

TEXAS INSURANCE LAW NEWSBRIEF

JANUARY 7, 2014

SOUTHERN DISTRICT OF TEXAS DETERMINES THAT AN INSURER'S PAYMENT OF AN APPRAISAL AWARD NEGATES AN INSURED'S BREACH OF CONTRACT CLAIM

Over the Winter break, the United States District Court for the Southern District of Texas—McAllen Division granted an insurer's Motion for Summary Judgment regarding an insureds' breach of contract and extra-contractual claims in *Scalise v. Allstate Texas Lloyds*, 7:13-CV-178, 2013 WL 6835248 (S.D. Tex. Dec. 20, 2013).

The Insured owned a residence in McAllen, Texas that was insured by Allstate. The insured made a claim for hail damage under his homeowner's policy, and Allstate inspected the property and determined that the total covered damages equaled \$551.79. Allstate applied the \$500 deductible and issued payment in the amount of \$51.79. Afterward, the insured's attorney immediately invoked appraisal. Both Allstate and the insured selected their appraisers, and the appraisers agreed on an umpire. The appraisers inspected the property and exchanged estimates. But, the insured's appraiser provided an estimate of \$56,881.88 and Allstate's appraiser calculated the damages at \$423.76. After receiving the estimate from Allstate's appraiser, the insured attempted to withdraw from the appraisal process on the basis that Allstate had breached the appraisal clause requirement that it select a competent appraiser. Afterward, but before the umpire decided the appraisal award, the insured filed this lawsuit against Allstate.

Less than a month after suit was filed, the umpire rendered his decision setting the amount of loss at \$9,795.30. Allstate's appraiser agreed to the decision, and Allstate issued a check to the insured and his attorney. Allstate then moved for summary judgment on Plaintiff's claims.

In its opinion, the Court noted that the Texas Supreme Court recognizes a strong policy in favor of enforcing appraisal clauses in insurance contract. The scope of appraisal is damages, not liability. Plaintiff argued that Allstate's appraiser essentially mimicked Allstate's loss determination, and it was not a competent estimate because it failed to include obvious covered damages. The Court dismissed Plaintiff's argument and stated that even assuming that Allstate's appraiser undervalued Plaintiff's covered damages, his estimate did not determine the award under the policy. In fact, the umpire and Allstate's appraiser agreed to a much higher figure than what Allstate's appraiser initially recommended. The Court further stated that if insureds were permitted to invoke appraisal, await the estimates, and then determine whether to risk an unfavorable award or commence litigation, the entire purpose of an appraisal—to resolve the parties' dispute without incurring the time and expenses of litigation—would be vitiated. The Court stated that the appraisal clause binds the parties to the extent the amount of loss is determined in a particular way.

The Court noted that Plaintiff's breach of contract claim did not seek to set aside the appraisal award, rather, the claims focused on Allstate's alleged failure to appoint a competent appraiser and to pay for all of the covered damages. The Court carefully analyzed Plaintiff's breach of contract claim and noted that when parties disagree on the amount of loss and submit to the contractual appraisal process to resolve the dispute, and the insurer pays all covered damages determined by the appraisal award, the insured may not then argue that the initial failure to pay those damages equates to breach of contract. The Court explicitly stated that the amount of an appraisal award does not determine if there was a breach, but rather a contractual alternative to determine whether the damages were undervalued.

Last, the Court analyzed Plaintiff's extra-contractual claims. The Court noted that Allstate's payment of the appraisal award precludes the bad faith claims because an insured may not prevail on a bad faith claim without first showing the insurer breached the contract. As such, the Court granted Allstate's Motion for Summary Judgment.

SAN ANTONIO COURT OF APPEALS REVERSES TRIAL COURT'S DEATH PENALTY SANCTIONS AGAINST INSURER

Late in December 2013, the San Antonio Court of Appeals granted Farmer County Mutual Insurance Company's ("Farmers") Writ of Mandamus overturning a trial court's granting of death penalty sanctions striking all of Farmer's affirmative defenses three weeks

before trial. *In re Farmers Texas County Mut. Ins. Co.*, 04-13-00644-CV, 2013 WL 6730094 (Tex. App.—San Antonio Dec. 20, 2013, no. pet. h.).

The underlying suit arises out of a vehicle-bicycle collision where Luke Jajou was driving a vehicle owned by his father and struck an 11-year-old boy riding his bicycle. Prior to the lawsuit being filed, the driver, Luke Jajou provided a recorded statement to his liability insurer. Jajou was later served with Plaintiffs' Original Petition, which included a Request for Disclosure. Allstate, Jajou's liability insurer, defended him in the litigation, and responded to the Request for Disclosure regarding witness statements that "he would supplement if any statements were taken". Approximately three weeks later, Plaintiffs settled with Jajou and Allstate for policy limits. Due to the settlement, Jajou never provided any supplemental responses to his Requests for Disclosure.

Plaintiffs then sued their own insurance carrier, Farmers, for breach of contract, late payment of claims, and unfair settlement practices in relation to their claim for underinsured motorist. Plaintiffs asserted that Jajou's insurance policy was insufficient to cover all of their boy's injuries, and Farmers was obligated to provide underinsured motorist benefits under their own policy. In response to Plaintiffs' Request for Disclosure, Farmers stated that it did not have any witness statements.

