

INSURANCE

THE COOPERATION CLAUSE OF AN AUTOMOBILE INSURANCE POLICY IS A CONDITION PRECEDENT TO COVERAGE UNDER THE POLICY

Progressive Mutual Ins. Co. v. Trevino, ___S.W. 3d___ (Tex. App.—San Antonio 2006).

FACTS: Plaintiffs brought a personal injury lawsuit against an individual insured by Progressive County Mutual Insurance Company (“Progressive”) after an automobile accident. After they obtained a default judgment, plaintiffs filed an action against Progressive as judgment creditors of the insured. In its response, Progressive claimed the company was not liable because the insured failed to comply with the cooperation clause as required by the insurance contract. Specifically, the contract listed general duties of the insured after an accident or loss, one of which was a duty to “cooperate with us in the investigation, settlement, or defense of any claim or suit.” If the clause operated as a condition precedent, as argued by Progressive, the plaintiffs bore the burden of proving the insured cooperated with Progressive in the defense of his case. Plaintiffs, however, argued the clause operated as a covenant and Progressive had the burden to prove not only that the insured failed to cooperate but that Progressive was injured by the failure.

Progressive claimed the company was not liable because the insured failed to comply with the cooperation clause as required by the insurance contract.

Based on the evidence presented, the trial court determined the plaintiffs were entitled to recover directly from Progressive. On appeal, the court considered whether the cooperation clause included in the insurance contract functioned as a condition precedent under the Progressive policy.

HOLDING: Reversed.

REASONING: To determine whether the policy clause was a condition precedent or a covenant, the court looked to the decision of the Texas Supreme Court in *Harwell v. State Farm Mutual Automobile Insurance Co.*, 896 S.W.2d 170 (Tex. 1995). In *Harwell*, the court concluded a notice of suit provision in an insurance policy constituted a condition precedent. The court noted the similarities between the cooperation provision in the Progressive policy and the notice clause in *Harwell* and, following the Texas Supreme Court’s reasoning, found the Progressive clause was a condition precedent to the insurer’s liability on the policy. Because the clause acted as a condition precedent, the Plaintiffs had the burden to prove the insured complied with the cooperation clause.

During the trial, plaintiffs introduced a recorded message left for Progressive by the insured’s wife, that requested Progressive deny coverage for the accident. Plaintiffs argued the message showed at least some degree of cooperation on the part of the insured and did not excuse Progressive from liability for the claim. However, because of other evidence, including the fact that the insured filed a pro se answer and a frivolous counterclaim despite having an attorney hired by Progressive, the court determined the

insured had failed to cooperate with Progressive’s defense of the claim. As a matter of law, the insured’s failure to cooperate caused Progressive to be prejudiced. Plaintiffs also argued the cooperation clause violated recent amendments to the Texas Motor Vehicle Safety Responsibility Act that intended to protect those making claims against insurance companies. The court, however, looked to long-standing Texas common law that upholds policy defenses such as the one offered by Progressive. *Ratliff v. Nat’l County Mut. Fire Ins. Co.*, 735 S.W.2d 955 (Tex.App.—Dallas 1987). Ultimately, the Plaintiffs failed to present adequate evidence to prove the insured complied with the cooperation clause as required by the Progressive policy. The court reversed the trial court decision and rendered a take-nothing judgment in favor of Progressive.

INSURER UNREASONABLY DELAYED PAYMENT

Coats v. Farmers Ins. Exchange, ___S.W.3d___ (Tex. App.—Houston [14th Dist.] 2006).

FACTS: Farmers issued a homeowner’s insurance policy to appellants John and Shahin Coats (“the Coatses”) in July of 2000. The policy limited claims to \$138,000 for damage to the dwelling, \$82,800 for loss to contents within the dwelling and \$27,600 for loss of use including alternative living expenses (“ALE”). In April of 2001, appellants filed a claim for hail and water damage to their roof. Farmers informed the Coatses that the damage did not exceed the \$1,000 policy deductible. In June of 2001 the Coatses filed another claim for water and roof damage to their home that occurred as a result of Tropical Storm Allison. After first issuing a denial, Farmers re-opened the claim and discovered several water sources had caused damage to the home. In March of 2002, Farmers determined the residence was a total loss and paid the policy limits of \$138,000 for the dwelling and \$27,600 for ALE. Farmers also paid over \$37,000 for damage to contents within the structure. In July of 2002, the Coatses filed another claim in which they alleged an air-conditioning and heating system “HVAC” overflow had caused water and mold damage to the dwelling. After an investigation, Farmers determined the damage associated with this claim was considered when the Coatses received the policy limits.

In December 2002, the Coatses sued Farmers for non-payment of the HVAC claim, pursuing causes of action for breach of contract, negligence, gross negligence violations of the Texas Deceptive Trade Practices Act, violations of the Texas Insurance Code, and breach of the duty of good faith and fair dealing. Farmers moved for summary judgment, contending there were no genuine issues of material fact because Farmers paid the Coatses the policy limits. The Coatses responded that they are entitled to receive a sum not to exceed policy limits for each source of damage. The trial court granted the motion for summary judgment, and the Coatses appealed.

HOLDING: Affirmed in part, reversed and remanded in part.

