for summary judgment on all but the breach of contract and Prompt Payment claims.

In response to State Farm's motion, plaintiff voluntarily dismissed all other extra-contractual claims except for the Unfair Settlement Claims and requests for exemplary and punitive damages. The court carefully reviewed Texas law and noted that the common law bad faith and Unfair Claim practices claims applied the same legal standard - "an insured must show that the insurer failed to settle the claim even though it new and should have known that it was reasonably clear the claim was covered." And, that evidence of nothing more than a "bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith." Addressing the insured's argument related to the reinspection and supplemental payment, the court observed that "the fact of the reassessment alone, does not warrant a reasonable inference of bad faith." Here, there is a disagreement among experts which "may sustain a breach of contract claim, but it does not suffice to establish bad faith." And because there was no evidence of bad faith the court granted State

Farm's motion for partial summary judgment. Further, noting that the only remaining claims were for breach of contract and 542.058 Prompt Payment Claims which don't permit recovery of exemplary or treble damages, State Farm's request for judgment as a matter of law on those claims was granted as well.

INSURED'S FAILURE TO PROVIDE PROPER PRESUIT NOTICE, PRECLUDES RECOVERY OF ATTORNEY FEES

Last Wednesday, a U.S. District in Houston analyzed an insurance dispute following storm damage to the insured's building project and the insurer's Verified Motion to Preclude Attorney's Fees because it did not receive proper notice as required under Texas Insurance Code § 542A.003(a). The motion was granted. In *Gilbane Building Co. Inc. v. Swiss Re Corporate Solutions Elite Ins. Co.,* 2023 WL 2021014 (S.D. Tex. February 15, 2023), the builder's risk insurance policy applied a $50,000 deductible for damage from windstorm, but a deductible of 2% of the property's insured value if the damage was caused by a named storm. The insured's submitted a summary of costs and damages totaling $906,220 and the insurer responded stating that it would apply the 2% "named storm" deductible. A series of letters were then exchanged with the insured arguing that the $50,000 "windstorm" deductible should apply. The insured then filed suit seeking recovery for $856,220 after applying the $50,000 deductible, plus attorney fees and other damages.

The insurer filed an answer and then a Motion to Preclude Attorney's fees due to lack of proper notice as required under Texas Insurance Code § 542A.003(a). The insurer argued that Texas Insurance Code § 542A.003(b) required the notice to include: 1) a statement of the acts or omissions, 2) the specific amount alleged to be owed, and 3) the amount of reasonable and necessary attorney fees incurred. The court also noted that § 542A.007(d) allows the insurer "to seek preclusion of attorney's fees if it timely pleads and proves that it was entitled to receive a presuit notice "stating the specific amount alleged to be owed by the insure under Section 542A.003 (b) (2)." In response, the insured argued that the "series of communications including the spreadsheet summarizing its damages and costs satisfied the statutory notice requirements. The court disagreed, noting that § 542A.003 (b) (2) "expressly requires presuit notice to state 'the specific amount alleged to be owed" (emphasis in original). The back-and-forth letters debating which deductible should apply, "failed to state any damage total or amount owed and therefore cannot satisfy 542A.003 (b) (2)."

In conclusion, the court observed: "It may be that the parties' substantive dispute was clear before Plaintiff filed this action. But 542A.007 (d) does not have an exception for when the claimed amount is unstated but easily calculable." Accordingly, the court found that proper notice as required by the statute was not given and granted the insurer's motion precluding any award of the insured's attorney's fees incurred starting on the date the Defendants filed their answers."

INSURED'S MISREPRESENTATIONS IN APPLICATION SUPPORT RECISSION – COURT RENDERS JUDGMENT IN FAVOR OF INSURER

Last Thursday, the U.S. District Court in Amarillo rendered judgment in a lawsuit for life insurance benefits, and issued findings of fact and conclusions of law which supported the insurer's affirmative defense of misrepresentation under Texas Insurance Code § 705.051. In *Guzman v. Allstate Assurance Company,* 2023 WL 2064719 (N.D. Tex. February 16, 2023), Mr. Guzman applied for life insurance with Allstate and signed an application indicating he was a not a smoker and had not used nicotine products in the previous twelve months. The Policy contained a two-year contestability clause and Mr. Guzman died less than two years after the Policy was issued. Allstate conducted a contestable claim investigation and found medical and other records indicating that he was a current smoker and was at the time he signed the application. Allstate subsequently rescinded the Policy and denied his spouse's claim. Mrs. Guzman filed suit in state court. Allstate removed the case to federal court and filed a Counterclaim for Declaratory Judgment asserting the affirmative defense of misrepresentation.

The court initially granted Allstate's motion for summary judgment which was reversed on appeal to the Fifth Circuit and remanded for further proceedings. The court then conducted a two-day bench trial and based on the evidence and arguments presented and issued its findings of facts and conclusions of law and granted judgment in Allstate's favor. In doing so, the court closely examined the evidence and required elements of proof in support of Allstate's affirmative defense for misrepresentation under Texas Insurance Code § 705.051 which requires that to defeat recovery, the misrepresentation must be: 1) of material fact; and 2) affects the risks assumed." And the undisputed elements to support rescission are: 1) making a representation; 2) the falsity of the misrepresentation; 3) reliance thereon by the insurer; and 4) materiality of the representation. The court also noted a possible 5th element of "intent to deceive" which is disputed by the parties and currently before the Texas Supreme Court. So, the court made a factual determination on that element as well.

The court carefully examined the evidence and applied it to the required elements of the misrepresentation defense, finding that Mr. Guzman was a tobacco user within twelve months of the application and his representations to the contrary were false, that Allstate would not have offered the Policy at a Standard Risk, nonsmoker premium rate had Guzman disclosed his smoking history and that the misrepresentations were material. And, that Allstate relied on Mr. Guzman's misrepresentations when it issued the Policy. Addressing the disputed element of intent, the Court determined that regardless of whether it is required, that the evidence supports, and the court concluded that "Mr. Guzman intentionally misrepresented his status and a smoker." Accordingly, the Court found that Allstate was entitled to judgment on its claim for declaratory relief under Texas Insurance Code § 705.051 and, its defense to Mrs. Guzman's breach of contract, Texas Deceptive Trade Practices Act and Texas Insurance Code claims and rendered judgment in favor of Allstate.