



TEXAS FEDERAL COURT DISMISSES 30 MONTH LATE HAIL DAMAGE CLAIM

In *Certain Underwriters at Lloyd's of London v Lowen Valley View LLC*¹, the Insured attempted to bring counterclaims against Underwriters for breach of contract and Texas Insurance Code violations. The Honorable Jane Boyle, US District Judge for the Northern District of Texas, granted summary judgment in favor of Underwriters on all claims and dismissed them with prejudice. Judge Boyle's decision was based, in part, on the Hamilton Opinion in which the Fifth Circuit affirmed Judge Boyle's grant of summary judgment in favor of an insurer on the insured's breach of contract and extra-contractual claims.²

1. No. 3:16-cv-00465-B (N.D. Tex. 2017)

2. See the HFW, formerly Legge Farrow, Newsletter on the Hamilton Opinion - <http://www.hfw.com/US-Fifth-Circuit-Holds-that-Insurer-was-Prejudiced-by-Unreasonably-Late-Notice>

“...Underwriters conducted an investigation and discovered that an estimated nine hail events had taken place between the date the Property was built and the date of the claim. Of the nine hail events, only one occurred during the Policy’s coverage period – the June 13 2012 hail event. In light of the 30 month delay in reporting the claim, Underwriters subsequently denied the claim...”

The Lowen Valley case initially arose out of a hail claim for damage to the roofs and exterior elevations of the insured property, the Hilton Garden Inn, in Irving, Texas (the Property). The property was covered under a commercial property insurance policy issued by Certain Underwriters at Lloyd’s, London (Underwriters), with effective dates from June 2 2012, to June 2 2013 (the Policy). The hail damage was allegedly sustained on June 13 2012, but the Insured waited approximately 30 months, until December 29 2014, to file the claim. Upon receipt of this claim, Underwriters conducted an investigation and discovered that an estimated nine hail events had taken place between the date the Property was built and the date of the claim. Of the nine hail events, only one occurred during the Policy’s coverage period – the June 13 2012 hail event. In light of the 30 month delay in reporting the claim, Underwriters subsequently denied the claim for two reasons:

1. The Insured violated the Policy’s notice condition.
2. Underwriters suffered prejudice as a result.

On February 18 2016, Underwriters filed Plaintiffs’ Original Complaint and Request for Declaratory Judgment, “asking the Court to declare ‘that there is no coverage under [the Policy] for the reported hail damage because Defendants violated the policy’s notice condition’”. In response, the Insured requested a declaration that there was coverage under the Policy and asserted breach of contract and Texas Insurance Code counterclaims against Underwriters, which are the subject of this motion for summary judgment.

In her opinion, Judge Boyle addressed each claim separately, starting with the breach of contract claim, which was largely dispositive of all other claims. Underwriters asserted two grounds for summary judgment on the breach of contract claim.

1. The Insured cannot prove the claimed damage resulted from a covered peril because the Insured provided no evidence segregating the damage attributable to the June 13 2012 storm from damage attributable to the other documented storms which occurred outside the Policy period.

2. The Insured failed to comply with the prompt notice requirement in the Policy. Judge Boyle cited Texas law and noted that for “Underwriters to be liable for breach of the insurance contract, Defendants must first prove that the claim was covered under the Policy.”

Although the Insured contended that the roof and exterior elevation damage was attributable to the June 13 2012 storm, the Court concluded that the Insured did not provide any evidence that would assist a jury in segregating the covered losses from the non-covered losses and “Federal courts applying Texas law have held that summary judgment is appropriate in cases where [parties] fail to raise a genuine issue regarding the amount of damage attributable to covered losses.”

While Judge Boyle’s ruling on this issue disposed of the breach of contract counterclaim, she also addressed the prompt notice grounds for dismissal as well. The Court, like the parties, acknowledged that “Texas has adopted a notice-prejudice rule when analyzing notice provisions in occurrence-based insurance policies



like this one.” Judge Boyle applied this test and found that:

1. The Insured’s 30-month notice was not prompt as a matter of law.
2. This delay prejudiced Underwriters’ investigation because of the impacts noted during Underwriters’ field adjuster’s deposition and the delay increased the cost of repair by \$47,802.67.

With both prongs of the “notice-prejudice rule” met, the Court found this to be an adequate ground for dismissal of the breach of contract claim as well.

The Court next turned to the extra-contractual counterclaims brought under §§ 541 and 542 of the Texas Insurance Code. Addressing the Section 541 claim first, Judge Boyle analyzed the recent *USAA Tex. Lloyds Co. v Menchaca* decision from the Texas Supreme Court, holding that a statutory violation will only be found, absent a contractual right to recover under the policy, if there is an independent injury that gives rise to the statutory claim.³ Since the Court found that the Insured was not eligible to receive benefits under the policy

for this damage and there was no evidence of an injury independent of the Policy, the claim under Section 541 failed as a matter of law. The Court’s finding of non-coverage was also dispositive of the Section 542 claim, so both Texas Insurance Code violations were dismissed with prejudice.

Lastly, the Court addressed the Insured’s request for declaratory judgment, finding that Underwriters’ motion for summary judgment on these counterclaims was sufficient to put the Insured on notice that all evidence supporting this declaration should be brought forward. Since the Court held that the breach of contract claim could not succeed as a matter of law, the Court, in effect, declared “no coverage” and summary judgment in favor of Underwriters on the claim for declaratory relief was also granted.

Judge Boyle’s opinion underscores the Fifth Circuit’s holding in *Hamilton* and reaffirms the concept that a significant delay in reporting a claim constitutes late notice and, if the insurer’s investigation was severely impacted as a result, prejudice can be proven. Once the insurer proves prejudice, the insured’s breach of contract and extra-

contractual causes of action fail as a matter of law.

The lesson for practitioners of insurance coverage litigation is to remain mindful of the potential impact of Insured’s late notice of claims and the precedent set by Judge Boyle and the Fifth Circuit when assessing the viability of an insurance claim and to ensure that field adjusters address possible late notice issues in their initial claims investigations.

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3. See *USAA Tex. Lloyds Co. v Menchaca*, No. 14-0721, 2017 WL 1311752 (Tex. Apr. 7, 2017).

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