

SPRING 2013 NEWSLETTER

INSURANCE LAW UPDATE

By Jennifer Kelley

THE FIFTH CIRCUIT

***Materials Evaluation and Technology Corporation v. Mid-Continent Casualty Company*, No. 12-40186, 2013 U.S. App. LEXIS 5323 (5th Cir. 2013).**

The United States Court of Appeals for the Fifth Circuit, construing Texas law, affirmed the district court's ruling granting an insurer's summary judgment regarding an insurer's duty to defend under a commercial general liability policy.

In *Materials Evaluation and Technology*, the insured renewed its coverage on an annual basis through at least 2004. The 2002 policy, effective from July 2002 to July 2003, provided for an Employer's Liability Exclusion. Through the Exclusion, the 2002 policy provided coverage for employee injuries arising from third-party contractual relationships.

The insured renewed its policy for the period of July 2003 to July 2004. While the coverage for the 2003 policy contained the Employer's Liability Exclusion, it also contained an endorsement excluding liability arising out of third-party relationships.

In 2003, the insured executed an agreement to provide various testing services at a DuPont facility in Beaumont, Texas. The agreement included an indemnity clause, requiring the insured and DuPont to indemnify each other. In 2004, two of the insured's employees sustained bodily injuries while working at the DuPont facility. DuPont settled with the injured employees and sought indemnity from the insured. The insured refused and was subsequently sued for breach of contract. The insured tendered defense to Mid-Continent Casualty Company. Mid-Continent determined that the Endorsement in the 2003 policy precluded coverage and the District Court agreed.

The Fifth Circuit rejected the insured's argument that the 2003 policy was on the same terms as the 2002 policy because Texas law generally provides that a policy renewal is on the same terms as the original. The Court carefully distinguished the case law the insured relied upon and then stressed that the cases were limited to their particular circumstances and did not "stand for the blanket proposition that a policyholder has a right to assume that a renewal policy is on the same terms as the original." Thus, because the 2003 Policy language with the endorsement specifically excluded liability arising from third party contracts, the Court determined the 2003 Policy specifically negated Mid-Continent's duty to defend the insured.

***Mid-Continent Casualty Company v. Eland Energy, Inc. and Sundown Energy LP*, 709 F.3d 515 (5th Cir. 2013).**

The United States Court of Appeals for the Fifth Circuit reaffirmed that Texas law does not recognize a cause of action for breach of the duty of good faith and fair dealing by an insurance company for the handling of third-party tort claims against its insured.

In *Eland Energy, Inc.*, Sundown's oil and gas production facility in Louisiana was severely damaged by Hurricane Katrina, causing storage tanks with crude oil to spill into the surrounding area. Sundown filed a claim under its CGL policy with Mid-Continent for reimbursement of government-mandated clean-up costs. At the same time, surrounding property owners and commercial fisherman filed multiple lawsuits against Sundown and Eland, which Sundown tendered to Mid-Continent for defense. One property owner not in a lawsuit contacted Mid-Continent directly to make a third-party claim and tried to negotiate a settlement, which Mid-Continent unsuccessfully attempted to do without Sundown's knowledge.

Mid-Continent agreed to defend the lawsuits and eventually paid to Sundown the \$1 million dollar primary policy limit and the \$5 million umbrella policy limit for clean-up costs. With policy limits exhausted, Mid-Continent withdrew from defending the lawsuits. Sundown, however, refused to accept the \$6 million, advised Mid-Continent it wished to hold the clean-up claim "in abeyance," and asked Mid-Continent to continue defending the lawsuits. Mid-Continent filed a declaratory judgment seeking to clarify its duties and responsibilities under the policies, and Sundown filed counterclaims for bad faith, Insurance Code violations and other counter-claims.

The district court granted summary judgment to Mid-Continent for some of the relief it sought, and the case went to trial on Sundown's remaining counter-claims, including a claim that Mid-Continent breached a duty of good faith and fair dealing by attempting to settle the claim of one property owner without Sundown's knowledge or consent. The jury returned a verdict in favor of Sundown, but the district court granted Mid-Continent's motion for judgment as a matter of law overturning the jury verdict.

Sundown complained on appeal that Mid-Continent's offer of settlement to a third-party claimant was bad faith, relying on *State Farm v. Traver* and *Republic Ins. Co. v. Stoker*. Sundown argued both *Traver* and *Stoker* expanded an insurer's liability in the third-party context if it "consciously undermined" the insured's defense, or committed some act, so extreme, that it would cause injury independent of the policy claim. The 5th Circuit said neither of the passages taken from *Traver* and *Stoker* established Texas law, and, in the seventeen years since *Stoker*, the 5th Circuit noted no Texas court had ever held that recovery was available under Texas law for an insurer's allegedly "extreme act" causing injury independent of the policy claim in the first-party context, let alone in the third-party context. The 5th Circuit refused to do so here and affirmed the district court's final judgment.

TEXAS COURTS OF APPEALS

***State Farm Mutual Automobile Insurance Company v. Bowen*, No. 11-11-00082-CV, 2013 Tex. App. LEXIS 2715 (Tex. App.—Eastland Mar. 14, 2003, no pet.).**

The Eastland Court of Appeals held that a driver involved in an auto accident whose suit against the other driver was unsuccessful due to the expiration of the statute of limitations was not entitled to treat the other driver as “uninsured” for purposes of a claim under his own policy.

In *Bowen*, the plaintiff was involved in an automobile accident in New Mexico in July 2000. In March 2003, the plaintiff sued the other driver in Texas court, but the case was dismissed for want of jurisdiction over the defendant driver and the estate of the late owner of the defendant driver’s vehicle. The plaintiff sued again in New Mexico, but the second case was dismissed because the statute of limitations had run. In a separate suit against his own insurance company, the driver and his insurer agreed as to the negligence of the other driver and the amount of the total coverage available in a suit against the other driver, and tried the matter on damages alone.

