Texas Property Law Changes and Rulings Since Hurricane Harvey

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As Hurricane Harvey wreaked historic damage after slamming into the Texas coast on August 26, 2017, recent updates to state laws dealing property insurance were scheduled, by coincidence, to take effect just 6 days later on Friday, September 1, 2017. These laws substantively changed the obligations of insurers under property policies issued in Texas. These laws were also, as yet, uninterpreted by Texas courts.

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INTRODUCTION

Just as other hurricanes and natural disasters have led to a torrent of property-coverage lawsuits, the same can be expected after Hurricane Harvey's visit in late August 2017. Although those claims have not yet begun winding their ways through the appellate courts, now is a good time to look at changes and rulings in the law that will affect those claims. Recall that much of Hurricane Harvey's effect was through flooding—those claims are handled separately under federally-related policies such as under the National Flood Insurance Program. The cases in this paper would not apply to claims decided under federal law.

TEXAS INSURANCE CODE CHAPTER 542A

The biggest actual change in Texas property-insurance coverage law since Hurricane Harvey is the enactment of Texas Insurance Code chapter 542A. Chapter 542A was proposed due to what was seen as an abuse of hail-damage claims by plaintiffs' attorneys. The new chapter strengthens the requirement for pre-suit notice, potentially limits claimants' attorney's fees, provides a mechanism to prevent plaintiffs from avoiding removal to federal court by naming a non-diverse adjustor as a defendant, and lowers the interest rate on prompt pay claims.

Scope

The statute became effective for claims after September 1, 2017, and will apply to the vast majority of Hurricane Harvey claims. It is much broader than previous notice proceedings in the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus & Comm. Code § 17.41 *et seq.* ("DTPA") or the Texas Insurance Code. It affects claims for (a) breach of contract, (b) negligence, fraud, or breach of a common law duty, (c) violations of Texas Insurance Code subchapter D of Chapter 541 and subchapter B of Chapter 542, and (d) the DTPA. Tex. Ins. Code §542A.002.

Although brought about by concerns about hail-storm claims, it applies to all first-party coverage claims for property damage "caused, wholly or partly, by forces of nature, including an earthquake or earth tremor, a wildfire, a flood, a tornado, a hurricane, hail, wind, a snowstorm, or a rainstorm." *Id.* at §542A.001(2).

Chapter 542A specifically does not apply to claims against the Texas Windstorm Insurance Association. *Id.* at §§ 542A.001(4) and 542A.002(b).

Notice Provisions and Their Effect on Attorney's Fees

Recognizing the basic ineffectiveness of prior notice provisions in the Insurance Code and DTPA, Chapter 542A strengths the requirements of the notice and provides more effective sanctions for providing an overstated notice.

The claimant must give written notice of his claim (in addition to any other notice required by the law or the insurance policy) at least 61 days before filing an action to which Chapter 542A applies. *Id.* at §§542.003(a). The notice must provide:

(1) a statement of the acts or omissions giving rise to the claim;
(2) the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property; and
(3) the amount of reasonable and necessary attorney's fees incurred by the claimant, calculated by multiplying the number of hours actually worked by the claimant's attorney, as of the date the notice is given and as reflected in contemporaneously kept time records, by an hourly rate that is customary for similar legal services.

Id. at §542A.003(b). The claimant's attorney or representative must give a copy of the notice to the claimant and state that she has done so in the copy of the notice provided to the claimant. *Id.* at §542A.003(c). Pre-suit notice is not required if a claimant has a reasonable basis for believing that the statute of limitations will expire if he gives notice or if the action is filed as a counterclaim. *Id.* at §542A.003(d).

To prevent harm to the claimant from providing the notice, the statute limits the ability of the noticed party to file its own suit during the notice period. *Id.* at §542A.003(c). Any such suit must be dismissed without prejudice. *Id.*

After receiving notice, the notified party acquires a right to (no later than the 30th day after receiving notice) send a written request to inspect, photograph, or evaluate the property at issue. *Id.* at §542A.004. If reasonably possible, the inspection must be completed by the 60th day after notice. *Id.*

Failing to give any notice or to provide a reasonable opportunity to inspect the property results in abatement, if requested. *Id.*at §542A.005(a). If no notice was provided, the abatement continues until the 60th day after a proper notice is given. *Id.* at §542A.005(e)(1). If an opportunity to inspect, photograph, and evaluate is requested and is not provided, the abatement continues until the 15th day after the inspection, photographing, or evaluating is completed. *Id.* at §542A.005(e)(2).

Much of the abatement process is automatic. If the plea in abatement is verified and alleges the failure to provide notice or an inspection, then the case is automatically abated "without a court order" on the 11th day after the abatement plea is filed (if no controverting affidavit is filed). *Id.* at §542A.005(c). The claimant can controvert the abatement based on a lack of notice with its own affidavit. *Id.* at §542A.005(d). It must include a copy of the notice as an attachment and a statement of the date the notice was given. *Id.* at §542A.005(d).

