UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2462

JUDWIN PROPERTIES, INC., ET AL.,

Plaintiffs-Appellants,

VERSUS

UNITED STATES FIRE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-89-3661)

(July 22, 1994)

Before SMITH and BARKSDALE, Circuit Judges, and WALTER,[1] District Judge.

RHESA HAWKINS BARKSDALE, Circuit Judge:[2]

In their second appeal in this case, Judwin Properties, Inc., et al. (Judwin), challenge a summary judgment awarded United States Fire Insurance Company (USF). We **AFFIRM**.

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

The factual background to this dispute was recited for the first appeal, ***Judwin Properties, Inc. v. United States Fire Ins. Co.***, 973 F.2d 432, 433-34 (5th Cir. 1992) ("***Judwin I***"). Briefly stated, Judwin treated its apartment properties with chlordane, resulting in nine personal injury actions involving several hundred plaintiffs. Judwin notified USF and other insurers, and USF began providing Judwin's defense. On May 3, 1990, USF entered into an oral settlement with two groups of plaintiffs (the Flores and Cordova plaintiffs), which was memorialized in writing at the end of May. Meanwhile, on May 4, by means of a settlement between Judwin and the Flores and Cordova plaintiffs, those plaintiffs acquired certain bad faith claims Judwin may have possessed against USF.

USF paid $6 million to the Flores and Cordova plaintiffs as part of the settlement, and, having exhausted its policy limits, declined further coverage. Judwin, in turn, filed suit against USF, claiming that it breached the insurance contract by failing to defend Judwin properly and to settle earlier with the Flores and Cordova plaintiffs. In addition, it asserted bad faith claims against USF.

A.

In ***Judwin I***, our court affirmed the summary judgment for USF on the claims that USF failed to exhaust its coverage obligations under its insurance contract and breached its duty to defend Judwin under that contract. ***Id.*** at 435-36. It reversed, however, the *sua*

sponte summary judgment for USF on the bad faith claims (they were not the subject of the summary judgment motions), *see* ***id.*** at 436-37, finding that the court failed to give adequate notice to Judwin that it would consider them for summary judgment:

> Even though summary judgment may have been proper on the merits because of *the assignment of the bad faith claims to the Flores and Cordova plaintiffs and the full performance of the insurance contract*, Judwin is entitled to an opportunity to present its case to the district court prior to such a dismissal.

Id. at 437 (citation omitted; emphasis added).[3]

B.

On remand, the district court ordered Judwin to demonstrate "a disputed fact issue on the tort claims". It responded that the issue was whether USF acted in bad faith by settling with the Flores and Cordova plaintiffs, when there were "literally hundreds of remaining plaintiffs".[4] This explanation of the tort claim

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[3] Judwin's tort claims were characterized as follows: "Judwin also raised bad faith tort claims arising from the manner in which USF handled Judwin's defense in the Flores and Cordova lawsuits." ***Id.*** at 434.

[4] One of Judwin's representations in its response was inconsistent with the law of the case. Judwin stated that USF "paid the entire $6 million to the *Cordova* plaintiffs to extinguish the bad faith claims against it." Instead, the $6 million was in exchange for "the Flores and Cordova plaintiffs' covenant not to execute against Judwin, USF, and the other defendants *in the underlying lawsuit.*" ***Judwin I***, 973 F.2d at 435 (emphasis added). USF paid a "peppercorn ... to the Flores and Cordova plaintiffs for their release of the bad faith claims against USF." ***Id.*** (footnote explaining validity of "peppercorn" as consideration in Texas omitted).

At oral argument, Judwin's counsel, who had not filed a reply brief, stated that, in preparing the preceding evening, he had come to a sudden revelation regarding USF's brief: USF was now contending that it paid $6 million to extinguish bad faith claims

differs somewhat from what this court previously understood it to be; nevertheless, the district court ruled that "whether [USF] exercised the appropriate degree of care in settling certain claims in the face of other impending and potential claims is a question of fact and must be tried by jury."

By supplemental motion, USF urged that "the only fact issue ... relates to the degree of care exercised by [USF] in settling the ***Cordova/Flores*** lawsuits", and that Judwin "relinquished their

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that the Flores and Cordova plaintiffs might have asserted, but had contended during the previous appeal, in order to prevail on the breach of contract claim, that the $6 million was paid to provide Judwin coverage. USF took no such position in its brief; and, as noted, this court has already ruled that USF paid a "peppercorn" to extinguish the bad faith claims and $6 million to settle the claims the Flores and Cordova plaintiffs had against Judwin.

