

CAUSE NO. 10-0-637

STEVEN DUNCAN,

Plaintiff,

V.

FARMERS INSURANCE EXCHANGE,

Defendant.

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IN THE DISTRICT COURT

22ND JUDICIAL DISTRICT

CALDWELL COUNTY, TEXAS

**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION
FOR SEPARATE TRIAL ON EXEMPLARY DAMAGES**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, STEVEN DUNCAN, Plaintiff in the above-styled cause, who hereby files his Response to Defendant Farmers Insurance Exchange’s Motion for Separate Trial on Exemplary Damages, and in opposition to said motion, respectfully shows the Court as follows:

**I.
INTRODUCTION**

Plaintiff filed suit against Defendant on November 18, 2010, for claims relating to breach of contract, bad faith, statutory violations of the Texas Insurance Code, and other damages.

Defendant answered, by and through its counsel of record, on December 10, 2010. Concurrently with its answer, Defendant has filed a Motion for Separate Trial on Exemplary Damages, which is the subject of this response by Plaintiff.

For the reasons that follow, Plaintiff will show that Defendant’s motion should be denied.

**II.
ARGUMENT AND AUTHORITIES**

Defendant incorrectly states that, “In his Petition, Plaintiff requested exemplary damages from Defendant Farmers Insurance Exchange,” in Paragraph 2.1 of its motion. In fact, nowhere

in the allegations of Plaintiff's Original Petition, nor in his prayer for relief, has Plaintiff sought exemplary damages. Plaintiff prays for:

- (a) Actual and **statutory damages** (including attorney's fees) in the maximum amount of seventy-five thousand dollars (\$75,000.00), exclusive of interest and costs;
- (b) Pre-judgment interest at the maximum rate of eighteen percent (18%) per annum;
- (c) Taxable Court costs;
- (d) Post-judgment interest on the above sums, compounded annually; and,
- (e) Such other and further relief, general or special, at law or in equity, to which the Court finds Plaintiff justly entitled.

Plaintiff's Original Petition, at Section XIV (emphasis added).

Defendant is obviously confusing Plaintiff's prayer for statutory damages (under the Texas Insurance Code) with exemplary damages. Plaintiff has included the following claim in his Original Petition, taken directly from that statute: "On a finding by the trier of fact that the defendant knowingly committed the act complained of, the trier of fact may award an amount not to exceed three times the amount of actual damages." Tex. Ins. Code § 541.152(b).

However, the Texas Civil Practice & Remedies Code (CPRC) makes clear that claims for statutory damages under the Texas Insurance Code are not covered by Chapter 41 of the CPRC, the statute dealing with exemplary damages:

Notwithstanding any provision to the contrary, **this chapter does not apply to ... an action brought under Chapter 21, Insurance Code.**"

Tex. Civ. Prac. & Rem. Code § 41.002(d)(4) (emphasis added).

As this Court is well aware, Chapter 21 of the old Texas Insurance Code, including and especially 21.21 (dealing with unfair claim settlement practices), was completely re-codified into Article 541 of the new Texas Insurance Code, by the 2003 Texas Legislative session. As such, Plaintiff's above-cited claim for statutory damages under Article 541 of the Texas Insurance Code is not encompassed by the exemplary damages provisions of the CPRC.

This renders Paragraph 3.1 of Defendant's motion completely inapplicable to this case, wherein Defendant cites Tex. Civ. Prac. & Rem. Code § 41.009(a) for the proposition that upon Defendant's request, the Court "must" bifurcate the trials and separate exemplary damages from all other issues in the case. Again, Defendant is laboring under the mistaken impression that Chapter 41 of the CPRC applies to this case. This chapter does not apply to cases brought under Chapter 21 of the old Texas Insurance Code (now re-codified as Article 541). Tex. Civ. Prac. & Rem. Code § 41.002(d)(4). Therefore, the Court is not obligated to do any such bifurcation or separation in this type of case, nor is there any issue of exemplary damages raised for the Court to even optionally consider, as Plaintiff's claim for statutory damages does not even qualify as a claim for exemplary damages, under the clear and explicit wording of the CPRC.

If the above explicit language were not enough, then even further analysis of Chapter 41 of the CPRC would make clear that Plaintiff's claims for insurance bad faith / statutory damages were never intended to be covered under the CPRC exemplary damages statute:

Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:

- (1) fraud;
- (2) malice; or
- (3) gross negligence.

The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, **bad faith, or a deceptive trade practice.**

Tex. Civ. Prac. & Rem. Code § 41.003(a)-(b) (emphasis added).

As the Court can see, Plaintiff is not making any such claims of fraud, malice, or gross negligence, and the above-cited CPRC provision specifically states that bad faith or deceptive trade practices (of the very type discussed in Article 541 of the Texas Insurance Code, cited

above and included in Plaintiff's Original Petition) do not rise to the level of exemplary damages. Therefore, Defendant's motion is entirely inapplicable to this case.

**III.
CONCLUSION AND PRAYER**

For the reasons discussed above, Defendant's motion should be denied. Claims for bad faith / deceptive trade practices are not considered claims for "exemplary damages," which require entirely different burdens of proof and state of mind, as set forth in the CPRC. Furthermore, Tex. Civ. Prac. & Rem. Code § 41.002(d)(4) explicitly states that Chapter 41's exemplary damages provisions do not apply to claims grounded in Chapter 21 of the old Texas Insurance Code (now re-codified as Article 541). It is therefore neither mandatory nor even discretionary for the Court to grant Defendant's request for bifurcated / separated trials, despite all of Defendant's representations to the contrary.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant's Motion for Separate Trial on Exemplary Damages be denied in all respects, and that Plaintiff have such other and further relief to which the Court finds him justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served upon the following counsel of record, by the method indicated, on this 30th day of December, 2010, pursuant to the Texas Rules of Civil Procedure:

Via Facsimile: (972) 934-9200

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