Under Chapter 542A, the contents (or lack thereof) the notice letter can have a huge effect on the amount of recoverable attorney's fees. *Id.* at §542A.007. First, if the defendant pleads and proves that he was entitled to but did not receive pre-suit notice stating the specific amount alleged to be owed on the claim for damage to or loss of covered property, then the attorney's fees recoverable are limited to those incurred before the defendant filed its pleading. *Id.* at §542A.007(d). That defensive pleading, however, must be filed not later than the 30th day after the defendant files its original answer. *Id.* The language requiring proof of a lack of presuit notice would appear to mean that a subsequent notice (whether after an abatement or otherwise) cannot cure the defect. Claimant's attorney's will argue otherwise and, given courts' disfavor with waivers of recovery, may prevail before the appellate courts.

Even when the notice is provided, its contents can limit the attorney's fee recovery. The, attorney's fees are limited to the lesser of (1) the reasonable and necessary fees as found by the tier of fact, (2) the amount that may be awarded under other applicable law, and (3) a calculated amount based on the notice. *Id.* at §542A.007(a)

The calculated amount is determined by first dividing the amount awarded in the judgment for the claim under the insurance policy for damage to or loss of covered property by the amount claimed for damage or loss in the notice. *Id.* at §542A.007(a)(3)(A). That amount is then multiplied by the amount of reasonable and necessary attorney's fees supported at trial by evidence. *Id.* at §542A.007(a)(3)(B). For example, if the notice claimed an amount twice that awarded at trial, the attorney's fees would be cut in half. Although the language appears to be limited to the actual damages awarded, claimants' attorneys will undoubtedly argue that it also includes any amount of additional damages under the DTPA or Insurance Code.

The statute further states that if the fraction calculated under 3(A) is greater than 0.8 and not otherwise limited by law, then the claimant gets the full amount of fees anyway. *Id.* at §542A.00(b) If, however, the fraction is less than 0.2, then the claimant recovers no fees. *Id.* at 542A.007(c).

Agent Responsibility and Removal

A common tactic by Claimants' attorneys to avoid removal to federal court is to name a nondiverse party, such as an adjuster, as a defendant in the suit. *See also* section IV, i*nfra.* Chapter 542A contains a provision to somewhat limit that tactic.

An insurer that is subject to the action may, by written notice to the claimant, elect to accept whatever responsibility an agent might have to the claimant for his acts or omissions related to the claim. *Id.* at §542A.006(a). If it does so before an action is filed, then no cause of action exists against the agent, and a court must dismiss any such claim with prejudice. *Id.* at §542A.006(b). Even after the action is filed, if the insurer elects to accept responsibility the court must dismiss the action against the agent with prejudice. *Id.* at §542A.006(c). An election may not be revoked by the insurer, and the court cannot nullify it. *Id.* at §542A.006(f). In a jury trial, the jury cannot be told about the election. *Id.* at §542A.006(i).

If an insurer is in receivership at the time the claimant commences an action against the insurer, the insurer cannot elect to accept responsibility and any prior election is disregarded. *Id.* at §542A.006(h). In general, after accepting responsibility, the insurer must still make the agent available for deposition at a reasonable time and place, or the safe harbor for the agent no longer applies. *Id.* at §542A.006(d). It does still apply, however, if the court finds that:

(1) it is impracticable for the insurer to make the agent available due to a change in circumstances arising after the insurer made the election under Subsection (a);
(2) the agent whose liability was assumed would not have been a proper party to the action; or
(3) obtaining the agent's deposition testimony is not warranted under the law.

Id. at §542A.006(d).

Finally, when the case is tried, it is submitted as if the agent were a party. *Id.* at §542A.006(g). Any judgment against the insurer must include the liability that would have been assessed to the agent. *Id.* That provision overrules anything contrary in Chapter 33 of the Texas Civil Practice and Remedies Code.

Change in Penalty Interest Rate

The statute creating Chapter 542A also added a provision under Insurance Code §542.060, which specifies the penalty interest terms of prompt pay claims under Chapter 542. For non-542A claims, the penalty interest rate remains 18% (plus the additional normal pre-judgment interest).

Under new section 542.060(c), the penalty interest rate for Chapter 542A claims is changed to 5% over the interest rate determined under Section 304.003 of the Finance Code, which sets the post judgment interest rate based on the prime rate of the Board of Governors of the Federal Reserve System with a minimum of 5% and a maximum of 15%. Although theoretically the penalty interest rate could increase to 20% (higher than the old prompt payment penalty interest), in practice the rate is 10% unless and until major inflation becomes an issue. Just as in normal prompt payment claims, the award also accrues regular pre-judgment interest.

MENCHACA

The biggest recent property-claim case under Texas law is undoubtedly the Texas Supreme Court's opinion after rehearing in *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (2018). The Court kept its previous opinion regarding extra contractual property claims, but found itself now splintered on how its opinion would be applied to the case itself.