Finally, after oral argument, Judwin filed with this court a copy of its "Emergency Motion" in district court requesting Rule 60 relief from judgment. The basis for the motion was the discovery of "new" evidence from another proceeding involving Judwin and USF. Judwin stated that, in that case, it obtained a report by a USF adjuster, which stated that USF had previously "entered into a settlement with the Cordva/Flores plaintiffs for all claims arising from alleged exposure to chlordane and included a release of the alleged bad faith claims which had been assigned to them by the insured in exchange for payment by [USF] of its ... $6 million policy limits." The Rule 60 motion exclaimed -- literally -- that USF had thus admitted that it had "paid $6 million ... to extricate itself from a bad faith claim!" (Even if we could consider this "new" evidence, it should hardly be surprising that an adjuster, describing what occurred, would fail to separate the consideration provided in the settlement agreement; a peppercorn is of little financial significance.) Judwin requested that the district court ask this court to "refrain from deciding [this] Appeal". The district court did not do so, rather it denied the motion on the basis that it had "no merit".

In sum, Judwin is either consistently confused, or deliberately misleading, in its discussions relating to USF's settlement with the Flores and Cordova plaintiffs.

rights to any tort claims related to the settlement" by virtue of its agreement with the Flores and Cordova plaintiffs.[5]

Judwin contended that it had not assigned the claim; that it arose "from the other chlordane lawsuits", not the Flores and Cordova actions.[6] USF disagreed, and attached a Judwin response to

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[5] That agreement provided that the Judwin defendants

> hereby ASSIGN, CONVEY, SELL, TRANSFER, and DELIVER to plaintiffs and their attorneys ... all of defendants' causes of action against any of their insurance carriers, including but not limited to U.S. FIRE INSURANCE CO. ... based upon bad faith and any violations by the insurance carriers of the Texas Insurance Code only in the two referenced law suits [sic]. It is specifically understood that the Defendants are not assigning to the Plaintiffs any claim(s) for coverage or a legal defense from any of the insurance carriers herein, but rather, are only assigning those claims and/or causes of action arising from the insurance companies' actions and omissions in the two referenced law suits [sic]. The Defendants specifically retain all causes of actions, claims and rights against any insurance carrier for insurance coverage and a right to a legal defense in the two referenced lawsuits and with respect to any other claim or lawsuit.

[6] Judwin's actual contention was somewhat more strident: "Quite frankly, it is a breach of the Federal Rules of Civil Procedure for any attorney or individual to claim to this Court that the causes of action herein sued for have been assigned to a party and are not owned by [Judwin]." Judwin's counsel hardly appears to be comporting with our court's advice in ***Judwin I***. There, Judwin filed a motion to dismiss the appeal for lack of subject matter jurisdiction, predicated on an absence of necessary parties. After discussing Judwin's ample, prior opportunity to join those parties, as well as its awareness that such parties might have been necessary, our court rejected the motion (and USF's for sanctions), and stated that it would

> not endorse an effort by plaintiffs to lay behind the log and raise the issue of indispensable parties following an adverse ruling.
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> The motions for sanctions are denied, but the

one of USF's interrogatories to lend support to its assertion that the claim did arise out of that litigation. The answer focused almost entirely on alleged wrongs committed by USF in its dealings with the Flores and Cordova plaintiffs.

Judwin, in turn, offered this final rejoinder:

> [USF] is also wrong when it contends that Judwin's claims here were in the category of the assigned claims because "the operative acts or omissions took place during the pendency of the ***Cordova/Flores*** lawsuits".... A cause of action consists of both liability acts and damages. The damages which Judwin sustained and which it continues to sustain occurred in other litigation **after** the ***Cordova/Flores*** settlement. Therefore, once again, [USF's] characterization that what was assigned includes the claims before this court is conceptually impossible.

The district court disagreed and rendered summary judgment for USF, concluding that the tort claim had been "transferred to the Cordova/Flores parties...."

II.

Summary judgment, which we review *de novo*, *e.g.*, ***Amburgey v. Corhart Refractories Corp.***, 936 F.2d 805, 809 (5th Cir. 1991), is appropriate when, viewing the evidence in a light most favorable to the non-moving party, there is no genuine issue of material fact

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> attorneys for both parties are advised to heed this Court's recent advise as set forth in ***Sidag Aktiengesellshaft v. Smoked Foods Products***, 969 F.2d 1562 (5th Cir. 1992).

Judwin I, 973 F.2d at 435. (***Sidag*** decried lawyer incivility, and cautioned the lawyers in that case against hurling "hyperbolical invectives at one another", lest sanctions be imposed. ***Sidag***, 969 F.2d at 1562-63.)

and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Judwin contends essentially that it was error to hold, as a matter of law, that its tort claim was assigned to the Flores and Cordova plaintiffs; that "[o]bviously, the claims against [USF] in the cases arising from the other chlordane lawsuits ... have never been assigned or transferred to any parties." While this may be obvious, it begs the real question: whether the claim arises from USF's acts or omissions in the Flores and Cordova actions. If so, then that is the end of the matter, for Judwin assigned to the Flores and Cordova plaintiffs any bad faith claim it had against USF for its conduct in the Flores and Cordova litigation. Indeed, Judwin summarizes its contention in this court by stating: "Whether [USF] exercised the appropriate degree of care in settling certain claims in the face of other impending, potential claims is indisputably a question of fact...." This inquiry hinges arguably on the propriety of the settlement; the bad faith claim must be derivative of some act or omission in the Flores and Cordova actions.

