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The Legal Update

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IN THIS ISSUE

Durrett Law Firm

Holding Insurance Companies Accountable For Their Promises to Policyholders Since 1989.

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Limitation Issues for Insurance Claims

Many friends have been asking questions about limitations for Hurricane Ike claims against insurance carriers. These questions are driven, in large part, by the numerous billboards around town proclaiming that "The End Is Near." The billboards are largely misleading; although there is some truth in them.

Here is what you need to know:

Causes of Action

Lawsuits contain legal theories of recovery called causes of action. Each cause of action has a different set of requirements that must be proved before there can be a recovery. In a typical insurance claim, one might assert causes of action for violations of the insurance code, breach of contract, violations of the deceptive trade practices act, and breach of the duty of good faith and fair dealing.

One Recovery

But, while there are many potential causes of action applicable to an insurance lawsuit, there can only be one recovery for any particular item of damage. In other words, if your building needs to be repaired and the repair cost is $100,000, then your actual damages under any cause of action allowing a recovery would be $100,000. However, this $100,000 of damage can only be recovered once. So if you simultaneously prove a breach of contract and violations of the insurance code within the same lawsuit, you may only recover the $100,000 in actual damages under one legal theory of recovery.

Television Lawyers have found a way to imitate Chicken Little

Remedies

Another difference between causes of action can be the applicable remedies. For instance, breach of contract, violations of the insurance code and deceptive trade practices allow the successful claimant to recover their reasonable and necessary attorney's fees. On the other hand, if you are successful on a breach of the duty of good faith and fair dealing claim, you can not recover your attorney's fees because this cause of action is a tort and not a statutory or contract based cause action allowing a recovery for attorney's fees. Other recovery differences would include the recovery of penalty interest for violations of the insurance code, treble or additional damages for violations of the insurance code and the deceptive trade practices act if you can also prove "knowing conduct" or punitive

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Ask the Attorney …

Brant Durrett
Attorney at Law

Q: If my carrier agrees to make a payment on a claim, do I have to hire the contractor suggested by my carrier to make repairs?

A: No. Whether your home was destroyed by fire or a plumbing leak, your carrier may suggest that you use one of their "approved" or "preferred" repairmen. Whatever they call them does not mean that you have to use them.

Generally, its up to you to select the repairman to make repairs to your home. The carrier is responsible (over your deductible and subject to your policy limits) as long as your repairman has specified in advance the materials and tasks that need to be done and priced the work fairly.

If you pick a qualified and reputable repairman who presents a detailed estimate that is in the right price range for the job, your carrier should pick up the tab.

If you have a question you would like Mr. Durrett to answer, please email it to brant@durrettlaw.com

Limitation Issues for Insurance Claims cont.

damages for breach of the duty of good faith and fair dealing if you can prove intentional conduct.

Limitations

Still another difference between causes of action is the applicable period of limitations. Generally, limitations for statutory causes of action such as violations of the insurance code and violations of the deceptive trade practices act as well as breach of the duty of good faith and fair dealing run two years from the date the cause of action accrues. When an unfair act or practice involves the denial of a claim, the cause of action accrues on the date the insurance carrier denies coverage. Equivocal or tentative denial letters do not trigger accrual. When the insurer does not completely deny a claim, the exact date of accrual can be a question of fact to be determined by the jury on a case-by-case basis. In addition, the statutory remedies incorporate the discovery rule which holds that the period of limitations is tolled until the claimant discovers or in the exercise of reasonable diligence should have discovered the unfair act or practice. Further, if the claimant can prove that the carrier engaged in conduct "solely calculated" to induce the plaintiff to delay or postpone filing suit the deadline for filing suit can be extended for 180 days. Finally, at least with regard to a breach of the duty of good faith and fair dealing, the period of limitations can be restarted if the insured makes a request for payment of an additional claim within two years of the date the original claim was denied. The additional claim must relate to the original claim.

On the other hand, at this time, a claim for breach of contract normally runs 4 years from the date the cause of action accrues. This is an area where recent case law defines the period of limitations. Most policies have language that states that limitations runs "… two years and a day from the date of the occurrence." While contracting parties in Texas have the option under a statute to modify the period of limitations that power is limited to a minimum of 2 years from the date the cause of action accrues. By using language that is triggered from the date of the occurrence rather than from the date of accrual, the period is actual shorter than statutorily allowed. The *Spicewood* case held that in such circumstances, the modified period of limitations was void and that the applicable period for limitations would extend to the normal contact period of limitation in Texas or 4 years from the date the case of action accrued.