Menchaca is an attempt to reconcile what appeared to be two different rulings on the determination of damages under the Insurance Code. In the earlier case, *Vail v. Texas Farm Bureau Mut. Ins.*, 754 S.W.2d 129 (Tex. 1988), the Court had held that "unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." *Id.* at 136. Subsequently in *Provident Am. Ins. v. Casteneda*, 988 S.W.2d 189 (Tex. 1998), the Court had ruled that "failure to investigate a claim is not a basis for obtaining policy benefits." *Id.* at 198. Many courts had interpreted *Casteneda* as meaning that an insurance claims damages may not be based on damages caused from loss of benefits. The Fifth Circuit Court of Appeals even stated that the opinion and other decisions from the Texas courts cast doubt on the remaining validity of *Vail. In re Deepwater Horizon,* 807 F.3d 689, 698 (5th Cir. 2015), citing *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, 612 F.3d 800, 808 and n.1 (5th Cir. 2010).

In response, the Supreme Court set out five interrelated rules:

1. As a general rule, an insured cannot recover damages for an insurer's statutory violation if the policy does not cover the claim.
2. An insured who shows that he had a right to receive policy benefits can recover those benefits as actual damages under the Insurance Code if the statutory violation caused the loss.
3. Even if the insured cannot establish a present contractual right to, benefits, it can recover them as actual damages if the insurers statutory violation caused the loss of the contractual right.
4. If a statutory violation causes damage independent of the loss of policy benefits, the insured can recover for that damage even without a right to recover policy benefits. The Court noted, however, that the possibility of an independent injury from a statutory violation is rare and that it, in fact, has never encountered one. *Id.* at 500, *citing Mid-Continent Cas. Co. v. Eland Energy*, *Inc.* 709 F.3d 515, 521-22 (5th Cir. 2013).
5. An insured can recover no damages based on a statutory violation if it had no right to receive policy benefits and sustained no injury independent of a right to benefits.

Menchaca, 545 S.W.3d at 489. It determined that a remand rather than rendition of judgment was the appropriate relief. *See also State Farm Lloyds v. Fuentes,* 549 S.W.3d 585, 61 Tex. Sup. Ct. J. (June 8, 2018) (remanding case involving claim that insured breached the contract first thereby excusing all claims against the insurer because of the court's recent opinion in *Menchaca).*

APPRAISAL AND ITS EFFECTS

Appraisal continued to be a favored method for insurers to show that they had met their statutory obligations and were not subject to Insurance Code violations, particularly under the Texas Prompt Payment of Claims statute, Texas Insurance Code Chapter 542.

Appraisal is a non-judicial method of determining the amount of policy damages on a claim. *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 406-407 (Tex. 2011). Appraisal provisions are commonly found in many types of policies, including property policies. *Pounds v. Liberty Lloyds of Texas Ins. Co.*, 528 S.W.3d 222, 226 (Tex. App.—Houston [14th Dist] 2017, no writ). In general, when a policy contains an appraisal provision, either party can invoke it. *See, e.g., In re Allstate Vehicle and Property Ins. Co.,* 542 S.W.3d 815, 821 (Tex. App.—Beaumont 2018, orig. proceeding).

Appraisal provisions vary among policies. In order to determine the exact rights and procedures under such a provision, you must consult the policy. For example, some only require the appointment of an umpire if there is a disagreement between the appraisers, while others require an umpire throughout the process. Likewise, some have only the disputed items submitted to the umpire, while other have the umpire independently review the entire claim of damages. Each party then chooses one appraiser and, if the appraisers cannot reach agreement on the amount of damage, they jointly appoint an umpire. Most provisions also provide that if the parties cannot agree on an umpire, then an appropriate court can appoint one upon request.

After examination, a determination signed by any two of the appraisers and umpire becomes the binding damage determination. An appraisal cannot determine whether there is coverage, but "the appraisers can still set the amount of the loss in case the insurer turns out to be wrong." *State Farm Lloyds v. Johnson,* 290 S.W.3d 886, 888 (Tex. 2009); *Texas Windstorm Ins. Co. v. Dickinson ISD,* 561 S.W.3d 263 (Tex. App.—Houston [14th Dist.], n.w.h.)(appraisal award insufficient to show which damages were covered and which were not).

An appraisal award can only be set aside if:

(1) the award was made without authority;
(2) the award was made as the result of fraud, accident, or mistake, or
(3) the award failed to comply with the requirement of the insurance policy.

Zhu v. First Community Ins. Co. v. 543 S.W.3d 428, 433 (Tex. App.—Houston [14th Dist.] pet. filed). If no one asserts and proves a ground to set the award aside, the award binds the parties. *Id.*

Cases have continued to pile up holding that if an insurer promptly pays an appraisal award, then it has complied with its contractual payment obligation and cannot be liable for damages under the Prompt Payment of Claims statute even if time has expired since its initial denial of the claim. *See Id.* at 428 (summary judgment for insurer upheld); *Pounds v. Liberty Lloyds of Texas Ins. Co.*, 528 S.W.3d 222, 226 (Tex. App.—Houston [14th Dist] 2017, no writ); *Manali Corp. v. Covington Specialty Ins. Co.*, 872 F.3d 255 (5th Cir. 2017)(same); *Cano v. State Film Lloyds,* 276 F.Supp.2d 620 (N.D. Tex. 2017)(summary judgment for insurer granted); *Turner v. Peerless Indem. Ins. Co.,* No. 07-17-00279-CV, 2018 WL 2709489 (Tex. App.—Amarillo, June 5, 2018, n.w.h.)(summary judgment affirmed); *Abdalla v. Farmers Ins. Exchange*, No. 07-17-00020-CV, 2018 WL 2220269 (Tex. App.—Amarillo May 14, 2018, n.w.h.)(summary judgment based on appraisal affirmed); *Ortiz v. State Farm Lloyds,* No. 04-17-00252-CV, 2017 WL 5162315 (Tex. App.—San Antonio, November 8, 2017, pet. filed)(same).

