District Court, Adams County, State of Colorado Adams County Justice Center 1100 Judicial Center Drive Brighton, Colorado 80601 (303) 659-1161	DATE FILED: January 24, 2013 COURT USE ONLY
Plaintiffs: **John and Ruth Traupe d/b/a Diamond T. Enterprises, LLC** v. Defendant: **Le Mars Insurance Company**	Case No.: 12CV410 Division: C Courtroom: 506
ORDER	

Plaintiffs John and Ruth Traupe filed a Motion to Strike Defendant's Designation of Nonparties at Fault pursuant to C.R.S. § 13-21-111.5 on December 18, 2012. Defendant Le Mars Insurance Company filed a Response on January 8, 2013. A Reply was filed on January 15, 2013. The Court, being fully advised, finds and orders as follows:

Background to the Motion

Plaintiffs assert claims for breach of contract, bad faith breach of an insurance contract, and statutory claims pursuant to C.R.S. §§ 10-3-1115 and 10-3-1116 based on Defendant's alleged failure to properly investigate, adjust, and pay Diamond T. Enterprises, LLC's claim under its insurance policy with Defendant. Defendant designated Matrix Business Consulting, Trinity Consultants, Interstate Restoration, unidentified consultants working on behalf of Plaintiffs, and John Lane as nonparties at fault pursuant to C.R.S. § 13-21-111.5. Plaintiffs filed this Motion to Strike Defendant's Designation of Nonparties at Fault.

Brief Summary of the Parties' Arguments

Plaintiffs

Defendant's designation of public adjusters, general contractors, and a property manager as nonparties at fault is without substantial justification because there is no case law or statute that even suggests a third party could be assessed part of insurance contract damages, or the penalties for bad faith or unreasonable delay or denial of insurance benefits under C.R.S. § 10-3-1116. First, none of the nonparties designated by Defendant were parties to the insurance contract, so the contract cannot be enforced against any of them. Second, with regard to the tort claim, bad faith breach of insurance contract, an insurance company's duty of good faith is a non-delegable duty. Defendant cannot use a designation of nonparties when the duty it allegedly breached is non-delegable. Third, C.R.S. §§ 10-3-1115 and 10-3-1116 were created specifically to punish **insurers** for bad actions, and a third party cannot be apportioned any part of the § 10-3-1116 penalty assessed against an insurer.

Finally, Defendant failed to file a certificate of review. C.R.S. § 13-20-602 requires a party alleging professional negligence to file a certificate of review. Both public adjusters and contractors are licensed professionals.

Defendant

Defendant concedes that a designation of nonparties at fault is not proper with regard to a breach of contract claim, but the designation of nonparties at fault for the damages arising from Plaintiffs' bad faith breach of contract and statutory claims pursuant to C.R.S. §§ 10-3-1115 and 10-3-1116 are permissible. Defendant may designate nonparties it contends are wholly or partially at fault for producing Plaintiffs' claimed damages. Designation of nonparties at fault ensures that parties found liable will not be responsible for more than their fair share of the damages. Because all of the designated nonparties owed legal duties to Plaintiffs, the fault of

those designated nonparties may be properly considered in determining the apportionment of damages arising out of Plaintiffs' claims. Specifically, Matrix Business Consulting and Ian Pollock acted as Plaintiffs' public adjuster for the insurance claims at issue and selected contractors for the benefit and on behalf of Plaintiffs; Trinity Consultants and Mitchell Kohn acted as a "general contractor" to evaluate damages Plaintiffs claimed occurred; Interstate Restoration and Brian Schupbach replaced Trinity as the "general contractor" charged with evaluating damages Plaintiffs claimed had occurred; unidentified consultants evaluated the roofing at the properties at issue in response to Plaintiffs' claimed damages; and John Lane, Plaintiffs' property manager, had responsibility for communicating the condition of the properties to Defendant.

Lastly, Defendant was not required under the circumstances here to file a certificate of review. Plaintiffs failed to present anything indicating that any of the nonparties require licensing from the State of Colorado in any capacity. Additionally, expert testimony is not required to determine whether the designated nonparties caused and interposed undue delay related to Defendant's efforts to adjust the relevant insurance claims.

Issues

1. Is Defendant's designation of nonparties at fault proper with regard to Plaintiffs' breach of contract claim?
2. Is Defendant's designation of nonparties at fault proper with regard to Plaintiffs' claim for unreasonable delay and denial of payment of covered benefits pursuant to C.R.S. §§ 10-3-1115 and 10-3-1116?
3. Is Defendant's designation of nonparties at fault proper with regard to Plaintiffs' bad faith breach of insurance contract claim?
4. Should the Court strike Defendant's designation of nonparties because Defendant failed to file a certificate of review?

5. Should the Court award Plaintiffs attorney fees?

Principles of Law

C.R.S. § 13-21-111.5(3)(b) Civil liability cases

"Negligence or fault of a nonparty may be considered if the claimant entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault within ninety days following commencement of the action unless the court determines that a longer period is necessary."

Analysis

1. Is Defendant's designation of nonparties at fault proper with regard to Plaintiffs' breach of contract claim?

Defendant concedes that a designation of nonparties at fault is not proper with regard to Plaintiffs' breach of contract claim. *See* Resp. at 5 n.2. Accordingly, Defendant may not apportion liability for Plaintiffs' damages arising from Plaintiffs' breach of contract claim, if any, to its designated nonparties at fault.