Moreover, the only factual assertions made by Judwin to support its claim relates to USF's conduct in the Flores and Cordova actions. Its interrogatory answer regarding the claim stated, in essence, that USF *could* have settled the Flores and Cordova actions earlier (and presumably for less money, thereby

leaving coverage for the other actions) but for USF's negligence, bad faith, and failure to provide an adequate defense.[7]

That the claim does arise from USF's conduct in the Flores and Cordova litigation is buttressed by the factual recitations in the agreement between Judwin and those plaintiffs. There, Judwin went on at length about how USF had acted wrongly throughout the Flores and Cordova actions. For this reason, Judwin alleged that it was "exposed to adverse jury findings that [the Judwin defendants'] actions have caused plaintiffs to sustain damages and injuries *far in excess of the total amount of insurance coverage under these ... policies*." (Emphasis added.) And, the agreement further recited that plaintiffs "anticipate receiving ... $6,000,000 ... during the next 30 days".

Taken together, these recitations establish that Judwin was aware that its exposure in that litigation exceeded greatly the USF limits, and that USF would therefore settle for their limits ($6 million). Any bad faith claim thus might turn on the acts that

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[7] Judwin's effort to persuade the district court that it had not assigned the claim, as quoted *supra*, turned on its separation of the "damages" it suffered from the actions giving rise to them. According to Judwin, because its alleged damages manifested themselves in the absence of a defense by USF in the other chlordane actions (an absence already blessed by our court in ***Judwin I*** insofar as the insurance contract between Judwin and USF was concerned), its present claim arises from those other actions and not from the Flores and Cordova actions. This contention implicitly acknowledges that the *source* of the damages is not USF's conduct in the other actions, but its conduct in the Flores and Cordova actions. And, no matter where the "damages" from that conduct are said to reside, Judwin's claim is arguably a "cause[] of action arising from the insurance companies' actions and omissions in" the Flores and Cordova actions -- the very claim assigned to the Flores and Cordova plaintiffs.

Judwin alleged on the part of USF that left Judwin exposed for substantially more than the policies' limits -- the very "acts or omissions" assigned by Judwin to the Flores and Cordova plaintiffs.

In any event, when asked at oral argument to explain how the tort claim did not arise out of the Flores and Cordova litigation, Judwin stated that "in Texas, under the ***Soriano*** ruling [***Texas Farmers Ins. Co. v. Soriano***, 844 S.W.2d 808 (Tex. Ct. App. 1992) (en banc), *reversed*, ___ S.W.2d ___ (No. D-3363, 1994 W.L. 264967 (Tex. June 5, 1994))], when [insurers] know that there are other claims, they have to make arrangements for the other claims." The Texas Court of Appeals had held in ***Soriano*** that a bad faith cause of action may lie against an insurer if, in a case in which its insured faces several claims likely to exceed coverage, the insurer settles one claim for the policy limit, thereby leaving the insured to defend himself in the remaining claims. ***Soriano***, 844 S.W.2d at 816-17. The court held that a plaintiff need not prove that the settlement was unreasonable to prevail on such a claim; rather, the claim arises out of "the totality of the circumstances surrounding the occurrence." ***Id.***

The Texas Supreme Court has recently reversed the court of appeals in ***Soriano***:

> [W]hen faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into a *reasonable settlement* with one of several claimants *even though such settlement exhausts or diminishes the proceeds available to satisfy other claims*. Such an approach, we believe, promotes settlement of lawsuits and encourages claimants to make their claims promptly.

Soriano, No. D-3363, 1994 W.L. 264967 at *2 (Tex. June 15, 1994) (footnote and citation omitted; emphasis added). To prevail on a claim that an insurer's settlement subjected the insured to "excess judgment liability" on other claims, *see* ***id.*** at *1, the insured "must show that a reasonably prudent insurer would not have settled [one claim] when considering *solely* the merits" of that claim. ***Id.*** at *3 (emphasis added). Otherwise, the insurer has acted reasonably as a matter of law, and no claim for a breach of good faith and fair dealing exists. ***Id.*** at *4.

Because, to proceed with this claim, Judwin must prove that the settlement of the Flores and Cordova litigation was unreasonable when considered by itself (which Judwin does not contend), the instant tort claim necessarily arises out of USF's acts and omissions in the Flores and Cordova litigation. As such, it is covered by the assignment from Judwin to the Flores and Cordova plaintiffs; and, obviously, Judwin does not have standing to raise a claim it assigned to others (as noted, that assigned claim was settled by USF's payment of a "peppercorn" to the Flores and Cordova plaintiffs).

III.

For the foregoing reasons, the judgment is

AFFIRMED.