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Texas Supreme Court Issues Two Important Opinions on Invoking Appraisal Process

On June 28, 2019, the Texas Supreme Court issued two opinions regarding whether invocation of the appraisal process and payment of the award by a carrier insulates the carrier from breach of contract, Chapter 541 claims, and Chapter 542 claims.

In *Ortiz v. State Farm Lloyds*, No. 17-1048 (Tex. 2019), the Court held that the insurer's payment of the award bars the insured's breach of contract claim premised on its alleged failure to pay the amount of the covered loss. The Court further held that the payment bars the insured's common law and statutory bad faith claims to the extent that the only actual damage sought are lost policy benefits. However, in light of the next opinion, the Court held that the insured could proceed on his claim under Chapter 542, the Prompt Payment Act.

In *Barbara Technologies Corp. v. State Farm Lloyds*, No. 17-0640 (Tex. 2019), the Court addressed the issue of whether payment of an appraisal award precludes recovery under Chapter 542. Because it was a case involving competing motions for summary judgment, the actual issue presented was whether an insured party can prevail on its claim for delayed payment pursuant to Chapter 542, when it is undisputed that the insurer investigated the claim, rejected it, invoked the appraisal process, and ultimately paid the insured in full in accordance with the appraisal. The Court held that the insurer's payment based on the appraisal was neither an acknowledgement of liability under the policy nor an award for actual damages. Finding that neither party had established its position as a matter of law, the court remanded the case to the trial court for further proceedings. But this case is not that simple.

A brief review of the facts is important. The insured turned in a wind and hail claim. State Farm inspected the property and denied the claim finding that the loss was less than the deductible ($3153.57 loss and $5,000 deductible). (sounds a lot like Manchaca). The insured requested a second inspection, but State Farm found no additional damages. The insured then sued. Six months after suit was filed, State Farm invoked the appraisal process. About seven months later, the appraisers agreed to an appraised value of $195,345.63. State Farm paid the appraisal amount within 5 business days. The trial court granted State Farm's summary judgment finding that payment of the award barred any Chapter 542 claims. The court of appeals affirmed.

The Texas Supreme Court noted that Chapter 542 does not mention appraisals or how invocation of same affects the statutory deadlines. The Court also noted that the Legislature knows how to fit appraisals within a statutory scheme citing the Texas Windstorm Insurance Association Act. The Court determined that the absence of any language in Chapter 542 means that the Legislature intended neither to impose specific deadlines for the appraisal process nor to exempt the process from the deadlines imposed by Chapter 542.

Turning to how the two would work together, the Court found that invocation of the appraisal process did not constitute a request for additional information under 542.055. In reaching that conclusion, the court noted that the facts of this case mandated said conclusion because State Farm had already made its determination to reject coverage. The Court did not determine whether invocation during the investigation process might demand a different result. The Court did note that as a practical matter, invocation of the appraisal process usually is not done until after the carrier has already made its decision and there remains a dispute about the amount of the loss. The Court also noted that invocation of the appraisal process does not start the timelines over again.

The Court then rejected the conclusion of several courts of appeals that merely paying the appraisal award exempts the carrier from Chapter 542 damages. Nor does such payment foreclose any further proceedings to determine the carrier's liability under the policy. The Court noted that nothing in Chapter 542 excuses a carrier from liability for damages if it is liable under the terms of the policy but delayed payment beyond the applicable statutory deadline, regardless of use of the appraisal process.

The Court then turned to the question of whether State Farm had been found liable under the terms of its policy, as required under 542.060. The Court found that a carrier cannot be liable on the claim within the meaning of this provision until (1) it has completed its investigation, evaluated the claim, and come to a determination to accept and pay the claim or some part of it, or (2) been adjudicated liable by a court or arbitration panel. Having determined that a rejected claim will not trigger damages under 542.060 absent a later acknowledgement or finding of liability, the Court turned to the question of whether the appraisal process, or subsequent payment, satisfies the liability element. The Court found that it did not because appraisal only determines the amount owed, not liability under the policy. The Court noted that payment of the appraisal neither established liability nor foreclosed Chapter 542 damages under 542.060.

The Court then undertook a look at 542.058, which states that if payment is delayed for more than 60 days after receipt of all information, the insurer **shall pay damages** as provided by 542.060. The Court noted that neither party had briefed the interplay between these two provisions. Therefore, the Court did not reach the question of whether 542.060's liability requirement applies to damages based on late payment under 542.058. That question remains for a later day.

This is an important opinion for the insurance industry. Invocation of the appraisal process no longer serves as an absolute bar to liability. This case is going back to the trial court for further proceedings. If the insured can establish that State Farm's rejection of the claim was invalid, then State Farm is looking at some very expensive interest and attorneys' fees payments. I am sure that in most counties in Texas, the jury will get to hear about the appraisal award which might suggest to the jury that State Farm was wrong at the time of its initial rejection.

