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DECEMBER 2018 TEXAS INSURANCE LAW UPDATE

SAN ANTONIO COURT OF APPEALS UPHOLDS REDUCED STATUTE OF LIMITATIONS PROVISION IN INSURANCE POLICY AND DISMISSES FRAUD CLAIM FOR NO SHOWING OF AGENCY RELATIONSHIP AND APPARENT AUTHORITY BETWEEN INSURER AND ALLEGED AGENT.

In *Granger v. The Travelers Home And Marine Insurance Co.*, No. 04-17-00814-CV, 2018 WL 6517406 (Tex. App.—San Antonio December 12, 2018), the San Antonio Court of Appeals addressed whether a reduced statute of limitations period agreed upon by the parties in an insurance policy is binding without any additional consideration for relinquishment of the general four-year limitations period for breach of contract under Texas law.

Appellant Terry Granger purchased a Renter’s Insurance Policy from Defendant Travelers Home and Marine Insurance Company (“Travelers”), which provided coverage against personal property loss from theft. Pursuant to the policy, any action brought against Travelers must have been commenced within two years and one day after accrual of cause of action. Granger submitted a claim during the policy period for loss of personal property due to burglary. Afterwards, Granger did not respond to Travelers’ request for documentation, proof of loss and examination under oath, after which Travelers sent a letter to Granger on January 19, 2011 closing the claim. On October 13, 2014, Granger commenced a lawsuit against Travelers alleging breach of contract. Travelers moved for traditional summary judgment on the basis that Granger’s breach of contract claim was barred by the “two years and one day” statute of limitations period in the policy.

Granger amended her complaint to include a common law fraud claim, alleging that her landlord Detweiler, who was also insurance an agent of Travelers, falsely represented to her that the limitation period for any insurance claim is four years. Traveler's amended its motion for summary judgment to seek dismissal of Granger's fraud claim via both a traditional summary judgment motion and a no-evidence summary judgment motion. The trial court granted Travelers motion and dismissed Granger's claims.

In her appeal, Granger argued that she did not receive any consideration for relinquishing the general 4-year statute of limitations for a breach of contract claim, and therefore, the reduced "two years and one day" statute of limitations period does not bar her claims. However, Travelers argued that payment of the insurance premiums constituted consideration for all of the Policy's terms and conditions. The San Antonio Court of Appeals agreed with Travelers and affirmed the trial court's decision.

In reaching its decision, the Court of Appeals reasoned that parties to a transaction can agree regarding the time a person must file a lawsuit on a particular claim, and such provisions in insurance policies are valid and binding. Since Granger commenced her lawsuit after two years and one day following Travelers denial of her claim, her cause of action for breach of contract was barred as a matter of law. The court also found that Granger's own affidavit stating she did not receive additional consideration for forfeiture of the 4-year statute of limitations is not evidence of lack of consideration for same.

With regard to her common law fraud claim, Granger argued that she met Detweiler and mentioned her interest in purchasing renter's insurance that he discussed the renter's insurance policy with Granger and falsely represented that claims against insurance policies have a 4-year statute of limitations. Granger further alleged that she relied upon the agent's misrepresentation in making her decision to purchase the renter's insurance policy from Travelers. After the loss occurred, Granger spoke to Detweiler, yet he never mentioned that she had a two year and one day limitation period following denial of her claim by Travelers to bring a lawsuit. Based upon same, Granger argued that the agent recklessly made a false representation to induce her to purchase the policy from Travelers, and she relied upon the false representation. Granger claimed that Detweiler had apparent authority to bind Travelers as Travelers' insurance agent.

The San Antonio Court of Appeals disagreed with Granger and affirmed the trial court's decision to dismiss Granger's common law fraud claim. The court reasoned that there was no evidence of how Granger learned that Detweiler was Travelers' agent or how Travelers controlled Detweiler's actions. Granger failed to show an agency relationship between Detweiler and Travelers. Furthermore, the court noted that the focus is on conduct of the principal for determining an apparent authority. There was no evidence that Travelers assigned Detweiler to present or explain the policy to Granger, or hold himself out as Travelers' agent, or that Travelers controlled Detweiler's tasks.

SAN ANTONIO COURT OF APPEALS AWARDS ABATEMENT OF EXTRA-CONTRACTUAL CLAIMS UNTIL RESOLUTION OF UIM CLAIM.

In *In Re Allstate Fire and Casualty Insurance Company and Latina Pruitt*, No. 04-18-00676-CV, 2018 WL 66224885 (Tex. App. –San Antonio Dec. 19, 2018), the San Antonio Court of Appeals addressed the issue of whether abatement of the real party in interest’s extra-contractual claims is required during pendency of that party’s breach of contract claim for underinsured motorist (“UIM”) benefits.

