

wait for Prudential to issue a decision or to appeal through Prudential's administrative channels. // Holt

Bad Faith/Genuine Dispute

Insurer Entitled to Summary Judgment on Bad Faith Claims, Despite Evidence Suggesting Insurer's Expert Worked Primarily for Insurer, Where Insured Did Not Challenge Insurer's Expert's Objectivity or Substantive Findings

Insurer's Expert's Unrefuted Opinion Demonstrated Existence of "Bona Fide" Dispute

C.K. Lee v. Catlin Specialty Insurance Company, 2011 WL 703624, ___ F.Supp.2d ___ (S.D. Tex., Feb. 28, 2011)

Case at a Glance

The mere fact that property insurer used single independent adjuster for claims arising from Hurricane Ike did not raise triable issue of fact regarding whether insurer's reliance on adjuster's conclusion that damage to the insured's property was not covered constituted bad faith. In order to raise a triable issue of fact on bad faith, the insured must proffer evidence challenging the substantive conclusions of the insurer's adjuster.

Summary of Decision

Hurricane Ike blew through Houston on September 12-13, 2008, leaving thousands of insurance claims in its wake. Many of these were roof claims, and this is one of those. The insured, C.K. Lee, owned a commercial shopping center. Shortly after Hurricane Ike hit, Lee submitted a claim to his property insurer, Catlin Specialty Insurance Company, for damage to the shopping center's roof. Catlin assigned the claim to Engle Martin & Associates, an independent adjuster that handled all of Catlin's Hurricane Ike claims. Lee hired Emergency Services 24, Inc. to meet with Engle Martin and reach agreement on the scope of the damage to Lee's roof. Emergency Services did not, however, act as public

adjuster, responsible for determining the cause of the roof damage and differentiating between covered and uncovered damage. Emergency Services's role was limited to estimating the cost of repairing Lee's roof and performing those repairs.

Engle Martin first inspected Lee's property with representatives of Emergency Services present. Engle Martin observed evidence of roof repairs that had apparently been made both before and after Hurricane Ike. Engle Martin concluded that an infrared scan of the roof was necessary to help identify which damages, if any, were attributable to wind, and thus Catlin's responsibility, and which, if any, were attributable to subpar prior repairs or natural deterioration, and thus excluded from coverage. Engle Martin also requested from Lee a copy of the invoice for emergency roof repairs performed after the hurricane and the shopping center's tenants' leases.

Engle Martin retained a roofing consultant and engineering firm, Project, Time & Cost ("PT & C"), to conduct an infrared inspection of the roof. PT & C inspected the roof and observed that (1) there was "no wind-related damage" to the roof covering, (2) "the roof membrane was brittle and deteriorated across the entire roof," (3) water infiltration, viewed through infrared photographs, existed in areas of previous repairs and in areas where normal wear and weathering had occurred, (4) there was "poorly installed roofing material along [the] parapet wall," and (5) "many areas of gravel ballast [were] missing prior to Hurricane Ike," confirmed by pre-hurricane aerial photographs. Based on these findings, PT & C concluded that Ike did not damage the roof, which was old and in need of replacement due to normal wear and weathering.

After receiving PT& C's report, Engle Martin reiterated its request for the invoice for post-hurricane repairs and the leases, which apparently was not forthcoming. Engle Martin also asked PT&C to reinspect the roof. The reinspection resulted in additional findings bolstering PT&C's original findings that the roof suffered no wind damage. Specifically, PT&C observed: (1) there was no "perimeter parapet wall flashing damage" anywhere on the roof, which is significant, according to Fischer, because wind damage "typically causes parapet wall flashing to become unfastened from the underlying nailer board"; and (2) a light-weight styrofoam

insulation board that was installed before the hurricane had not been displaced, which made it "highly improbable" that wind damage compromised the roof. Based on PT&C's findings, Engle Martin concluded that Hurricane Ike did not damage Lee's roof and submitted a detailed report to Catlin supporting its conclusion.

Lee's contractor, Emergency Services, did not dispute or respond in any meaningful way to the engineering reports Engle Martin and PT&C prepared for Catlin. Indeed, the only "report" Emergency Services prepared was an estimate of the costs of repairing Lee's property, which Emergency Services put at \$871,187.50 for the roof and approximately \$1.3 million for the entire building. Emergency Services's estimates stood in marked contrast to the \$22,864.77 estimate for roof repairs prepared by a contractor retained by Engle Martin.

Common Law Bad Faith

Lee sued Catlin for breach of contract and insurance bad faith. Catlin sought to dispose of the bad faith claims as a matter of law, leaving only the breach of contract claims for the jury to decide. Whether Catlin was entitled to summary judgment on the bad faith claims turned on whether the reports prepared by Engle Martin and PT&C established the existence of a "bona fide" dispute over coverage. Under Texas common law, the existence of a bona fide dispute regarding coverage defeats bad faith liability. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex.1994). However, an expert report supporting the insurer's coverage position does not give rise to a "bona fide" dispute sufficient to shield the insurer from bad faith liability "if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable." *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex.1997) (*Nicolau*).

In opposing Catlin's summary judgment motion, Lee attempted to raise triable issues of fact regarding the objectivity of the Engle Martin and PT&C reports and the reasonableness of Catlin's reliance on them. Lee argued that Catlin failed: (1) to investigate or reconcile the discrepancies between the reports on which it relied and Emergency Services report; (2) to investigate Engle Martin's and PT&C's qualifications;

and (3) to adopt procedures for resolving disputes between experts. Lee further argued that Engle Martin's report was biased because the company had a financial interest in preparing reports that favored Catlin's interests.