ABOUT THE AUTHOR:

Craig L. Reese leads the Firm's appellate and coverage practice group. He has over 28 years practice experience including appeals at the federal and state level, insurance coverage/defense, and commercial litigation. He has represented clients in a wide variety of

litigation including insurance coverage, general insurance defense, bad faith litigation, and commercial matters. His appellate experience includes cases before every level of the state courts of appeals and appeals to the Fifth Circuit Court of Appeals.

Fletcher Farley continues to win victories for our clients. This alert includes four recent summary judgments across Texas.

Fletcher Farley Obtains Summary Judgment in Premises Liability Case

Fred Arias and Lorin Subar obtained a summary judgment and dismissal of a premises liability action filed in Austin and removed to the Federal Court for the Western District of Texas. The plaintiff had claimed that she was injured when she slipped on a vase holder on the floor of our client's department store. After briefing the issues to the Court, the Court found that there was insufficient evidence regarding how long the item had been on the floor and insufficient evidence that the store personnel would have notice of the alleged defective condition. Fred Arias was trial counsel in the matter and Lorin Subar drafted the motion for summary judgment.

Fletcher Farley Obtains Summary Judgment in Premises Liability Case

Paul Bennett, Alex J. Bell, and Lorin Subar recently obtained a summary judgment for a national restaurant group on a premises liability case in Dallas County. The Plaintiff alleged that she had slipped and fell when an ordinary dining chair was left in her way while an employee was rearranging tables for her large group. Alex Bell secured very favorable deposition testimony for the plaintiff, who admitted that she simply mis-stepped and caught her foot on the chair leg and that the was nothing dangerous about the chair or the floor. Lorin Subar briefed the motion.

Fletcher Farley Obtains Summary Judgment in Premises Liability Case

Keith Robb and Lorin Subar obtained summary judgment for a wind farm owner located in Kansas where the plaintiff fell off a hoist while trying to repair a wind turbine. The plaintiff fell a distance between 100 and 160 feet. He suffered significant orthopedic injuries, which required several surgeries to his spine and legs. The plaintiff's medical treatment has incurred more than $1.5 million in paid medical bills related to the incident. As the incident occurred in Kansas but was filed in Texas, we prepared a Motion for Summary Judgment based on both of the plaintiff's theories of liability; premises liability and general negligence, in both Texas and Kansas, as well as statutory defenses available to Texas commercial property owners under Chapter 95 of the Texas Civil Practice and Remedies Code that the plaintiff was the employee of a subcontractor, and he was injured while repairing an improvement to real property. Under Kansas law, what was more probably the correct law under a choice of laws analysis, we argued that while Kansas law provides a layer of protection for the employees of subcontractors doing inherently dangerous activities, our client still had no control over the work being done by the Plaintiff. Further, under Texas law, our client, as the premises owner, would only be liable if it controlled the work and had actual knowledge of the dangerous condition. The court agreed that the laws in neither Texas nor Kansas made our client liable and granted a summary judgment.

Fletcher Farley Obtain Summary Judgment in Products Liability Case

Keith Robb and David Colley obtained summary judgment for a compass manufacturer in a case from a serious boating accident. An entrepreneurial dentist suffered a head injury that ended his ability to practice dentistry. The plaintiff disclosed an economist who intends to testify that the dentist suffered more than $17 million in lost earning capacity alone, and a life care planner who intends to testify that he needs about $3.5 million in future medical care. The plaintiff alleged that the instrument lights on the boat, including the lighted compass, kept the operator from seeing a bridge before driving the boat into the bridge. We moved for summary judgment. The Plaintiff contended that the combination of the instrument lights, the lighted compass, and the boat's windshield led to a condition that kept the operator from correctly perceiving that the bridge was too low to the water to safely travel beneath. We showed the judge that the operator repeatedly testified that he could see the bridge, and we convinced the judge that a component-part manufacturer is not responsible for how its product is combined into another product unless the component-part manufacturer participated in the designing the combination. We moved for summary judgment, and the judge was convinced that our client's product-a compass integrated into the boat's dashboard-wasn't defective and granted a summary judgment.

ABOUT THE FIRM:

With depth of experience in all matters of tort, commercial, insurance and other litigation, Fletcher Farley is dedicated to resolving conflicts and solving problems for our clients throughout the State of Texas. Our practice involves defending, counseling and negotiating on behalf of businesses and public entities. We leverage our extensive experience and skills as trial and appellate attorneys to achieve resolution both inside and outside of the courthouse. Whether in mediation, arbitration, negotiation or courtroom proceedings, Fletcher Farley provides value as a partner in quickly and effectively resolving conflict and allowing our clients to do what they do best - conduct business.

If you have any comments, questions or would like more information, please contact us at 214-987-9600.

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