

Hot Topic Articles: Natural Catastrophes

Servicing Insurer Agreement

Fonte v. Audubon Insurance Co., 8 So.3d 161 (Miss. 2009): Insurer contracting to service wind-and-hail claims for underwriting association could be held liable for alleged negligent and arbitrary adjusting practices.

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A recent decision from the Supreme Court of Mississippi, *Fonte v. Audubon Insurance Co.*[1] considers, in relevant part, whether an insurance company contracting to service wind-and-hail claims for an underwriting association could be held liable for alleged negligent and arbitrary adjusting tactics.

The case arose in the aftermath of Hurricane Katrina when Raul Fonte and Helen Flammer (the Fontes) filed suit against Audubon Insurance Company (Audubon) and other parties in Harrison County, Mississippi Circuit Court to recover insurance proceeds for the loss of their newly constructed home.

At the time of the loss, the Fontes held three separate insurance policies on their home: a wind-and-hail policy through the Mississippi Windstorm Underwriting Association (MWUA); a federal flood policy; and a State Farm insurance homeowner's policy.[2] Coverage was sought under all three policies.[3]

MWUA's agreement with Audubon required Audubon to provide services on MWUA policies, including issuing policies, claims adjustment, and full-claim supervision.[4] MWUA owned Audubon's work product generated in performance of these duties.[5] Audubon contracted with independent adjusting firm FARA Catastrophe Services (FARA) to assist with claims adjustment. Audubon, through FARA, assigned adjuster John Jay to investigate and adjust the Fontes' wind claim. Jay stated that he was given a mandate—which Audubon's own corporate representative admitted may have been "arbitrary"—"not to pay 100 percent of any of the claims along U.S. 90 in the Gulfport/Biloxi/Pass Christian area because of the fact it was assumed and believed that storm surge, or flood, created a significant part of the total damage." Jay possessed no training in meteorology, structural or civil engineering, or other expertise to help him distinguish between wind and water damage nor was he provided standard meteorological data or other expert analysis prior to adjusting the Fontes' claim.

FARA's final report concluded that only the second-story portion of the Fontes' home was damaged by wind, whereas the first floor was deemed destroyed by storm surge, precluding coverage for the ground level under the MWUA policy. Payment was made to the Fontes for the \$140,000 policy limit under the flood policy and for a total of \$201,402 of the \$400,000 limit under the wind-and-hail policy.

The Fontes filed suit against their insurers. MWUA then tendered the remaining limits on the insureds' wind-and-hail policy, and the Fontes dismissed all claims against MWUA

and Audubon for recovery of policy limits. To reserve their claims for litigation costs, attorney fees, and punitive damages, however, the Fontes maintained their claim against Audubon for negligent and arbitrary adjusting practices. Audubon moved for summary judgment denying any liability for its handling of the Fontes' wind claim.

The trial court granted Audubon's motion for summary judgment. On appeal, the Supreme Court of Mississippi reversed and remanded, holding that genuine fact issues regarding agency and negligence precluded summary judgment.

Audubon argued that as an agent for MWUA, it was immune from any causes of action arising from negligent claims handling or breach of contract; and its adjustment of the Fontes' wind claim did not constitute an independent tort.

The Fontes, however, argued that: Audubon's contractual assumption of MWUA obligations and the equity rights Audubon held in the policy premiums rendered it a co-principal, therefore subjecting it to claims for simple negligence; and the absolute control Audubon exercised over the scope and methodology of adjuster Jay's investigation, as well as the method—especially the mandate not to pay 100 percent of any claims along the U.S. 90 corridor—actually employed by Jay, were grossly negligent adjusting practices that were designed to produce arbitrary results.

The court found that Audubon could be held liable for alleged negligent and arbitrary adjusting tactics. Although MWUA controlled all work product produced by Audubon, its contract with Audubon did not give MWUA explicit authority to supervise Audubon's work—thereby providing Audubon with significant autonomy. Therefore, the court reasoned, there exists a factual issue regarding whether MWUA possessed the requisite control over Audubon throughout the adjusting process necessary for a principal-agent relationship. Even if it was found to be a mere agent of MWUA, the court held that Audubon could still be held liable for grossly negligent adjusting practices. The Court indicated that adjuster Jay may not have investigated all relevant information to make a proper evaluation of the claim. Jay's decision to adjust the claim assuming that only the top half of the Fontes' home was damaged by wind was itself deemed "arbitrary," made with little expertise or other assistance, and was based upon a questionable instruction not to pay 100 percent of the policy limits. Therefore, whether an arguable or legitimate basis for denial of the Fontes' claim existed was best left for the jury.

It would be interesting to see whether the Mississippi Supreme Court would have upheld the summary judgment determination if the servicing insurer agreement would have granted the underwriting association complete control over the servicing insurer, including the right to supervise and inspect its work.

END NOTES

1. 8 So.3d 161 (Miss. 2009)
2. *Id.* at 163
3. *Id.* at 164
4. *Id.* at 163, 165
5. *Id.* at 165-67