Plaintiff, the real party in interest, was in an automobile accident with another driver. After settling with the other driver for the latter’s full policy limit, Plaintiff made a UIM claim to his insurance company, Allstate Fire and Casualty Insurance Company and its adjuster, Latina Pruitt (“Allstate”). Alleging that Allstate failed to pay under the terms of the policy, Plaintiff sued for breach of contract. Plaintiff also brought extra-contractual claims for violations of the Texas Insurance Code. Allstate moved in trial court to (1) sever Plaintiff’s contractual claim (UIM) claim from his extra-contractual claim, and (2) abate the extra-contractual claims until resolution of the contractual claim. Although the trial court granted the unopposed severance, the court denied abatement, after which Allstate filed a petition for writ of mandamus in San Antonio Court of Appeals. Plaintiff did not respond to the petition

Plaintiff relied on Texas Supreme Court’s decision *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018) to argue that because much of the same evidence can be used in his contractual and extra-contractual claims, abating the latter may prevent discovery in the underlying breach of contract case. Allstate argued in its petition that until Plaintiff establishes entitlement to UIM benefits, the extra-contractual claims have not accrued and should be abated. The San Antonio Court of Appeals agreed with Allstate and overturned the trial court’s decision on abatement. The court found that Plaintiff did not state what evidence was relevant to both his contractual and extra-contractual claims, or what specific evidence that was relevant to his contractual claims could not be obtained if the extra-contractual claims were abated. Relying on *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006), the court reiterated the longstanding rule that a UIM insurer is under no contractual duty to pay UIM benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist. The court conditionally granted [All State’s] petition reasoning that since breach of contract liability had not been adjudicated, the extra-contractual claims were not “ripe.” Accordingly, the trial court erred by not granting abatement of Plaintiff’s extra-contractual claim.

AMARILLO COURT OF APPEALS FINDS INSURER’S PAYMENT OF APPRAISAL AWARD SATISFY PROMPT PAYMENT OF CLAIMS ACT; NO INDEPENDENT INJURY FOR EXTRA-CONTRACTUAL LIABILITY.

In *Perry v. United Services Automobile Association*, No. 07-18-00031-CV, 2018 WL 6442050 (Tex. App. –Amarillo Dec 7, 2018), the Amarillo Court of Appeals addressed whether

the insured's extra-contractual claims were independent of her breach of contract claim under *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).

USAA issued a homeowner's insurance policy to Della R. Perry ("Perry"). Following a claim for loss, coverage was undisputed, yet USAA disputed the value of the loss. USAA valued the loss at \$5,153.00. However, Perry claimed the loss amounted to approximately \$33,000.00. Before invoking an appraisal, Perry filed a lawsuit. Perry then submitted the loss to an appraisal, which appraised the loss at \$14,988.76. USAA agreed to pay the appraised value, and issued a check to Perry for \$9,335.26 (the appraisal value less the \$5,153.00 amount already paid and Perry's deductible). Following payment, USAA filed a traditional summary judgment motion in trial court claiming: (1) since it paid the appraisal value of the loss, USAA is not in breach of contract claim because USAA complied with the contract [policy], and (2) Perry's extra-contractual claims should be dismissed because USAA did not breach the insurance contract and Perry had not suffered any injury independent of the insurance contract. The trial court granted USAA's summary judgment motion and dismissed Perry's claims.

On appeal, Perry claimed (1) the trial court violated the Texas constitution by granting summary judgment based on payment of the appraisal; and 2) the trial court erred by dismissing Perry's statutory claims. Perry argued that the viability of her statutory claims depended on whether she was entitled to benefits under the insurance policy, the Texas Insurance Code permitted her to recover attorney's fees, and appraisal clauses in an insurance policy do not preempt the Texas Insurance Code.

The Amarillo Court of Appeals disagreed with Perry and affirmed the trial court's decision. Relying on *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), the court found that Perry's extra-contractual claims were not independent of Perry's breach of contract claim. The court held that in order for Perry to recover the damages for her statutory claims must arise from an injury independent of her policy benefits. The court noted that the only possible independent injury that could potentially arise was from USAA's alleged failure to accept/reject Perry's insurance claim within the time period under the Prompt Payment of Claims Act. However, because USAA paid the appraisal award per the contract, USAA was not liable as a matter of law for Perry's extra-contractual claim.

Given that Perry and USAA contractually agreed to follow the appraisal clause of the insurance policy, which USAA abided by via payment of appraisal value, USAA could not be found liable for Perry's claim for \$33,000,00.00, or for neglecting to timely pay the claim for which the parties contractually agreed. Accordingly, Perry did not establish USAA's violation of the Prompt Payment Act, or that she had suffered any injury independent of loss of policy benefits, and her extra-contractual claims were properly dismissed.

