

THOUGHT LEADERSHIP

News

## FEDERAL MAGISTRATE RECOMMENDS DENIAL OF INSURER'S MOTION TO PRECLUDE ATTORNEY'S FEES IN COVERAGE DISPUTE

Newsbrief

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Recently, a U.S. Magistrate Judge for the Western District of Texas—Waco Division recommended that the district court deny an insurer's motion to preclude attorney's fees after finding that the claimant satisfied the pre-suit notice requirements of the Texas Insurance Code. *Waco Hippodrome, Inc., v. Central Mutual Ins. Co., et al.*, Civil No. 6:22-cv-349, 2022 WL 17668128 (W.D. of Tex. Dec. 14, 2022). After the historic February 2021 winter storm struck the Waco area and caused several burst pipes and flooding in the Waco Hippodrome Building, the entity that owned the building ("Hippodrome") filed a claim with its insurer, Central Mutual Insurance Company ("Central").

Due to a dispute about the covered damages, on October 5, 2021, Hippodrome filed a lawsuit in state court against Central alleging, in part, that Central violated sections of the Texas Insurance Code. That same day, Hippodrome sent Central a demand letter with notice of its claims. On November 5, 2021, Central removed the lawsuit to federal court. Four days later, Central filed a Motion to Preclude Attorney's Fees, arguing that Hippodrome did not provide the sixty-one-day notice required by the Texas Insurance Code. On November 10, 2021, before Hippodrome could file a response, Central moved to withdraw its previously filed motion on the basis that it had filed it inadvertently. On November 17, 2021, the court granted Central's motion to withdraw and, a day later, Hippodrome and Central agreed to voluntarily dismiss the lawsuit so that they could perform additional inspections while giving Hippodrome the opportunity to re-file its lawsuit no earlier than ninety days afterward. The parties also agreed not to waive any of their existing rights, claims, or defenses.

During the ninety-day period that was part of the agreement, Central re-inspected Hippodrome's property at least two times. However, the parties were still unable to reach an agreement, and Hippodrome eventually filed a new lawsuit in federal court on April 1, 2022. In this new lawsuit, Central again filed a Motion to Preclude Attorney's fees, arguing that Hippodrome did not provide sixty-one-day notice of the new lawsuit. Hippodrome countered that the pre-suit notice it sent on October 5, 2021, satisfied the statutory requirements and it had thus fulfilled its obligations. The trial court referred Central's motion to a Magistrate.

The Magistrate first found that Central provided no evidence Hippodrome's October 5, 2021, pre-suit notice letter was defective. Indeed, he pointed out that the pre-suit notice letter complied with the statute and, even if it did not, Central relied exclusively on the argument that it was untimely because Hippodrome sent it the same day it filed its

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state court lawsuit.

Further, the Magistrate found Central's argument unpersuasive for several reasons. First, the plain language of the Texas Insurance Code referred to "the action," which clearly meant the current lawsuit in which the insurer was filing its motion to preclude attorney's fees, not any prior or subsequent lawsuits. Second, Central's argument ignored the fact that the parties had agreed to voluntarily dismiss the first lawsuit, which "rendered the proceedings a nullity" and made it as if the lawsuit had never been filed. Third, Central was assuming Hippodrome's October 5, 2021, pre-suit notice letter did not comply with the substantive requirements of the Texas Insurance Code, an issue that was never addressed in the previous lawsuit because Central withdrew the motion before Hippodrome could respond to it. Fourth, the parties' previous agreement that no party was waiving any rights, claims, or defenses—which Central argued allowed it to re-assert the basis of its original motion in a subsequent lawsuit—clearly showed the parties' intention was to preserve their rights in the first lawsuit, not any future lawsuits, and did not create any new rights for subsequent lawsuits.

Based on these findings, the Magistrate found that Hippodrome provided the required pre-suit notice on October 5, 2021—one-hundred and seventy-seven days prior to the filing of the second federal court lawsuit—and recommended that the trial judge deny Central's Motion to Preclude Attorney's Fees.