First Circuit Affirms Summary Judgment that Insurer did not act Unfairly or Violate Chapter 93A in Handling Ice Dam Claim.

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A Large Disparity Between Insurer's Offers And A Reference Award Is Not Sufficient for an Insured to Defeat Insurer's Summary Judgment Motion.

Homeowners' insurance claims for water infiltration due to snow and ice present a difficult challenge both for homeowners and insurers. A recent First Circuit decision addressing one of the many such claims from the New England winter of 2015, *River Farms Realty Trust* v. *Farm Family Casualty Ins. Co.*, First Circuit No. 19-188 (November 19, 2019), highlights some of these challenges. The court concludes that a disparity of around $100,000 between the insurer's initial estimate and the award made over a year later by a panel of three referees was not evidence of unfairness requiring a trial of the homeowners' unfair settlement practices suit.

Ice dams caused water to leak into the home at the end of February 2015. The homeowners contacted the insurer early in March. Due to some confusion with another claim by the homeowners, the insurer did not send an independent adjuster to inspect the damage until May, and in June, presented the homeowners with an estimate of around $18,000.

The homeowners did not respond until November, when they sent estimates from three contractors, each addressing a different aspect of the damage, totaling over $150,000. At the same time, the homeowners retained an attorney, and informed the insurer that their contractors believed the adjuster was not acting in good faith. No repairs had been made, and the homeowners informed the insurer that black mold was now present.

By February 2016, the homeowners' estimate had increased to over $230,000. In March, the insurer provided a new estimate – less the deductible and depreciation, and not including any roof repairs – of around $30,000.

The homeowners responded by demanding a reference. Under this procedure, which either the homeowner or the insurer may demand under Massachusetts law, each side chooses a referee, the two referees choose a third, and the panel then holds a hearing and determines the amount of the loss.

The parties agreed on a figure for the roof repairs, and submitted the rest of the loss to the referees. By the time of the hearing the homeowners' estimate had increased to nearly $260,000. In July, 2016, the referees valued the loss, including the agreed figure for the roof, at around $150,000. The insurer paid the amount determined by the referees, less amounts already paid, in August. In September, the homeowners demanded an additional $150,000, consisting of legal fees, reference expenses and an amount for alleged unfair and deceptive practices in violation of Chapter 93A, the Massachusetts unfair trade practices statute, and Chapter 176D, the unfair insurance practices statutes. The insurer responded by offering approximately $8,000, representing interest on the reference award during the period of the dispute. The homeowners brought a lawsuit for violation of the statutes and for breach of contract.

The trial judge ruled for the insurer on summary judgment, and the First Circuit affirmed. The court observed that the insurer may not have behaved admirably, and may at times have been negligent. However, the court concluded that the homeowners' position, based solely on the disparity between the insurer's estimates and the reference award, did not present a genuine issue of material fact for trial as to the insurer's good faith, stating that the homeowners do not "tell us which parts of [the] estimate were unreasonable when made or point to any evidence as to why this is so."

The homeowners argued that the standards developed in case law addressing unfair conduct by an insurer in the settlement of third-party liability cases should not apply to its claim as an insured for first-party coverage. There are undoubtedly some differences between a first-party insurance claim for water infiltration and a claim that a third party's negligence caused bodily injury, the context in which much of the c. 93A/176D case law has developed. The homeowners appears to have been arguing that for a property loss the only question is how much it will cost to fix the damage (as opposed to more subjective issues like pain and suffering or the relative negligence of the parties), so the case law holding that settlement negotiation is a bargaining process and the insurer should not be expected to make its final offer first off should not apply. But the First Circuit disagreed. Notably, the court agreed with the insurer's argument that all the damage in a water infiltration case isn't necessarily visible on a first look, and will likely continue to accrue over time, so the fact that there is a significant difference between the insurer's first estimate and the reference award over a year later doesn't mean the initial estimate was in bad faith.

Tips for Insureds

Perhaps the most significant fact in this case was the six-month delay between the insurer's first estimate and the homeowners coming back with their contractor's number. If there is one piece of wisdom a homeowner can take away from this case, it is the importance for a homeowner with a significant water infiltration claim to quickly get their own contractor involved (ideally one who is willing to advocate for them with the insurer, although this may be easier said than done). Without an estimate of their own near the time of the insurer's initial estimate, the homeowners' ability to make the case that the insurer unfairly underestimated the loss was impaired.

Right to a Jury Trial on a Chapter 93A Claim in Federal Court Remains an Open Issue

The homeowners also argued that they were entitled to a jury trial under a prior First Circuit decision, *Full Spectrum Software, Inc*. v. *Forte Automation Systems, Inc*., 858 F.3d 666 (1st Cir. 2017). *Full Spectrum* suggests that, although there is no right to a jury trial on a c. 93A claim under Massachusetts law, for at least certain types of c. 93A claims brought in federal court, there might be a Seventh Amendment right to a jury trial. *River Farm* indicates that the existence and extent of such a right are still open questions for the First Circuit. *River Farm* also emphasizes that, even if a c. 93A plaintiff has a right to a jury trial in federal court in some circumstances, that right does not preclude the granting of summary judgment when there is no genuine dispute of material fact. A trial judge can determine, as the trial court did in *River Farm*, that a plaintiff's claim falls outside the boundaries of a viable c. 93A claim as a matter of law.