Opinion issued August 11, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01054-CV

IN RE LOYA INSURANCE COMPANY, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

In this insurance coverage dispute, Loya Insurance Company seeks mandamus relief from the trial court's order partially severing its insureds' breach of insurance contract claim from the insureds' extra-contractual claims, but

refusing to sever the insureds' prompt payment claim or to abate any of the extra-contractual claims pending resolution of the breach of contract claim.[1]

Background

Fabian and Martha Jagrup sued Loya for breach of their homeowner's insurance policy, violations of the Texas Insurance Code and its Chapter 542 prompt payment provisions, violations of the common-law duty of good faith and fair dealing, and fraud. Loya offered to settle the Jagrups' claims. After the Jagrups rejected Loya's offer, Loya then moved to sever and abate the Jagrups' breach of insurance contract claim from their extra-contractual claims. The trial court denied the motion.

Loya filed a petition for a writ of mandamus, prompting the Jagrups to ask the trial court to modify its order. The Jagrups agreed to sever their breach of contract claim from their extra-contractual claims, except their statutory claim for prompt payment. They continued to contest Loya's motion to abate. Pursuant to the Jagrups' request, the trial court (1) vacated its earlier order, (2) severed the Jagrups' breach of contract and Chapter 542 prompt payment claims from the remainder of their claims, and (3) denied Loya's request for abatement of any extra-contractual claim. Loya seeks mandamus relief from the modified order,

[1] The underlying case is *Fabian Jagrup and Martha Jagrup v. Loya Insurance Co., IAS Claim Services, Inc., and Albert Russell Callaway*, No. 2009-64454 in the 11th District Court of Harris County, the Honorable Mike Miller presiding.

contending that the trial court erred by refusing to sever the prompt payment claim along with the other extra-contractual claims and to abate the severed claims pending resolution of the contract claim.

Discussion

Standard of Review

An order denying severance and abatement of a breach of contract claim from extra-contractual claims in the insurance context is reviewed for abuse of discretion; it is well settled that an improper denial is a basis for mandamus relief. *See F.A. Richard & Assocs. v. Millard*, 856 S.W.2d 765, 766–67 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding); *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 671–72 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).

Severance

When an insurer offers to settle a breach of contract claim, the trial court must sever the insured's extra-contractual claims from the contractual claims to avoid prejudice to the insurer in its defense of the coverage dispute. *See F.A. Richard & Assocs.*, 856 S.W.2d at 767; *U.S. Fire Ins. Co.*, 847 S.W.2d at 673. This is because, ordinarily, an offer to settle a coverage dispute is inadmissible to prove the merit of a coverage claim, but such evidence nevertheless may be admissible on the extra-contractual claims to rebut evidence that the insurer acted in bad faith. *See Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex.

1996) (orig. proceeding); *U.S. Fire Ins.*, 847 S.W.2d at 673. Under such circumstances, the trial court can reach only one decision that will protect all interests involved, and that is to order severance of the two types of claims. *See State Farm Mut. Auto. Ins. Co. v. Willborn*, 835 S.W.2d 260, 262 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

Loya asserts that the trial court's order severing only some of the Jagrups' extra-contractual claims—while maintaining their prompt payment claim in the lawsuit with their coverage claim—is contrary to the principles of law set forth above. It observes that the Jagrups could seek to admit Loya's settlement offer as evidence of Loya's belated attempts to resolve the disputed insurance claim to support Loya's prompt payment liability; but the admission of such evidence would undermine Loya's coverage defense of the underlying insurance claim. The Jagrups respond that prompt payment claims are not separate causes of action; rather, a prompt payment claim combines an insurer's contractual and statutory liability into a single cause of action. In support, the Jagrups rely on the Amarillo Court of Appeals' holding in *Lusk v. Puryear*, 896 S.W.2d 377, 379 (Tex. App.—Amarillo 1995, orig. proceeding). There, the claimant alleged that the insurance company "had refused to pay her personal injury protection claim in full within 30 days of presentment, which 'constitute[d] a breach of [the] insurance contract,' and a violation of article 21.55." *Id.* at 380. The court of appeals determined that the

trial court abused its discretion in severing and abating the insured's causes of action for breach of contract and violations of article 21.55 (Chapter 542's statutory predecessor). *Id.* The court reasoned:

> Although the damages and attorney's fees provided by the article do not arise from the insurance contract, they are recoverable for the insurer's failure to timely pay any loss for which it may be liable under the contract. Thus, when [the insured] alleged [the insurer] failed to timely pay her claim and pleaded for damages and attorney's fees provided by article 21.55, the entire liability of [the insurer], both on the insurance policy and under article 21.55, was put in issue as one cause of action.