REASONING: The court, reading the policy as a whole, found no ambiguity in the policy provisions under consideration. The court next considered the Coatses’ claim that Farmers violated article 21.55 of the Texas Insurance code when it delayed the

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payment it did make under the policy. Farmers contended that this claim was waived when the Coatses failed to argue the point in their response to the motion for summary judgment. Using this rationale, Farmers moved for summary judgment on the 21.55 claims. The court denied Farmers' motion, stating that appellants can challenge the trial court's summary judgment based on Farmers' alleged failure to prove there was no genuine issue of material fact without having expressly asserted this argument earlier. Appellants made the original claim in April 2001 and did not receive payment until March 2002. Article 21.55 requires insurers to notify claimants in writing of the acceptance or rejection

of a claim no later than the fifteenth business day after the date the insurer receives all items necessary to secure final proof of loss. TEX. INS. CODE. art. 21.55 § 6. If an insurer, after receiving all items necessary to secure proof of loss delays payment beyond the period of time specified by applicable statutes, or for more than 60 days if the statutes do not specify a period, the insurer is required to pay an eighteen percent penalty on the amount due plus attorney's fees. TEX. INS. CODE ANN. art. 21.55 § 6. The court concluded that Farmers failed to present conclusive proof refuting the 21.55, and reversed that portion of the trial court's order granting summary judgment.

DEBT COLLECTION

LAWYER HIRED TO HANDLE FORECLOSURE CAN BE SUED UNDER FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

Wilson v. Draper & Goldberg, PLLC, 433 F.3d 373 (4th Cir. 2006).

FACTS: Plaintiff Wilson brought suit against the law firm of Draper & Goldberg, P.L.L.C., who had been retained by Chase Manhattan Mortgage Corporation "Chase" to foreclose upon Wilson's property. Defendants wrote to Wilson on Sept. 2, 2003, stating among other things that they were preparing foreclosure papers, that "federal law requires us to advise you that this letter is written pursuant to the provisions of the Fair Debt Collection Practices Act" and that "this letter is an attempt to collect a debt." Defendants also sent Wilson a Validation of Debt Notice, in accordance with FDCPA requirements. Upon receipt of the letter, Wilson wrote to Draper & Goldberg, disputing the debt. On Sept. 11, 2003, Draper & Goldberg commenced foreclosure proceedings. In mid-September, Plaintiff's attorney notified Defendants that he was representing Wilson in this matter and they should communicate with him in all future correspondence, but on two occasions in October, Draper & Goldberg corresponded only with Wilson.

Wilson settled her dispute with Chase prior to foreclosure, and brought suit, alleging that Defendants had violated the Fair Debt Collection Practices Act "FDCPA" by failing to verify the debt, continuing collection efforts after the debt had been contested, and by communicating directly with plaintiff when they knew she was represented by counsel. Defendants filed a Rule 12(b)(6) motion to dismiss, stating Wilson had failed to make a claim upon which relief could be granted, arguing that they were not "debt collectors" as defined by the Act and that they were not acting in connection with a "debt." The district court granted Defendant's motion, ruling that "trustees foreclosing on a property pursuant to a deed of trust" are not "debt collectors" under the Act, and actions taken by a trustee foreclosing on a property pursuant to a deed of trust may not be challenged as FDCPA violations.

HOLDING: Reversed and remanded.

REASONING: The Fourth Circuit Court of Appeals held that the Defendant law firm was 1) attempting to collect a debt, 2) that the firm was outside the exception to FDCPA's definition

of debt collector for activity "incidental to a bona fide fiduciary obligation," and 3) that a borrower did not have to assert a claim under a specific provision of the Act in order to succeed on that claim.

The court first reviewed Draper & Goldberg's contention that they were not acting in connection with a "debt," but rather acting as trustees foreclosing on a deed of trust. The court disagreed, holding that Wilson's "debt" remained a "debt" under the Act, even after foreclosure proceedings began, and that defendant's actions were indeed attempts to collect that debt.

Next the court reviewed defendant's argument that because they were acting as trustees, they fell under an exception from the Act's general definition of "debt collector" which covers any person collecting a debt that is "incidental to a bona fide fiduciary obligation." 15 U.S.C.A. § 1692a(6)(F)(i). The court again disagreed, holding that defendant's actions were not "incidental" but rather central to their fiduciary obligation as trustees. The court stated that it is not relevant that defendants are attorneys, as generally all lawyers are fiduciaries to their clients.

Finally, the court reviewed defendant's argument that Wilson had alleged violations of the portions of the Act that did not apply to them. According to defendants, because they are engaged in a business the principal purpose of which is the enforcement of security interests, they could only be a "debt collector" under one section expressly provided, 15 U.S.C.A. § 1692f(6), and because Wilson had alleged no violation of § 1692f(6), they could not be liable. Again the court disagreed, interpreting this provision in the Act as applying to those whose only role in the debt collection process is that of enforcement of a security interest. The court stated that 15 U.S.C.A. § 1692f(6) is not an *exception* to the definition of the term debt collector, but rather an *inclusion*, and that defendants could still be "debt collectors" even if they were also enforcing a security interest.

CHECK GUARANTEE COMPANY IS DEBT COLLECTOR UNDER FDCPA

Volden v. Innovative Fin. Sys., Inc., 440 F.3d 947 (8th Cir. 2006).

FACTS: Innovative Financial Systems, Inc. ("IFS") is primarily a check guarantee company that contracts with merchants who accept checks from customers. In June 2002, Travis Volden