In some cases, however, even if there is not a coverage issue, there may still be questions of fact precluding summary judgment. *Hall v. Germania Farm Mut. Ins. Assoc.*, No. 07-16-00304-CV, 2017 WL 4630028 (Tex. App.—Amarillo, October 13, 2017, n.w.h.). In *Hall*, the policy did not specify a time for payment after the appraisal. Thus, the Court followed the rule that "where no time of performance is stated in a contract, the law will imply a reasonable time. *Id. at *4*, citing *Moore v. Dilworth*, 142 Tex. 538, 179 S.W.2d 940, 942 (1944). The Court noted that although the trial-court record showed the date of the appraisal award, it did not contain the dates when the check was sent to the insured, received by the insured, or negotiated by the insured. *Id.* at *6. The Court ruled that the evidence was not conclusive that

the appraisal award was paid within a reasonable time, so the summary judgment in favor of the insurer was reversed.

The same court of appeals in a different case, however, found that the facts established the award was paid within a reasonable time as a matter of law and distinguished *Hall. Turner v. Peerless Indem. Ins. Co.,* No. 07-17-00279-CV, 2018 WL 2709489 (Tex. App.—Amarillo, June 5, 2018, n.w.h.). The last appraiser signed the award on October 13. *Id.* at *3. The next day, counsel for the insurer emailed the insured's counsel and (1) described the amount due after various deductions and depreciation, (2) asked if counsel agreed with the calculations, (3) asked for drafting instructions for the check issuance, and (4) asked who the payees should be, including whether the insured's counsel's firm should be on it.

When there was no response, he emailed the counsel again on October 19. On the 19th and 20th, the counsel exchanged emails confirming the amounts and terms of the check to be issued. *Id.* The check was issued on October 24, and forwarded from the insurer's counsel's office to that of the insured's counsel by overnight mail on October 25. The Court distinguished its opinion in *Hall* by noting that here the date of insurance attorney's receipt of the check and the date they forwarded it to the insured was contained in the evidence. *Id.* Therefore, it affirmed the summary judgment in favor of the insurance company.

Because Courts are effectively eliminating breach of contract and Prompt Pay claims in cases where there is an appraisal award, attorneys for insureds have tried (mainly unsuccessfully) to attack either the requirement that the claim be appraised or the award itself.

To avoid appraisal through waiver by the insurer, the claimant must show that the insurer intentionally relinquished a known right or conducted itself intentionally in a manner inconsistent with claiming the right. *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 407 (Tex. 2011). Additionally, it must show that it was prejudiced by the delay. *Id.* at 411.

Most attempts to argue waiver have continued to fail, absent egregious behavior. *See, e.g., In re Allstate Vehicle & Property Ins. Co.*, 542 S.W.2d 815 (Tex. App.—Beaumont 2018, orig. proceeding); *In re Am. Nat. Prop. And Cas. Co.,* No. 04-18-00138-CV, 2018 WL 3264932 (Tex. App.—San Antonio July 5, 2018, orig. proceeding). Courts have supported their finding of no waiver on a number of grounds. For example, many policies contain a no-waiver clause, which requires any waiver to be by signed endorsement, and the courts have also held that an insured cannot create a waiver merely by filing suit and arguing that that cost is prejudice. *In re Allstate Vehicle & Property Ins. Co.*, 542 S.W.2d at 820; *In re Am. Nat. Prop. And Cas. Co.,* No. 04-18-00138-CV, 2018 WL 3264932 at *4-5. Similarly, when insureds argue that they have been prejudiced by incurring litigation expenses, courts have also ruled against them by noting that they could have avoided the costs by invoking the appraisal clause themselves. *In re Allstate*, at 821. *In re Am. Nat. Prop.* at *5.

Some insurers still find a way to waive the appraisal or create a bad one, however. For example, in *In re Philadelphia Indem. Ins. Co.*, No. 13-17-00506-CV, 2017 WL 5616272, (Tex. App.—Corpus Christi-Edinburg, November 20, 2017, orig. proceeding), the insurer selected an appraiser, Darrell Edwards, who the insured, Iglesia del Pueblo, Inc. complained had been found in 2012 to have engaged in the unauthorized practice of law and who was a defendant in an unrelated case involving Iglesia's counsel. Iglesia chose Sergio De La Canal as its appraiser.