Finding that Lee's arguments were either unsupported by the evidence or irrelevant, the trial court granted summary judgment in favor of Catlin on Lee's common law bad faith claims. Nothing in the record supported Lee's assertion that Catlin was faced with competing or conflicting expert reports. The Emergency Services "report" was nothing more than an estimate of the costs of repairs; it did not offer an opinion on the cause of Lee's roof damage, let alone disagree with the findings Catlin's experts. Moreover, Lee did not challenge Engle Martin's and PT&C's qualifications. The absence of procedures for reconciling competing expert reports was, in the court's view, irrelevant "because there is not a report in the record that conflicts with the findings found in Engle Martin's and PT & C's reports." The only evidence Lee proffered relevant to Catlin's knowledge of whether the Engle Martin and PT&C reports were objectively prepared was the fact that Catlin had assigned approximately 200 claims to Engle Martin pursuant to an informal understanding that Engle Martin would be Catlin's exclusive independent adjusting firm for Hurricane Ike claims. The court found this fact alone insufficient standing to permit a reasonable juror to conclude that Catlin's reliance on Engle Martin's conclusion was unreasonable.

The court distinguished two Texas cases in which the insurer was found to have acted in bad faith despite having an expert's report favoring the insurer's position. In both *Nicolau* and *State Farm Lloyds v. Johns*, No. 93-00323-E, 1998 WL 548887 (Tex.App.-Dallas 1998, no pet.) (not designated for publication), the insurers possessed competing expert reports that reached opposite conclusions and chose to rely on an expert whom the insurers should have known lacked objectivity. Moreover, in *Johns*, "most of" insurer's expert's engineering work came from insurance companies. Here, by contrast, although Catlin had sent Engle Martin over 200 Hurricane Ike claims, there was nothing in the record that shows what percentage or portion of Engle Martin's business comes from insurance companies.

Statutory Claims

The only bad faith point with respect to which summary judgment was not granted was a time point. Certain provisions of the Texas Insurance Code (452.057 & 542.058) require that an insurer “rule” on a claim within 15 days of receiving all items, statements and forms which are necessary for the insurer. If the insurer cannot rule, it may get another 45 days by notifying the policyholder. Here, it was undisputed that Catlin did not “rule” on the claim within 15 days of receiving everything it needed, and there was a fact issue as to whether Catlin gave proper notice of its need for another 45 days. Catlin took the position that it had given the policyholder notice of its need for an additional 45 days, since it had repeatedly asked for the invoice. The court held that Catlin did not provide satisfactory evidence that it needed these documents to decide the claim, and it did not demonstrate that these documents were required, or even actually needed, for it to need a 45 day extension.

Comment

1. Frequently insurers do not perform in the adjustment process as well as Catlin did here. That observation may even be true of Catlin itself.

2. Given Catlin’s performance and the extent to which factual proof was presented to the court, it is easy to infer that the main problem in this case, so far, is the fact that the policyholder did not line up empirical evidence to refute or conflict with Catlin’s data and argument. Of course, if that evidence did not exist, the insured was sunk as to bad faith, and perhaps with respect to the breach of the insurance contract it will be, as well.

3. The insured’s argument that Catlin’s adjusters were not objective is tempting. If Adj-A works repeatedly and/or intensely for one insurer, it seems intuitively probable that he will be more biased in favor that insurer than Adj-B who serves a whole variety of insurer-clients. The problem is that the “*financial connections = bias*” proposition is not a necessary truth. This is particularly true, since all insurers and all adjusters proclaim that objectivity, reasonableness, and assisting and insured are really fundamental to sound insurance practice. Thus, if a policyholder wants to establish a lack of objectivity on

the part of a specific adjuster, the policyholder must produce empirical evidence that his point regarding this alleged bias is true. Intuition, even plausible intuition, about factual matters is not enough in court proceedings. Bias does not automatically follow from any number of claims. It cannot be proved by hollering that all insurance adjusters are biased.

4. Infrared roof inspections are rarely seen in most roof adjustments. They are too expensive. I’ve never seen one in a residential adjustment, and one rarely sees them even in commercial adjustments. Often insurers only do them if they sense, feel, or intuit a threat just around the corner. Nevertheless, these inspections can reveal all sorts of facts about a roof. Often they are used only to detect the presence and place of water, but—if well done—many kinds of data and conclusions can be found and drawn. Doing this kind of inspection was one of the best things that was done on behalf of Catlin. // Quinn

Bad Faith/Procedure

Insurer Is Entitled to a Jury Trial in Bad Faith Failure to Settle Cases

Case of First Impression in New Jersey

Wood v. New Jersey Manufacturers Ins. Co., __ A.3d __, 2011 WL 2314954 (N.J. June 14, 2011)

Case at a Glance

A claim that an insurer in bad faith failed to settle a lawsuit within the policy limits, thereby exposing its insured to liability for any excess, represents, under New Jersey law, a typical contract claim that the insurer breached the implied covenant of good faith and fair dealing and therefore the right to trial by jury attached to the disposition of the claim.

Summary of Decision

New Jersey has long recognized that a claim can be brought against an insurer in bad faith for failure to settle a lawsuit within policy limits thereby