The Weekly Update of Texas Insurance News
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San Antonio Court of Appeals Finds Fact Issues Preclude Summary Judgment for Primary and Excess Insurers, But Grants Summary Judgment on Chapter 542 Late Payment Claims

Last Wednesday, the San Antonio Court of Appeals concluded that fact issues involving damage caused by one or two hail storms precluded summary judgment on the insured's breach of contract claims against its primary and excess insurers. But the court affirmed the trial court's finding that the $5,000,000 paid by primary insurer was not paid timely and affirmed the trial court's award of penalties and interest under Chapter 542, Texas Prompt Payment of Claims Act.

In *United States Fire Insurance Company v. Lynd Company,* 2012 WL 3326344 (Tex. App.-San Antonio, August 15, 2012), the court withdrew its April 25, 2012 decision and reviewed a trial court's grant of summary judgment on the insured's breach of contract claim and awarding damages, attorney's fees and statutory interest under Chapter 542. The trial court also awarded summary judgment to the excess insurer RSUI Indemnity Company. On appeal, U.S. Fire argued that the evidence raised material fact issues on whether the damage caused to two of the insured's apartment complexes was the result of one or two hail storms. The San Antonio Court of Appeals agreed.

Following review of expert reports, proof of loss forms and other evidence submitted, the court found that fact issues precluded summary judgment in favor of the insured. But because the excess insurer, RSUI's summary judgment evidence was "dependent on and interwoven with" the insured's summary judgment, the court also reversed judgment in favor of RSUI and remanded the breach of contract case for further proceedings. Concerning the trial court's award of Chapter 542 penalties and interest on the $5,000,000 paid by United States Fire, however, the court found that the payments were not made timely and affirmed summary judgment in favor of the insured awarding Chapter 542 penalties and interest.

Fifth Circuit Withdraws June 2012 *Ewing* Opinion, Certifies Questions to Texas Supreme Court

In a June 15, 2012 opinion, *Ewing Construction Company, Incorporated v. Legacy of Amerisure Insurance Company* --- F.3d ----, 2012 WL 2161134 (5 Cir. June 15, 2012), a divided panel of Fifth Circuit initially affirmed the district court's judgment holding that Amerisure had no duty to defend and, vacated the district court's judgment with respect to the duty to indemnify and the Prompt Payment of Claims Act. Ewing petitioned for rehearing.

On August 8, 2012, in a per curium opinion, the panel withdrew its prior opinion to certify questions to the Texas Supreme Court. *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, -- F.3d ---, 2012 WL 3205557, No. 11-40512 (5th. Cir. August 8, 2012). The Court explained that because the case involved important and determinative questions of Texas law to which there is no controlling Texas Supreme Court precedent, the

panel certified the following questions to the Texas Supreme Court: (1) Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, assume liability for damages arising out of the contractor's defective work so as to trigger a contractual liability exclusion in a CGL insurance policy; and (2) if the exclusion is triggered, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for "liability that would exist in the absence of contract."
Editor's note: We will continue to monitor this significant case and will report on any new developments.

In Lawsuit Between Insurers, Dallas Court of Appeals Finds Other Insurer Wrongfully Refused To Defend And Indemnify Mutual Insured

On August 6th, the Dallas Court of Appeals considered whether one insurer wrongfully refused to defend and indemnify in a case where two insurance carriers provided consecutive coverage to a mutual insured, a homebuilder. *Great American Lloyds Ins. Co. v. Audubon Ins. Co.*, --- S.W.3d ---, 2012 WL 3156571, No. 05–11–00021–CV (Tex. App.—Dallas, August 6, 2012).

In the underlying suit, the homeowners sued the insured homebuilder alleging that it negligently constructed their home. One of the insurers, Great American, initially agreed to contribute to the insured's defense costs, but after some discovery was conducted early in the lawsuit, Great American concluded that the earliest date any damage occurred was around March 30, 1998, which was outside its policy period, and therefore it did not have a duty to defend or indemnify the homebuilder and withdrew its defense. Appellee Audubon Insurance Company later sought contribution and reimbursement from appellant Great American Lloyds Insurance Company for defense and settlement costs it incurred allegedly as the result of Great American's breach of its duty to defend and indemnify their mutual insured. The parties filed cross-motions for summary judgment, and the trial court granted Audubon's and denied Great American's.