Because Edwards and Iglesia's appraiser could not agree on an umpire, Iglesia asked the Honorable Israel Ramon to appoint one, and he chose Andy Almaguer. The two appraisers, however, then executed a "Declaration of Appraisers" appointing Tom Powell as umpire. Edwards and Powell signed an award, and Philadelphia paid the actual cash value minus the depreciation.

Iglesia filed suit alleging that Philadelphia and Edwards refused to proceed with appraisal unless and until the appointment of Almaguer was vacated. It filed a motion to set aside the appraisal award, alleging that (1) Powell was improperly designated as umpire; (2) Edwards was not competent or impartial; (3) the award improperly decided issues of coverage and liability; and (4) the award was not an "honest assessment" of the necessary repairs. The trial court granted the motion, and Philadelphia filed a petition for writ of mandamus contending the trial judge abused his discretion.

The Court of Appeals found that vacating the award was not a clear abuse of discretion. *Id.* at *3. It noted the facts above as well as that Edwards had voluntarily relinquished his adjuster's license. The

court also noted Iglesia argued that Edwards and Powell had offered no evidence of why they disregarded $70,000 of temporary repairs it had made. The Court stated that although a gross disparity between an appraisal award and the cost of repair cannot support a finding of bias or impartiality without additional evidence, here the trial court had other evidence that Edwards was not impartial, *Id.* at *3, citing *Hennessey v. Vanguard Ins.,* 895 S.W.2d 794, 799 Tex. App.—Amarillo 1995, writ denied).

Ultimately, the court held that it was not a clear abuse of discretion to set aside the appraisal award on the basis that Edward's appointment filed to comply with the insurance policy. *Id.* It did not address the other reasons that Iglesia raised in its motion.

In *In re Allstate Vehicle and Prop. Ins. Co,* 549 S.W.3d 881, No. 02-17-00319-CV, 2018 WL 2069185 (Tex. App.—Fort Worth, May 3, 2018, orig. proceeding) the insurer undertook conduct that allowed the trial court's finding of waiver of the appraisal process and that allowed the appellate court to deny mandamus. *Id.* at *1.

The insured, Deniedra Jackson, made two claims for roof damage, and, when Allstate's actions were not satisfactory, filed suit. Prior to invoking appraisal, Allstate undertook a great deal of action. It conducted at least six inspections of the roof. When suit was filed Allstate removed it to federal court, which later remanded the case and awarded fees to Jackson. Allstate took Jackson's deposition, and conducted discovery. It agreed to a February 2018 trial setting. It then argued to the trial court that it needed a seventh inspection, representing that it was needed for Allstate to prepare for the upcoming trial. It also requested and obtained an extension of time to designate experts, and Jackson's attorney stated she had no objection to the extension so long as "it doesn't postpone the trial setting." *Id.* at *1.

Four days after the inspection, Allstate offered to settle for $24,000, which was rejected by the insured on August 16, 2017. The next day Allstate made written demand for an appraisal. Allstate argued that a point of impasse had only been reached on August 16 with the settlement rejection, so its appraisal demand was timely.

Allstate filed a motion to compel appraisal, and the trial court denied it based on waiver, specifically stating that Allstate's requesting a seventh appraisal was not part of negotiating a settlement, but was part of preparing for trial. *Id.* at *3. It also noted if Allstate had not requested a seventh inspection, the parties could have had the appraisal inspection at that time.

The Court of Appeals discussed the law concerning appraisals and found the trial judge had not abused his discretion. It first found that Allstate's actions had clearly constituted intentional conduct inconsistent with Allstate's right of appraisal. It also found that the impasse was reached earlier than August 16. *Id.* at *8. It found that impasse was reached no later than May 9, which was when Allstate offered $4,000, which Jackson rejected and demanded (for the third time) $19,350.42. It noted that Allstate waited three months from that date to demand appraisal.

The Court also found prejudice to Jackson. It noted:

> Although "it is difficult to see how prejudice may be shown *simply by a delay in requesting an appraisal* after the point of impasse when an appraisal may be requested by either side," prejudice may arise not only from the delay but also from the requesting party's intentional conduct in the meantime – like conduct triggering additional expenses, conduct constituting inherent unfairness, conduct constituting purposeful manipulation of the appraisal process, and conduct giving the party requesting appraisal an unfair tactical advantage.

Id., at 9, quoting *Universal Underwriters*, 345 S.W.3d at 411 (emphasis added by the Court of Appeals). The Court noted the following prejudice:

- [Jackson] would incur additional expense in participating in an appraisal;
- she could not use her only expert, Troy Cruthers, as an appraiser because she had selected him to replace her roof;

- she would be unable to obtain an appraiser—her counsel told the trial court he had called two appraisers after Allstate's motion to compel appraisal had been filed, and both had said "no"—because of the age of the roof damage and the conflicts of interest with Allstate that many potential appraisers have;
- the roof damage to her home was over two and a half years old when Allstate demanded an appraisal, and storms during those two and a half years had added to her roof damage, making it impossible for an appraiser to now determine what damage was caused by which storm;
- she was preparing for trial, and she had incurred trial expenses and additional attorney's fees preparing for trial;
- Allstate had compelled a seventh inspection of Jackson's roof just a few weeks earlier over Jackson's objections that a seventh inspection constituted harassment and was unnecessary by repeatedly representing to the trial court that a seventh inspection was necessary for Allstate to use in the upcoming jury trial;
- an appraisal will take weeks or months to accomplish, further delaying resolution of this matter, which Jackson's counsel represented could be tried in one or two days; and
- An appraisal would, obviously, postpone the agreed-to trial setting.