DALLAS COURT OF APPEALS HOLDS INSURER HAS NO CONTRACTUAL DUTY TO PAY UIM CLAIM BEFORE DETERMINATION OF LIABILITY IN THE UNDERLYING LAWSUIT.

In *Bryant v. Progressive County Mutual Insurance Company and Kristen Winkler*, No. 05-17-01023-CV, 2018 WL 6521853, (Tex. App.—Dallas Dec. 12, 2018), the Dallas Court of Appeals addressed several issues including special exceptions to a summary judgment motion and the appropriateness of same in the context of an Uninsured/Underinsured Motorist (“UIM”) claim.

On April 14, 2013, Appellant George Bryant (“Bryant”) was injured in a car accident where the tortfeasor was uninsured. Bryant had an automobile insurance policy with Progressive County Mutual Insurance Company (“Progressive”), which included UIM coverage with a limit of \$100,007.00. On October 14, 2014, Bryant filed suit against Progressive and its agent, seeking UIM coverage and alleging extra-contractual common-law bad faith claims and violations of the Texas Insurance Code. Progressive made several offers to Bryant before and after he filed the lawsuit, including its highest offer of \$40,000.00, yet Bryant consistently rejected and demanded the full UIM limit. The trial court severed the UIM claim from Plaintiff’s extra-contractual claims and abated the latter until after adjudication of UIM claim.

Before trial, the trial court granted Bryant’s summary judgment motion finding that the tortfeasor was an uninsured driver. During trial, Progressive stipulated that Warlow caused the accident. The jury awarded Bryant a total of \$74,965.43 for damages, and on October 14, 2016, Progressive paid \$89,473.90 (full amount of judgment plus interest) to Bryant. Subsequently, on December 9, 2016, the trial court lifted the abatement, and Bryant amended his petition. Bryant alleged that Progressive violated the Insurance Code’s requirement to conduct reasonable investigation, misrepresented policy terms by claiming they did not have the burden to prove whether the tortfeasor was uninsured, and violated the Prompt Payment Act by not paying the claim within 5 days of judgment. Progressive moved for summary judgment on Bryant’s extra-contractual claims. In its summary judgment motion, Progressive argued that Plaintiff’s extra-contractual claims failed because Progressive did not breach the contract and there are no disputed issues of material fact, Plaintiff’s misrepresentation claims should be dismissed because the statutory provisions do not apply to Plaintiff’s allegations, and Plaintiff’s claim for violation of the Prompt Payment of Claims Act must be dismissed because same do not apply to litigation or judgment. The trial court granted Progressive’s motion for summary judgment and the Dallas Court of Appeals affirmed.

With regard to Bryant’s extra-contractual claim based on lack of reasonable investigation, the Dallas Court of Appeals reiterated the longstanding rule that the insurer [Progressive] was under no contractual duty to pay UIM benefits until the insured [Bryant] obtained a judgment that established liability and the uninsured/undersinsured status of the tortfeasor, and therefore, Progressive had no obligation to make any payment or settlement before the trial court reached a decision, relying on *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006).

Moreover, since Progressive paid the full amount of damages within 30 days after trial, the payment was prompt. Also, although coverage under the policy was stipulated prior to trial, said stipulation did not establish the amount of damages of Progressive's liability on the claim, and therefore, there was no stipulation as to damages. Also, Progressive's ongoing offers showed that, contrary to Bryant's contentions, Progressive never denied the claim or refused to compromise. Finally, the court also concluded that Bryant was not entitled to any additional benefits as damages for any statutory violations since he had no right to any benefits beyond those found by the jury (i.e. there was no independent injury under *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018)).

With regard to Bryant's Prompt Payment of Claims Act violation, the Court held that, under the Act, Progressive was required to acknowledge receipt of the claim and commence investigation within 15 days. Since Progressive sent a letter to Bryant's attorney acknowledging receipt and requesting information within 10 days after receipt of claim, Progressive did not violate the Act. Furthermore, although the Act requires payment of claims within 5 business days after notice, Progressive's payment 24 days following trial was proper. The Court relied upon its prior opinion, *DeLagarza v. State Farm Mut. Auto. Ins. Co.*, 175 S.W.3d 29, 33 (Tex. App.—Dallas), supplemental opinion on reh'g, 181 S.W.3d 755 (Tex. App.—Dallas 2005, pet. Denied.), which held that "the deadlines in the Prompt Payment of Claims Act for the payment of claims do not apply to the litigation process for UIM claims."