February 2019

LITIGATION

Case Law Update

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No Bad Faith Counterclaims: *U.S. Specialty Insurance Co. v. Strategic Planning Associates, LLC*[1]

In this recent Louisiana law indemnity case out of the United States District Court for the Eastern District of Louisiana, several counterclaims of bad faith were dismissed pursuant to Rule 12(b)(6). Here, the Surety used the power of attorney clause in the indemnity agreement to leverage its principal's claims against the obligee to obtain a favorable settlement. Unsurprisingly, when it came time for the indemnity fight, the principal asserted a slew of counterclaims alleging bad faith by the Surety. The court found that there was no cause of action against the surety under Louisiana law for bad faith breach of the GIA, the performance bond, the payment bond, or a fiduciary duty. While the court did find that bad faith settlement could provide an indemnitor a defense to a surety's affirmative claims, it could not provide a basis for a counterclaim. This case highlights that, pursuant to common language in Indemnity Agreements, the surety may settle claims at its sole discretion, and it may use the power of attorney provision to do so. Texas is in accord. *Travelers Casualty and Surety Company of America v. Padron.*[2]

The Decision to Arbitrate is for the Texas Court: *Jody James Farms, JV v. The Altman Group, Inc.*[3]

According to the Texas Supreme Court, the trial court decides whether a claim with a non-signatory must be arbitrated. Here, after losing out on its claims against the insurer because of alleged inaction by an insurance agent, the insured sued the agency and the agent (collectively the "Agency") for breach of fiduciary duty and DTPA. The Agency, which was not a party to the underlying insurance agreement, moved to compel arbitration based on the terms of the policy. The trial court then sent the case to arbitration (despite the protests of the insured), the arbiter issued a take nothing award, and the trial court confirmed the award. The insured appealed on the basis that the Agency did not sign the arbitration agreement and was not bound by the arbitration award.

[1]No. CV 18-7741, 2019 WL 296864 (E.D. LA. 2019).

[2]No. SA-15-CV-00200-DAE, 2019 WL 369157, at *1 (W.D. Tex. Jan. 30, 2019).

[3]547 S.W.3d 624 (Tex. 2018).

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On appeal, the Texas Supreme Court first determined that the trial judge, not the arbiter, determines whether the parties have agreed to arbitrate. More importantly for the insured in this instance, the Supreme Court also found that the insurance policy did not require the insurer to submit its claims against the Agency to arbitration. This opinion shows the importance of knowing who determines whether there should be arbitration—as well as the limits of compelling non-signatories to attend.

Texas Trust Fund Statute: *Dudley Constr. Ltd. v. Act Pipe and Supply, Inc.*[4]

In this suit under the Texas Construction Trust Fund Act ("TCTFA"), judgment was for Act Pipe (a pipe supplier), with no attorneys' allowed. Because of a pricing dispute, Dudley (the general contractor) did not pay Act Pipe for pipes supplied to municipal water and sewer improvement projects. Act Pipe sued and alleged that Dudley had misapplied trust funds that it had received from the owner. At the trial court level, Act Pipe was awarded a judgment for its TCFTA claims. The Texas Supreme affirmed there was "some sum of money, more than nothing, that constituted a trust fund under the statute" - but remanded the case to determine the amount of damages. Further, the Court also found that attorneys' fees are not recoverable under TCFTA. Accordingly, if a plaintiff has the option of pursuing a breach of contract claim (which allows fees) or a TCFTA claim (which does not allow fees), the contract claim may provide the better recovery.

[4]545 S.W.3d 532 (Tex. 2018).

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