Id. at *9. The Court of Appeals found that to be sufficient evidence of prejudice.

Finally, the Court found that the policy did not contain a "nonwaiver" clause. *Id.* at *10. Allstate argued that a policy section stating that the policy can only be changed by endorsement was a nonwaiver clause, but the Court of Appeals disagreed and distinguished earlier cases relying on such a clause. The policy did not specifically mention waiver or require that waivers be in writing and signed. *Id.* It did not state that delay and omission in exercising a contractual right is not a waiver. *Id.* It did not provide that policy terms could be waived only by endorsement. Thus, Allstate's cited clause did not prevent a finding of waiver.

REMOVAL TO FEDERAL COURT AND IMPROPER JOINDER

The federal district courts continue to be flooded with cases removed from state court and in which the Plaintiffs ask for remand.

In order for a defendant to remove a case to federal court based on diversity jurisdiction, there must be, among other things, complete diversity of parties -- every plaintiff must have a different citizenship from every defendant. 28 U.S.C. §1332. Additionally, no defendant can be a citizen of the state in which the suit is initially filed. 28 U.S.C. 1441(b).

Insured's attorneys tend to believe that state court is more favorable than federal court. Therefore, to stop removal, they usually name a Texas adjuster or other Texas agent of the insurer as a defendant, often with conclusory allegations of their liability.

The defendant insurance companies have been arguing that the in-state defendant is improperly joined, so his citizenship can be ignored. *See Abbott Labs,* 408 F.3d 177, 183 (5th Cir. 2005). To show improper joinder, a defendant must either (1) show there is actual fraud in pleading jurisdictional facts or (2) demonstrate that the plaintiff is unable to establish a cause of action against the nondiverse defendant. *Campbell v. Stone Ins., Inc.,* 509 F.3d 665, 669 (5th Cir. 2007). To prove the second ground, the defendant must show there is "no reasonable basis for the district court to predict that the plaintiff might be able to recover against the in-state defendant." *Smallwood v. Illinois Central RR Co.,* 385 F.3d 568, 573 (5th Cir. 2004) (*en banc*), *cert denied*, 544 U.S. 992 (2005).

The recent remand cases are inconsistent, but tend toward granting remand. *Caruth v. Chubb Lloyds Ins. Co.*, CA No. 3:17-CV-2748G, 2018 WL 1729136 (N.D. Tex. April 4, 2018)(Fish, J.)(remand denied and rule 12(b)(6) motion granted); *Allied Stone, Inc. v. Acadia Ins. Co.*, CA No. 3:17-CV-1603-B, 2018 WL157864 (N.D. Tex. March 27, 2018)(Boyle, J.)(remand granted); *Avalanche Food Group LLC v. Starr*

Surplus Lines Ins. Co., CA No. 2:17-CV-338, 2018 WL 329826 (S.D. Tex. Jan. 1, 2018)(Ramos, J.)(remand granted); *Kel Lee Properties v. Evanston Ins. Co.*, CA No. 2:17-CV-292 (S.D. Tex.)(Ramos, J.)(remand granted); *Anderson v. Continental Western Ins. Co.*, CA No.5:17-CV-222-M-BQ, 2017 WL 7310390 (N.D. Tex. Dec. 29, 2017)(Bryant, MJ)(remand granted); *Marick Foods, Inc. v. State Farm Lloyds*, CA No. EP-17-CV-302-PRM, 2017 WL 9360837 (W.D. Tex. Dec. 21, 2017)(Martinez, J)(remand granted); *Sunburst Homeowners Assoc. v. Nationwide Property and Cas. Ins. Co.*, Civil No. 5:17-CV-946-OLG, 2017 WL 9439099 (W.D. Tex. Dec. 12, 2017) (Garcia, J.) (remand granted); *So Apartments, LLC v. Everest Indem. Ins. Co.*, CA No. 5:17-CV-856-OLG, 2017 WL 9439097 (W.D. Tex. Dec. 18, 2017)(Garcia, J.)(remand granted); *5857 Park Vista, LLC v. United States Liability Ins. CO.*, CA No. 4:17-CV-818-A, 2017 WL 6210829 (N.D. Tex. Dec. 7, 2017)(McBryde, J)(remand denied); *In and Out Express v. Great Lakes Reinsurance SE,* CA. No. SA-17-CA-522-FB, 2017 WL 9403305 (W.D. Tex. Nov. 14, 2017)(Biery, J.)(remand granted); *Arrow Bolt & Electric, Inc. v. Landmark Am. Ins. Co.*, CA No. 3:17-CV-1894-M, 2017 WL 4548319 (N.D. Tex. Oct. 12, 2017)(Lynn, J.)(remand granted); *Mauldin v. Allstate Ins. Co.,* CA No. 4:17-CV-641-A, 2017 WL 4402531 (N.D. Tex. Oct. 2, 2017)(appeal pending)(McBryde, J)(remand denied)' *Wakefield v. Allstate Vehicle & Property Ins. Co.*, CA No. 1:17-CV-307, 2017 WL 4364100 (E.D. Tex Sept. 29, 2017)(Crone, J.)(remand granted); *R2 Investments v. Penn-America Ins. Co.,* CA No. DR-16-CV-00190-AM, 2017 WL 5240895 (W.D. Tex. Sept. 19, 2017)(Moses, J)(remand granted).