Great American appealed contending that its traditional motion for summary judgment should have been granted for the following reasons: (1) its duty to defend was not triggered because the petition did not allege facts sufficient to show that bodily injury or property damage occurred during Great American's policy period; (2) its duty to defend was not triggered because an exclusion applied to preclude coverage; (3) Audubon's claim for breach of contract of Great American's 1995–96 policy was barred by limitations; and (4) all of Audubon's claims are barred by the supreme court's decision in *Mid–Continent Insurance Co. v. Liberty Mutual Insurance Co.*, 236 S.W.3d 765 (Tex.2007). The Dallas Court of Appeals disagreed.

As to Great American's first argument, the Court stated that where the pleadings do not state facts sufficient to show that the cause of action is clearly covered or not covered, "the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy." Regarding Great American's second argument, the Court concluded that the homeowners' allegations in the underlying suit were sufficient to claim that subcontractors may have performed the work and, as a result, the exclusion for "damage to your work" contained in Great American's policy did not apply to preclude Great American's duty to defend. On the third issue, the Court held that Audubon's claim for breach of contract of Great American's 1995–96 policy was not barred by limitations. As to the fourth and final issue, the Court held that *Mid–Continent* was distinguishable because Great American and Audubon were not co-primary insurers and the policies at issue were consecutive, not concurrent. Therefore, the appellate court concluded that *Mid–Continent* did not bar Audubon's claims against Great American and that the trial court did not err by denying Great American's traditional motion for summary judgment on that basis. Accordingly, the trial court's judgment concluding that the evidence showed that property damage occurred during the insurers' respective policy periods and holding that Great American wrongfully refused to defend and indemnify its mutual insured, was affirmed.

El Paso Court of Appeals Holds Trial Court Erred in Denying Motion to Sever Extra-Contractual Underinsured Motorist Claims from Contract Claims but Properly Denied Abatement

In an underinsured motorist lawsuit, State Farm sought mandamus relief from the trial court's order denying its motion to sever the plaintiffs' breach of contract claim from their extra-contractual claims and its motion to abate the extra-contractual claims pending resolution of the breach of contract claim. In *In re State Farm Mut. Auto. Ins. Co.*, --- S.W.3d --- 2012, WL 3195099, No. 08–12–00176–CV. (Tex. App.—El Paso, August 8, 2012), the El Paso Court of Appeals denied mandamus relief with respect to the portion of the trial court's order denying abatement, but conditionally granted mandamus relief with respect to the portion of the trial court's order denying severance.

In the underlying action, Rosa Duran was injured when struck by an underinsured motorist while walking through the parking lot of a shopping center. Rosa settled her claim with the underinsured motorist, accepting the full amount of liability insurance the motorist had in force at the time of the accident. Rosa then made a claim on two separate State Farm policies, one issued to her husband Alfonso Duran and the other to her daughter Cecilia Duran. State Farm offered Rosa $7,500 to settle both claims. The Durans did not accept the settlement offer and sued State Farm for breach of the insurance policies, violations of the Deceptive Trade Practices Act and Chapter 542 of the Insurance Code, and violations of the common-law duty of good faith and fair dealing. The Durans sought $50,000 in damages—$25,000 from each policy—for Rosa's injuries and for Alfonso's claims of loss of consortium and of household services.

State Farm moved to sever and abate arguing that severance and abatement of the Durans' extra-contractual claims from their contract claim pending resolution of the contract claim was necessary to avoid the prejudice it would suffer in defending both claims in a single trial. The trial court denied State Farm's motion.

On appeal, State Farm argued that because it offered to settle the Durans' entire contract claim, the trial court should have severed and abated the Durans' extra-contractual claims from their contract claim. And by failing to do so, the trial court abused its discretion. The Court of Appeals agreed that the trial court should have severed Durans' extra-contractual claims, stating that severance is required when an insurer offers to settle the entire contract claim so as to avoid the unfair and prejudicial dilemma an insurer faces in simultaneously defending against a contract claim and extra-contractual claims.