Conclusion

As you can tell, interpreting the applicable period of limitations for any particular insurance related cause of action is complex and very fact specific. Accordingly, to be safe, it might be best to file your suit two years from the date of the occurrence; however, if you missed this deadline do not be frustrated. Even at this point, it is possible some recovery can be made if suit is filed within four years of the date of accrual.

How I "fixed" the normal problems associated with the Appraisal Process ... by Lewis O'Leary

Although there is an exception for any rule that can be laid out, the following has been more the rule than the exception for me in my 41 years of involvement with the Appraisal Process.

The single most important element of the Appraisal Process is the selection of the Umpire. Within Harris and Galveston Counties, Appraisers routinely are faced with two choices for an Umpire.

They can select from a list of candidates that work entirely or to a significant degree, within the insurance industry, either in direct support to the carriers or as a Public Adjuster. For those of us who have been around the industry for decades, we recognize the potential for backlash if one of these Umpire candidates comes down hard against the carrier with an Appraisal Award, even if the evidence supports doing just that. Even PA's are not immune from having to consider the potential for this type of backlash.. The wiser PA's recognize that at any given time, a carrier that they are working well with, to resolve disputed claims, can suddenly reverse that trend after he has just sided with the Insured's Appraiser in an Appraisal.

They can refer the matter to the court system to select the Umpire. There is a system in-place in Harris and Galveston Counties whereby the State District Judges are normally selecting the Umpires from a list of retired judges or Attorneys that have served as an Arbitrator and or Mediator before. Although these candidates have an understanding of Appraisal, routinely instead of following the evidence to wherever it takes them, they will drift toward a resolution that is akin to splitting the baby.

As an alternative to this, the Ike Appraisals I have served in went to the Federal Judges for the umpire appointments, for two reasons. One, because these judges are not tied to a preconceived list of retired judges or Attorneys to work from for their selection. Secondly, because they have been willing to consider arguments for local Chief Building Officials, from neighboring towns, to serve as Umpires. Thus far, for the exception of one Appraisal, these judges have agreed with the logic that these men are more qualified than attorneys to examine damages and render an informed decision. Secondly, because of the nature of their normal role as building inspectors, they will follow the evidence to wherever it takes them.

There is good and bad that can come from getting a Chief Building Official as an umpire. The good is that if the case you make is the better of the two presentations, these candidates will not hesitate to render an award for all that you are asking for.

The bad is that if you make assertions to these guys that he knows to be "over the top" or is something that you cannot back up with written authority, you can lose credibility with these guys fast. These men are "authority driven". Simply put, they are used to asking contractors and or engineers for the authority they are working from to be requesting the variance they are seeking. Because this mindset carries over into these Appraisals, I am ever mindful of this mind-set. In the last two Ike appraisals I completed, where a CBO was serving as the umpire, my presentations included dozens of support documents to back up every assertion that I made.

Conversely, much of what my counterparts submitted was not backed up by any written authority and when asked for the authority they were drawing from on the various points they were making, they either could not produce written authority or produced something that did not make their case for the point they were promoting. In short, not being able to back up what you are promoting to these guys will work against you. However, the reverse is true because their rulings were based solely on the merits of the presentations.

Although going through this extra effort will drive the cost of an appraisal up, in one of these cases the owner of a large beach house went from zero dollars (TWIA believed that his wind damages were less than his $5,400 deductible) to an appraisal award of $249,000, which went uncontested. The other case involved two large metal buildings where my counterpart proposed an award amount of $34,000 but failed to make his case on multiple points he was promoting. By contrast, by presenting a report that was backed by about forty documents to back up my position, the CBO serving as the Umpire agreed to award of $417,000.

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The Big Easy

At the end of July, Hailie Durrett was asked to participate in a national bridge tournament in New Orleans, Louisiana. Of course, my wife, Shari, could not resist the excuse for another trip (we had just returned from San Francisco three weeks earlier) and insisted that Hailie needed parental supervision. Thus, began our sojourn in New Orleans. If you have not been to New Orleans in July, I suggest you plan a vacation there in any other month. It was HOT.

Hailie beat the heat by playing in the bridge tournament for three days with her friend, Andrew Pruet. Hailie and Andrew were able to earn credit toward "Master Points" as a result of their participation. While Hailie played bridge, Shari and I explored New Orleans with another of our friends, Lorren Rowland. We went to the World War II Museum, took the bus tour of New Orleans and forged our own culinary excursions.

By my own estimation, New Orleans is back from Katrina. I recommend that you visit the city soon, just not in July!

Pictured are Hailie Durrett and Lorren Rowland.

Get Connected To Attorney Brant Durrett

In the virtual world of the internet, social media is the way people get connected and stay connected. To learn more about Brant Durrett or the Durrett Law Firm make a connection on Linkedin, Facebook and Twitter.

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