A removing party should first examine the past decisions of the judge to whom the case is assigned and make sure to key its arguments into the concern of the judge. The more factual the plaintiff's pleading of claims are against the adjuster, the more likely that the case will be remanded. Pure recitations of statutory language can often be attacked. *See, e.g., Caruth v. Chubb Lloyds Ins. Co.,* 2018 WL 1729136 at *4. Failures to identify specific misrepresentations can support a finding of improper joinder. *Id.*

As discussed above, the enactment of Texas Insurance Code Chapter 542A should alleviate much of this issue. The insured will be much more likely to send a proper DTPA/Insurance Code notice letter prior to suit than previously. When it does, the insurance company can assume the liability of the adjuster and negate any cause of action against the adjuster, which means there will usually be diversity of citizenship.

ODDS AND ENDS

Smith v. Travelers Cas. Ins. Co. of America, CA No. H-16-1527, 2018 WL 3369683 (S.D. Tex. July 10, 2018) reemphasized how statutes of limitations apply to insurance matters. The Defendant argued that the statute of limitations began to accrue on November 13, 2013 when it sent its denial of coverage letter. As the suit was not filed until January 25, 2016, it claimed that Plaintiff's claims for violations of the Insurance Code, DTPA, and the contract were based by a two-year statute of limitations since the policy had a provision shortening the normal four-year statute of limitations for breach of contract to "2 years and one day from the date the cause of action first accrues…" *Id.* at *3. Smith claimed that the statute was tolled due to Defendant's continued investigation.

The Court discussed the law governing accrual of the statute and determined that the insurance company was correct. It noted that the plaintiff never made an additional claim for damages, and defendant made no additional payments.

Before filing suit, Smith requested that Travelers reconsider the denial in light of plaintiff's engineer's report. The company responded that the letter contained no "additional or different information which would cause Travelers to change its position in this matter," but it would hire a third engineer to investigate. *Id.* at *5 (emphasis in opinion). The Court ruled that the request and subsequent review had no effect on the statute of limitations because Travelers never changed its original decision to deny coverage. Therefore, the statute had run before Smith filed suit, and her claims were dismissed.

The plaintiffs were denied discovery regarding other nearby insurance claims in *In re Allstate Ins. Co.*, 551 S.W.3d 798 (Tex. App.—San Antonio April 4, 2018 orig. proceeding). The plaintiff, Jones, claimed that his property had been damaged during a hailstorm. He sought discovery about other hailstorm claims within a 5-mile radius of Jones's property. He argued at a hearing on his motion to

compel that he had radar data showing the coverage of the hailstorm and that he wanted to draw a map for the jury of other properties that Allstate agreed by payment were damaged by hail. The trial court limited the scope, but otherwise granted the motion to compel.

The San Antonio Court of Appeals disagreed and found that the trial court abused its discretion relying upon *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486 (Tex. 2014) to deny the discovery.

REFERENCES

Abbott Labs, 408 F.3d 177 (5th Cir. 2005)

Abdalla v. Farmers Ins. Exchange, No. 07-17-00020-CV, 2018 WL 2220269 (Tex. App.—Amarillo May 14, 2018, n.w.h.)

Allied Stone, Inc. v. Acadia Ins. Co., CA No. 3:17-CV-1603-B, 2018 WL157864 (N.D. Tex. March 27, 2018)

Anderson v. Continental Western Ins. Co., CA No.5:17-CV-222-M-BQ, 2017 WL 7310390 (N.D. Tex. Dec. 29, 2017)

Arrow Bolt & Electric, Inc. v. Landmark Am. Ins. Co., CA No. 3:17-CV-1894-M, 2017 WL 4548319 (N.D. Tex. Oct. 12, 2017)

Avalanche Food Group LLC v. Starr Surplus Lines Ins. Co., CA No. 2:17-CV-338, 2018 WL 329826 (S.D. Tex. Jan. 1, 2018)

Campbell v. Stone Ins., Inc., 509 F.3d 665 (5th Cir. 2007)

Cano v. State Film Lloyds, 276 F.Supp.2d 620 (N.D. Tex. 2017)

Caruth v. Chubb Lloyds Ins. Co., CA No. 3:17-CV-2748G, 2018 WL 1729136 (N.D. Tex. April 4, 2018)
5857 Park Vista, LLC v. United States Liability Ins. CO., CA No. 4:17-CV-818-A, 2017 WL 6210829 (N.D. Tex. Dec. 7, 2017)

Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc., 612 F.3d 800 (5th Cir. 2010)

Hall v. Germania Farm Mut. Ins. Assoc., No. 07-16-00304-CV, 2017 WL 4630028 (Tex. App.—Amarillo, October 13, 2017, n.w.h.)