As to abatement of the extra-contractual claims, however, the El Paso Court of Appeals stated that no rule of law mandates that a trial court abate extra-contractual claims when it orders severance of such claims from a contract claim. Rather, in determining whether extra-contractual claims should be abated until a contract claim becomes final, the trial court should abate if the movant can show that abatement will: (1) promote justice; (2) avoid prejudice; and (3) promote judicial economy. *Tex. Farmers Ins. Co. v. Cooper*, 916 S.W.2d 698, 701 (Tex.App.-El Paso 1996, orig. proceeding).

The Court disagreed with State Farm's reliance on *Brainard v. Trinity Universal Ins. Co*., 216 S.W.3d 809 (Tex. 2006), stating that *Brainard* does not address when abatement of extra-contractual claims in an uninsured/underinsured case is required. Rather, *Brainard* addressed whether an insured can recover attorney's fees from his or her uninsured/underinsured insurer if the insured fails to establish the underinsured motorist's fault and the amount of damages. *Brainard*, 216 S.W.3d at 818. In this case, however, the Court found that there was no dispute that the Durans reached a policy limits settlement with the underinsured motorist, thereby proving the negligence and underinsured status of the motorist. The Court noted that the case of *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 631 (Tex.1996), squarely addressed the issue of abatement in the context of an uninsured/underinsured case and held that abatement of a bad faith claim until all appeals of a contract claim are exhausted was not required as a matter of law.

The Court ultimately determined that State Farm failed to carry its burden of showing that it would be prejudiced in defending against the Durans' contract claim while defending against their extra-contractual claims and that abatement would promote justice, avoid prejudice, and promote judicial economy. Accordingly, the Appellate Court held that abatement of the Durans' bad faith claims was not required and the trial court did not abuse its discretion in refusing to abate the Durans' extra-contractual claims.

Safeco Wins Bad Faith Jury Trial in Fort Bend County

Last Wednesday evening, a jury in Fort Bend County (southwest of Houston) determined that Safeco did not breach its insurance policy with a homeowner but the homeowner failed to comply with his obligations under the policy in the trial of *Tasneem and Mohammed Khan vs. Safeco Surplus Lines and Crawford & Co* in the 240th Judicial District Court of Fort Bend County. This decade-old mold claim arose during the height of the Texas mold crisis under a forced-placed policy through the homeowners' mortgage company, Option One. The claim was investigated and the carrier paid more than $80,000 on ten different claims involving water intrusions into the large home in Sugarland. Unhappy with the claim payments, the homeowners sued the property insurer Safeco, the independent adjusting company (Crawford) and an engineer hired by Crawford to investigate the house in question. Emotions ran high in the case with allegations early that mold in the home caused the death of one of the homeowners' children. Safeco defended by claiming that its claim payments were sufficient to repair all water damage and resulting mold but the insured chose to spend that money paying his past due mortgage payments and buying new clothes. Safeco also alleged the homeowner failed to provide it with alternative repair estimates which the homeowner alleges he mailed after his claim was adjusted. The homeowners were ultimately represented by seven different lawyers and firms.

Safeco filed three different motions seeking to have all of the claims dismissed based on the Texas Supreme Court's decision in *Fiess v. State Farm* holding that mold isn't covered under Texas homeowners policies. All three motions were denied by the court forcing Safeco and Crawford to the try a plethora of contractual and extra-contractual claims arising from the 2002 water events and the corresponding mold that allegedly destroyed the home. At the end of the second week of trial, the jury determined that Safeco did not breach its insurance policy, the homeowners did fail to comply with their duties under the policy, and neither Crawford nor its engineer engaged in any unfair or deceptive acts or practices. None of the other extra-contractual questions were answered because of the jury's answers to the earlier questions.

Chris Martin and Chris Avery of our firm had the privilege of representing Safeco in this trial. We appreciate the courage of Safeco in its willingness to take this decade-old case to trial and achieve the vindication of its handling of these claims. Crawford and its engineer were represented by Curtis Collette and Russell Ramsey of Ramsey & Murray in Houston. Congratulations to Crawford and our co-counsel for their success as well.

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