Farmers issued a deposition of written questions to Allstate, and after pursuing its inquiry for recorded statements, it obtained the recorded statement that Luke Jajou had given Allstate—which had not been previously produced. The recorded statement was provided to Plaintiffs' counsel within 10 days of Farmers learning of its existence. Nonetheless, Plaintiffs' counsel moved for sanctions asking that Farmer's affirmative defenses be stricken because of their alleged discovery abuse in the late production of Jajou's recorded statement. The trial granted Plaintiffs' Motion for Sanctions.

The Court of Appeals determined that Farmer's production of the recorded statement was reasonable given the circumstances of production, and the trial court abused its discretion granting death penalty sanctions against Farmers. The Court noted that the Texas Supreme Court requires sanctions to be "just," and require a two component test in determining whether the sanction is just: (1) there must be a direct relationship between the offensive conduct and the sanction imposed; and (2) the sanction must not be excessive. Further, the Court noted that regardless of the offending conduct, the trial court must consider the availability of less stringent sanctions.

Here, the Court noted that no party refused to produce material evidence, and Plaintiffs were not prejudiced by the late production of the recorded statement. The Court reversed the trial court's grant of death penalty sanctions and determined that Farmers, which had no prior relationship with Jajou and no involvement in the prior suit prior to Jajou's settlement agreement, produced the recorded statement promptly upon discovery of its existence. Further, the Court determined that the recorded statement may be used in trial.

MCALLEN COURT DENIES INSURED'S MOTION TO REMAND ON THE BASIS OF IMPROPER JOINDER OF THE INDEPENDENT ADJUSTING COMPANY

Judge Crane from the McAllen Division of the District Court for the Southern District of Texas denied an insured's Motion to Remand on the basis of improper joinder. *Cortez v. Meritplan Ins. Co.*, 7:13-CV-140, 2013 WL 6835266 (S.D. Tex. Dec. 20, 2013). Plaintiffs' Original Petition alleged that they own properties in Hidalgo County and they were damaged by a March 2012 hail storm. Dissatisfied with the adjustment of the policy claims, Plaintiffs brought causes of action against their insurer, Meritplan for breach of contract and adjusting company Cunningham Lindsey, U.S. Inc. for breach of the duty of good faith and fair dealing and violations of the Texas Insurance Code and Deceptive Trade Practices Act.

Meritplan removed the case from state court on the grounds that the Court had diversity jurisdiction over the action, the amount in controversy exceeded \$75,000, and Cunningham Lindsey was improperly joined in an effort to defeat diversity jurisdiction.

In its analysis, the Court noted that improper joinder is a "narrow exception" to the rule of complete diversity, and Meritplan's burden is a "heavy one". The Court noted that its analysis focused solely on whether Plaintiffs pleaded enough facts to establish a reasonable possibility to recover from Cunningham Lindsey, not a mere hypothetical one. The Court agreed with the insurer and held that Plaintiffs' Original Petition failed to identify a reasonable basis for recovery against Cunningham Lindsey. Specifically, the Court noted that the "Facts" section in Plaintiffs' Original Petition solely alleges that Cunningham Lindsey performed a faulty investigation and used their faulty investigation to make coverage decisions. The Court further noted that Plaintiffs' pleading asserted bad faith, DTPA, and Insurance Code causes of action against Defendants collectively and in a conclusory manner, without any indication of the specific, actionable bases for Plaintiffs' claims against Cunningham Lindsey. As such, the Court denied Plaintiffs' Motion to Remand because Plaintiffs only pleaded a theoretical possibility of recovery against Cunningham Lindsey.

MDJW First Friday Webinar - Emerging Issues in Insurance Bad Faith Litigation

CHRIS MARTIN - PRESENTER
JANUARY 10, 2014

Our first webinar of 2014 will be held on January 10, 2014 at **noon Central Time**. Christopher W. Martin, MDJW founding partner, will present “Emerging Issues in Insurance Bad Faith Litigation.” Mr. Martin will present an overview of current developments in insurance bad faith trials and his opinions and observations based on his participation in several recent trials. He will also offer opinions as to how claims professionals can better prepare themselves and their companies to avoid potential problems during the adjustment of a claim.

Mr. Martin is Board Certified in Consumer Law by the Texas Board of Legal Specialization and is one of the most recognized insurance attorneys in Texas. He is the author of three legal Treatises on Texas Insurance Law, he is a frequent speaker at state and national insurance programs and conferences, and he served as the professor of Insurance Law at the University of Houston Law School for 10 years. He has tried numerous insurance coverage and bad faith lawsuits in Texas and in other states and he has received multiple recognitions for his skills in trying insurance lawsuits.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit. Insurance professionals accredited by the Texas Department of Insurance should have their license number available during the training in order to request credit for the course.

Register for this webinar at: <https://student.gototraining.com/r/3138967514430556416>. After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar.

Note: If you have never participated in one of the MDJW webinars, or, if you have had trouble in the past connecting to a webinar, please use the following link to check your computer’s connectivity:

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