In and Out Express v. Great Lakes Reinsurance SE, CA. No. SA-17-CA-522-FB, 2017 WL 9403305 (W.D. Tex. Nov. 14, 2017)

In re Allstate Ins. Co., 551 S.W.3d 798 (Tex. App.—San Antonio April 4, 2018 orig. proceeding)

In re Allstate Vehicle and Prop. Ins. Co, 549 S.W.3d 881, No. 02-17-00319-CV, 2018 WL 2069185 (Tex. App.—Fort Worth, May 3, 2018, orig. proceeding)

In re Allstate Vehicle and Property Ins. Co., 542 S.W.3d 815 (Tex. App.—Beaumont 2018, orig. proceeding)

In re Am. Nat. Prop. And Cas. Co., No. 04-18-00138-CV, 2018 WL 3264932 (Tex. App.—San Antonio July 5, 2018, orig. proceeding)

In re Deepwater Horizon, 807 F.3d 689 (5th Cir. 2015)

In re Nat'l Lloyds Ins. Co., 449 S.W.3d 486 (Tex. 2014)

In re Philadelphia Indem. Ins. Co., No. 13-17-00506-CV, 2017 WL 5616272, (Tex. App.—Corpus Christi-Edinburg, November 20, 2017, orig. proceeding)

In re Universal Underwriters of Tex. Ins. Co., 345 S.W.3d 404 (Tex. 2011)

Kel Lee Properties v. Evanston Ins. Co., CA No. 2:17-CV-292 (S.D. Tex.)

Manali Corp. v. Covington Specialty Ins. Co., 872 F.3d 255 (5th Cir. 2017)

Marick Foods, Inc. v. State Farm Lloyds, CA No. EP-17-CV-302-PRM, 2017 WL 9360837 (W.D. Tex. Dec. 21, 2017)

Mauldin v. Allstate Ins. Co., CA No. 4:17-CV-641-A, 2017 WL 4402531 (N.D. Tex. Oct. 2, 2017)

Mid-Continent Cas. Co. v. Eland Energy, Inc. 709 F.3d 515 (5th Cir. 2013)

Moore v. Dilworth, 142 Tex. 538, 179 S.W.2d 940 (1944)

Ortiz v. State Farm Lloyds, No. 04-17-00252-CV, 2017 WL 5162315 (Tex. App.—San Antonio, November 8, 2017, pet. filed)

Pounds v. Liberty Lloyds of Texas Ins. Co., 528 S.W.3d 222 (Tex. App.—Houston [14th Dist] 2017, no writ)
Provident Am. Ins. v. Casteneda, 988 S.W.2d 189 (Tex. 1998)
R2 Investments v. Penn-America Ins. Co., CA No. DR-16-CV-00190-AM, 2017 WL 5240895 (W.D. Tex. Sept. 19, 2017)
Smallwood v. Illinois Central RR Co., 385 F.3d 568, 573 (5th Cir. 2004) (*en banc*), *cert denied*, 544 U.S. 992 (2005)
Smith v. Travelers Cas. Ins. Co. of America, CA No. H-16-1527, 2018 WL 3369683 (S.D. Tex. July 10, 2018)
So Apartments, LLC v. Everest Indem. Ins. Co., CA No. 5:17-CV-856-OLG, 2017 WL 9439097 (W.D. Tex. Dec. 18, 2017)
State Farm Lloyds v. Fuentes, 549 S.W.3d 585, 61 Tex. Sup. Ct. J. (June 8, 2018)
State Farm Lloyds v. Johnson, 290 S.W.3d 886 (Tex. 2009)
Sunburst Homeowners Assoc. v. Nationwide Property and Cas. Ins. Co., Civil No. 5:17-CV-946-OLG, 2017 WL 9439099 (W.D. Tex. Dec. 12, 2017)
Tex. Bus & Comm. Code § 17.41
Tex. Ins. Code §542A *et seq.*
Texas Windstorm Ins. Co. v. Dickinson ISD, 561 S.W.3d 263 (Tex. App.—Houston [14th Dist.], n.w.h.) 28 U.S.C. §1332 28 U.S.C. 1441(b)
Turner v. Peerless Indem. Ins. Co., No. 07-17-00279-CV, 2018 WL 2709489 (Tex. App.—Amarillo, June 5, 2018, n.w.h.)
USAA Texas Lloyds Co. v. Menchaca, 545 S.W.3d 479 (2018)
Vail v. Texas Farm Bureau Mut. Ins., 754 S.W.2d 129 (Tex. 1988)
Wakefield v. Allstate Vehicle & Property Ins. Co., CA No. 1:17-CV-307, 2017 WL 4364100 (E.D. Tex Sept. 29, 2017)
Zhu v. First Community Ins. Co. v. 543 S.W.3d 428 (Tex. App.—Houston [14th Dist.] pet. filed)