After trial, the jury answered the single question on damages with a number far beneath than the aggregate insurance covering the other driver. Thus, if the statute of limitations had not run in the New Mexico lawsuit, the plaintiff’s recovery plainly would not have exceeded the amount of coverage available, and the plaintiff would have been fully compensated. Nevertheless, the trial court entered judgment on the UIM claim for the total amount of damages, without accounting for the other driver’s available coverage.

On appeal, the Eastland court focused its analysis on the meaning of “denies coverage” in the UIM portion of the operative policy. The court concluded that the failure of the plaintiff to recover because of the statute of limitations did not constitute a denial of coverage by the other driver’s insurer. The court therefore reversed the judgment of the trial court and rendered judgment in favor of State Farm.

FEDERAL DISTRICT COURTS

***Bramlett v. Medical Protective Company of Fort Wayne, Indiana*, No. 3:10-CV-2048-D, 2013 U.S. Dist. LEXIS 31044 (N.D. Tex. Mar. 5, 2013).**

The District Court for the Northern District of Texas, Dallas Division, rejected an insurer’s motion for summary judgment on a *Stowers* claim against a liability insurer after the insurer rejected settlement offers within policy limits and an excess judgment was entered against their insured.

In *Bramlett*, a treating physician, following surgery, suspected internal bleeding and ordered related tests, but then left the hospital before checking the results. By the time the physician returned and checked the test results, it was too late and the patient later died from post-operative bleeding. After the death but before presenting a required expert’s report indicating the doctor was negligent, the decedent’s family presented a policy limit settlement demand for \$200,000. The offer was rejected. A policy limit settlement demand was made and

the expert's report provided, but that offer was allowed to expire. The trial court entered judgment in excess of \$12,000,000 and the decedent's family pursued the insurer for the excess judgment.

There was no dispute that the first two *Stowers* elements; a claim within the scope of the liability coverage and, a demand within policy limits, were met. But the insurer moved for summary judgment asserting that the third element of *Stowers* – that the offer was such that a reasonable and prudent insurer would accept it considering the insured's potential exposure – was not met as a matter of law. As to the first demand, the insurer asserted that plaintiffs failed to provide the statutorily-required expert report expressing a medical opinion that the treating physician was negligent. The court rejected this argument observing that a jury could find based solely on the facts as known to the insurer at the time of the demand, that a reasonably prudent insurer should have accepted it. As to the second demand, the insurer argued that its actions were reasonable because the 17 day time period allowed to accept the offer was insufficient. The court noted that there are some instances that the time allowed to accept the offer can be unreasonable, but under the facts of this case, the question is one of fact and the jury should be allowed to apply the "reasonably prudent insurer standard." Accordingly, summary judgment was denied.

Church on the Rock North d/b/a The North Church v. Church Mutual Insurance, Company, No. 3:10-CV-0975-L, 2013 U.S. Dist. LEXIS 17849 (N.D. Tex. Feb. 11, 2013).

The Northern District of Texas, Dallas Division, rejected an insurer's motion for summary judgment, concluding that the insurer's payment of an appraiser's award was insufficient to defeat the insured's breach of contract claim, and that the insured's statutory and common-law bad faith claims remained viable as well.

In *Church on the Rock North*, the insured, a Dallas house of worship known as the North Church, had sued over Church Mutual's handling of a claim for damages arising out of an April 2010 thunderstorm. The parties agreed on the cost of a number of repairs, but differed on others, including the amount to be paid for replacement of the North Church's roof. Church Mutual invoked the appraisal process, and while appraisal was ongoing, North Church sued.

Church Mutual removed the lawsuit to federal court, and the case was administratively closed (subject to a potential future motion to re-open) so that appraisal could be completed. Based on the umpire's award, Church Mutual issued two checks, one for the remaining unpaid balance of the loss owed, and a second releasing depreciation. Church Mutual later moved to re-open the lawsuit and for summary judgment on North Church's claims for breach of contract, common law bad faith, and violations of the Texas Insurance Code and the Deceptive Trade Practices Act. Church Mutual contended that without a viable contract claim, North Church's other claims necessarily fail, and North Church cannot succeed on its contract claim because it is estopped by the alleged binding appraisal award and Church Mutual's timely payment of that award from pursuing a contract claim.

The District Court rejected Church Mutual's position in all respects. Specifically, the court concluded that Church Mutual had failed to establish as a matter of law that the appraisal award was binding and enforceable, but only assumed that it was true. Moreover, Church

Mutual did not present sufficient evidence to prove that North Church intended to be bound by the award, failed to prove that its payments were timely, and did not establish as a matter of law that its calculations of deductible, depreciation, and prior payments were correct. Thus, Church Mutual's motion for summary judgment on the contract claims was denied.

The court's denial of summary judgment on the contract claims resulted in a denial of summary judgment on all extra-contractual claims, since Church Mutual's theory was that extra-contractual claims could not succeed absent an underlying breach of contract. However, the court went further and observed that mere payment of an appraisal award, without more, did not preclude an award for pre-appraisal violations of the Insurance Code. The court also noted that North Church's statutory claims were based on timing of payment and purported misrepresentations, not allegedly wrongful underpayment or denial of policy benefits, so the statutory claims would not stand or fall with the common-law bad faith claim. In closing, the court expressly stated that he was not commenting on the strength or weakness of North Church's case, but only that Church Mutual had not met its summary judgment burden.