2. Is Defendant's designation of nonparties at fault proper with regard to Plaintiffs' claim for unreasonable delay and denial of payment of covered benefits pursuant to C.R.S. §§ 10-3-1115 and 10-3-1116?

"A **person engaged in the business of insurance** shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant." C.R.S. § 10-3-1115(1)(a) (emphasis added). "A first-party claimant as defined in section 10-3-1115 whose claim for payment of benefits has been unreasonably delayed or denied may bring an action in a district court to recover reasonable attorney fees and court costs and two times the covered benefit." C.R.S. § 10-3-1116(1).

The General Assembly declared that C.R.S. § 10-3-1116 "is a law regulating insurance." C.R.S. § 10-3-1116(7). "The clear import of this language shows that the General Assembly intended to prohibit *conduct* by insurers in their handling of claims for benefits owed to their insureds." *Kisselman v. Am. Family Mut. Ins. Co.*, 2011 WL 6091708 at *13 (Colo. App. Dec. 8, 2011) *cert. denied*, 12SC51, 2012 WL 4482571 (Colo. Oct. 1, 2012) (emphasis included). "Therefore, after the Statutes' effective date of August 5, 2008, **insurers** are statutorily prohibited from engaging in certain conduct—namely, acts of unreasonable delay or denial of payment of benefits, as defined in the statute—stemming from a claim for benefits." *Id*. (emphasis added).

"Courts should construe designation requirements strictly to avoid a defendant attributing liability to a non-party from whom the plaintiff cannot recover." *Redden v. SCI Colorado Funeral Services, Inc.*, 38 P.3d 75, 80 (Colo. 2001). Because C.R.S. §§ 10-3-1115 and 10-3-1116 apply only to those engaged in the business of insurance, Defendant may not apportion liability for Plaintiffs' damages arising from Defendant's violation of C.R.S. §§ 10-3-1115 and 10-3-1116 claim, if any, to its designated nonparties at fault.

3. Is Defendant's designation of nonparties at fault proper with regard to Plaintiffs' bad faith breach of insurance contract claim?

"Because of the 'special nature of the insurance contract and the relationship which exists between the insurer and the insured,' an insurer's breach of this duty gives rise to a separate cause of action sounding in tort." *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466 (Colo. 2003) (quoting *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo.1984)). "The basis for tort liability is the **insurer's conduct** in unreasonably refusing to pay a claim and failing to act in good faith, not the insured's ultimate financial liability." *Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 414 (Colo. 2004) (emphasis added). Because a

bad faith breach of insurance contract claim requires Plaintiffs to prove **Defendant** was unreasonably in refusing to pay a claim, it would be absurd to instruct the jury to apportion fault to a non-party who had no duty to act in good faith regarding Plaintiffs' insurance contract with Defendant.

Furthermore, "[a] co-defendant or a designated non-party at fault cannot be apportioned damages arising out of a claim that could not, in the first instance, have been asserted against it as a defendant." *Harvey v. Farmers Ins. Exch.*, 983 P.2d 34, 39 (Colo. App. 1998). Here, Plaintiffs could not bring a claim for bad faith breach of insurance contract against the designated nonparties because the duty allegedly breached is non-delegable. *See Cary*, 68 P.3d at 466 ("Every insurer owes its insured a **non-delegable duty** of good faith and fair dealing." (emphasis added)). C.R.S. § 13-21-111.5(6)(f)(I) specifies that a party cannot use a designation of nonparties to "abrogate or affect…other nondelegable duties at common law."

Defendant relies on *Harvey v. Farmers Ins. Exch.*, 983 P.2d 34 (Colo. App. 1998) to support its argument that the designated nonparties at fault may be responsible for Plaintiffs' damages. This reliance, however, is misplaced because in *Harvey*, "plaintiffs' claims of bad faith breach of insurance contract are inextricably intertwined with their claims for negligence." *Id*. at 39. The jury determined that "defendant had not failed to pay any contractual benefits, and plaintiffs do not appeal that determination." *Id*. at 39-40. "Thus, plaintiffs' bad faith claim now rests solely on defendant's negligent referral." *Id*. at 40.

Here, Plaintiffs only brought an ordinary claim for bad faith breach of an insurance contract, not a claim for negligence. "In an ordinary claim for bad faith breach of an insurance contract, where the plaintiff seeks damages for the insurance company's bad faith refusal to pay benefits, it would be incongruous for the jury to be instructed to apportion fault to a [third party]." *Id*. at 39. Therefore,

Defendant may not apportion liability for Plaintiffs' damages arising from Plaintiffs' bad faith breach of insurance contract claim, if any, to its designated nonparties at fault.

4. Should the Court strike Defendant's designation of nonparties because Defendant failed to file a certificate of review?

Because the Court found Defendant may not apportion liability for Plaintiffs' claims to its designated nonparties at fault, it is unnecessary to discuss the effects of Defendant's failure to file a certificate of review in accordance with C.R.S. § 13-20-602.

5. Should the Court award Plaintiffs attorney fees?

The Court will not award attorney fees at this time.

Order

Plaintiffs' Motion to Strike Defendant's Designation of Nonparties at Fault is GRANTED.

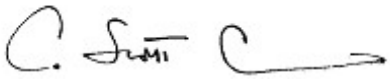
Dated this 24th day of January, 2013.

By the Court:

C. Scott Crabtree
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was served on all counsel of record and pro se parties whose address was entered in the electronic service filing system on this 24th day of January, 2013.



Court