

BAD FAITH BLOG

Court Finds No Bad Faith Due to Bona Fide Dispute Over Coverage for Wind Damaged Roof

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Summary: The District Court granted partial summary judgment in favor of insurer on bad faith claim regarding roof damage. The District Court found there was a bona fide dispute whether coverage applied, but that the insurer had not acted in bad faith by relying on its experts' reports which concluded that the damage was not caused by Hurricane Ike.

Lee v. Catlin Specialty Insurance Company, 766 F.Supp.2d 812 (S.D. Tx. 2011)

Insured plaintiff owned a commercial shopping center and purchased a commercial property insurance policy from defendant insurer. The policy provided coverage up to \$1.7 million for wind damage with a \$36,000 deductible. Insured submitted a loss notice claiming that the roof of the shopping center sustained damage caused by Hurricane Ike.

The loss was submitted on September 24, 2008, approximately 10 days after the loss was allegedly sustained. On September 25, 2008, insurer acknowledged receipt of the claim and it retained an independent private adjuster to adjust the claim. The independent adjuster attempted to contact the insured several times by telephone between September 26 and October 2, 2008, to arrange for an inspection. On November 9, 2008, the adjuster sent the insured a letter to schedule a time to inspect the property.

On November 19, 2008, both the insurer's and insured's private adjusters jointly inspected the roof. The insurer's adjuster observed evidence of roof repairs that had apparently been made both before and after Hurricane Ike. Also, the insurer's adjuster concluded an infrared scan of the roof was necessary to help identify which damages, if any, were attributable to wind and which, if any, were attributable to prior repairs or natural deterioration.

The insurer's adjuster retained a roofing consultant to conduct an infrared inspection of the roof and sent a letter to the insured requesting invoices for the emergency roof repairs. The letter also provided notice of the infrared inspection. The insurer's roofing consultant inspected the roof and found there was no wind related damage and concluded that the roof had exceeded its life expectancy and was in need of replacement due to normal wear and tear. The insurer's adjuster submitted this information to the insurer and noted it still needed invoices from the insured relating to the repairs it had made to the roof.

On February 14, 2009, the insured wanted to begin repairing the roof, but the insurer's adjuster replied that the investigation was ongoing and that there was not yet an agreement concerning the scope of the damages or the replacement cost or actual cash value of the repair. On February 19, 2009, the roofing consultant hired by the insurer re-inspected the roof and again concluded there was no wind related damages. Based on these findings, the insurer's adjuster concluded that the damage to the insured's roof was not caused by winds from Hurricane Ike and submitted a detailed report to the insurer that included this conclusion.

The insured's roofing contractor estimated that the total cost of repairing the roof would be approximately \$871,000 and the cost of repairing the entire building would be approximately \$1.3 million. The roofing contractor retained by the insurer concluded that the replacement cost to repair hurricane wind damage to the roof would be approximately \$22,800 which was below the \$36,000 deductible. The insurer refused to pay the claim.

The insured filed suit against the insurer alleging breach of contract, breach of duty of good faith and fair dealing, fraud, and violations of the Texas Insurance Code, and the Texas Deceptive Trade Practices-Consumer Protection Act ("TDPA"). The insurer moved for partial summary judgment with respect to all of the insured's extra-contractual claims arguing there was a bona fide dispute concerning the cause of the loss and there was no evidence of bad faith, fraud, or violations of the Insurance Code or TDPA.

The District Court, in analyzing the insured's bad faith claim, found it was not reasonably clear to the insurer based upon the evidence, that there was a loss covered by the insurance policy. The roof was inspected once by insurer's adjuster and twice by insurer's roof consultant. None of the inspectors concluded that the damage was covered by the policy. More importantly, the insurer was not privy to any information that concluded otherwise.

The insurer's decision to deny the claim was based upon the conclusions of the insurer's independent adjuster and roofing consultant that the damages to the insured's roof were caused by natural deterioration and low quality prior repairs instead of wind. The record did not contain a report with conclusions that conflicted with those formulated by the insurer's experts. The only document in the record which possibly conflicted was prepared by the insured's private adjuster and was an estimate of the cost of repairing the roof. The estimate did not contain any statements or conclusions relating to the cause of the damages. There was nothing in the record to show that the insurer's decision to believe its own experts rather than other experts was unreasonable. Furthermore, there was nothing in the record indicating that any of the companies used to investigate the roof were unqualified. Also, the District Court found that just because the insurer had not created written procedures governing the retention of, and report preparation by, outside experts was immaterial to the insurer's decision; there was no report in the record that conflicted with the findings in the reports of the insurer's experts.

Finally, although the insurer acknowledged that it had sent its independent adjuster over 200 Hurricane Ike claims, there was nothing in the record that showed what percentage or portion of the adjuster's business came from insurance companies. Therefore, there was no evidence that the adjuster retained by the insurer failed to act objectively. Based upon the facts in the record, the District Court granted summary judgment in favor of the insurer on the bad faith claim. There was insufficient evidence in the record to persuade a reasonable juror that the insurer knew or should have known that it was reasonably clear that the insured's claim was covered.

Based upon the same evidence, the District Court granted summary judgment in favor of the insurer on the insured's claims of unfair settlement practices, fraud, and violation of the TDPA. However, the District Court denied summary judgment on the insured's prompt payment of claim count in part because there was a genuine issue of material fact whether the insurer had received all of the necessary items to make its final determination and the insurer failed to file an affidavit supporting its claim it did not timely receive the repair invoices. Thus, whether the insurer was justified in failing to timely notify the insured of its rejection of the claim within the statutorily imposed deadline was a fact for the jury to decide.

As with most bad faith claims, the District Court analyzed the specific facts of this case, which favored the insurer. Although fact intensive, summary judgment is possible for the insurer on bad faith claims, like in this case, when there is overwhelming evidence the insurer acted reasonably and a lack of evidence from the insured to refute the insurer. This case also illustrates the importance of retaining well-qualified experts and independent adjusters, in first party claims. The Court suggested that if the insured had a qualified private adjuster who opined that the roof damage was caused by Hurricane Ike, the insured would have defeated summary judgment.

By Aaron French

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