Id.

We decline to follow the Amarillo Court of Appeals' holding in *Lusk* because the claims asserted here are different. In *Lusk*, the claimant asserted that the insurer breached its insurance contract in one way only—by failing to pay insurance benefits within 30 days, after the insured had presented her claim. *Id.* at 379. There was no other underlying coverage dispute. The Jagrups' assertion of breach of contract, in contrast, is broader. The Jagrups allege that Loya failed to adequately compensate the Jagrups' loss. In the Jagrups' separately pleaded violations of Chapter 542, they allege not only that Loya unreasonably delayed payment of the claim but also that Loya failed to timely perform a number of additional duties imposed by Chapter 542. Also, unlike the facts of this case, the insurer in *Lusk* had not offered to settle the relator's claims, which makes *Lusk* similar to *Akin*, where the Texas Supreme Court found no harm from trying the

claims together. *Compare Akin*, 927 S.W.2d at 630 (noting that prejudice was not likely to result from trying claims together when insurer paid uncontested portion of claim), *with Lusk*, 896 S.W.2d at 380 (noting that because entire liability of insurer was put in issue in one cause of action trial court erred in ordering severance). We conclude that the Jagrups' breach of contract and prompt payment claims present distinct claims. The Amarillo Court of Appeals has itself recognized this distinction. *See In re Trinity Universal Ins. Co.*, 64 S.W.3d 463, 467 (Tex. App.—Amarillo 2001, orig. proceeding) (severing contract claim from prompt payment claim; declining to follow *Lusk* when prompt payment claim hinged on resolution of coverage dispute). We hold that the Jagrups' breach of contract claim must be severed from their prompt payment claim. *See U.S. Fire Ins. Co.*, 847 S.W.2d at 673.

Abatement

In most circumstances, a decision to grant or deny a motion to abate is within the discretion of the trial court. *See Project Eng'g USA Corp. v. Gator Hawk, Inc.*, 833 S.W.2d 716, 724 (Tex. App.—Houston [1st Dist.] 1992, no writ). An order on a plea in abatement ordinarily is an incidental ruling that is not subject to mandamus review. *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985). Both Houston Courts of Appeals have long concluded, however, that where an insured has filed a breach of contract claim as well as extra-contractual claims, and the

carrier has made a settlement offer, the trial court should abate the latter claims to prevent unfair prejudice. *See U.S. Fire Ins. Co.*, 847 S.W.2d at 673; *Wilborn*, 835 S.W.2d at 262; *see also In re Allstate Ins. Co.*, No. 01-02-01235-CV, 2003 WL 21026877, at *2 (Tex. App.—Houston [1st Dist.] May 8, 2003, orig. proceeding). We hold that Loya is entitled to a separate trial of the Jagrups' extra-contractual claims. We further conclude that Loya does not have an adequate remedy by appeal because, absent such an order, the parties will be put to the expense and the effort of preparing and trying extra-contractual claims that may be disposed of by resolution of the breach of contract claim. *U.S. Fire Ins. Co.*, 847 S.W.2d at 675–76. We note, however, that the trial court has discretion in managing its docket. Loya has made no argument to support its request for a complete abatement, nor any showing of prejudice or burden relating to parallel discovery of contractual and extra-contractual claims in this case. A bifurcated trial of the extra-contractual claims, should the Jagrups prevail in their coverage claim, may serve as well as an abatement to protect the underlying policy concerns. Absent any showing of prejudice, we leave discovery and management of the separate trials to the trial court's discretion.

Conclusion

We direct the trial court to order the severance of the Jagrups' prompt payment claim. Our writ of mandamus will issue only if the trial court does not comply.

Jane Bland
Justice

Panel consists of Justices Bland, Massengale, and Brown.