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IN THE SUPERIOR COURT OF GUAM

GUAM SURGICENTER, LLC, ISLAND CANCER CENTER, and AC MICRO GUAM, LLC, Plaintiffs, vs. DB INSURANCE CO., LTD, MOYLAN'S INSURANCE UNDERWRITERS, INC., and EQUITABLE ADJUSTING & SERVICE COMPANY Defendants.	CIVIL CASE NO. 0594-24 **EQUITABLE ADJUSTING & SERVICE COMPANY'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO GRCP 12(B)(6)**

Defendant EQUITABLE ADJUSTING & SERVICE COMPANY ("Defendant" or "EASCO"), by and through its undersigned counsel, moves to dismiss Plaintiffs' Complaint dated November 4, 2024 ("Complaint") against EASCO pursuant to the Guam Rules of Civil Procedure ("GRCP") Rule 12(b)(6).

Introduction

EASCO moves to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) because Plaintiffs have failed to allege sufficient facts to state a claim for relief. EASCO is merely an insurance adjuster, and does not issue insurance policies to any entity. Plaintiffs have alleged that EASCO is an agent of DB Insurance, and that "DB Insurance is liable for the acts, omissions, and misrepresentations of its agents. . . ." Complaint at ¶ 39. The courts agree with this statement that an insurer is liable for the acts of its agents—the majority view is that adjusters without privity with the insured are not liable for the denial of a claim. As stated by the Texas Supreme Court, "[b]y imposing a non-delegable duty of good faith and fair dealing on insurance companies we are sending a clear message -- the buck stops with them. The insurance companies must answer for the "sins" of their agents." *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 698 n.7 (Tex. 1994), *reh'g overruled* (Tex. June 8, 1994).

Accordingly, Plaintiffs have failed to allege facts that would entitle them to relief on any of its causes of action against Defendant EASCO and therefore the Complaint must be dismissed against EASCO.

Statement of Facts

On November 4, 2024, Plaintiffs Guam Surgicenter, LLC ("Surgicenter" or "Plaintiff"), and AC Micro Guam, LLC ("AC Micro"), collectively known as Plaintiffs, filed a complaint against Defendants DB Insurance Co., Ltd ("DB"), Moylan's Insurance Underwriters, Inc. ("Moylan's"), and EASCO. EASCO files this motion to dismiss under GRCP 12(b)(6) in lieu of answering the Complaint at this time.

Viewed in the light most favorable to Plaintiffs, the Complaint alleges the following: Surgicenter had been purchasing insurance from DB through its authorized agent, Moylan's, since 2001, and in August 2021, Surgicenter purchased a Business Owner Policy from DB though Moylan's. Complaint ("Com.") at ¶¶ 8-9. Surgicenter paid all premiums to Moylan's for 22 years. Com. at ¶¶ 20. Surgicenter requested that Moylan's sell it a policy to cover losses relating to floods and typhoons since it had a significant amount of medical equipment located on its lower level, of which Moylan's was fully aware, and Surgicenter agreed to pay additional premiums for the additional coverage. Com. at ¶¶ 12, 15. Moylan's directed Surgicenter to a DB policy covering tidal wave, flood, highwater and overflow, but withheld information about the policy, which limited coverage solely to flooding from rising navigable waters. Com. at ¶¶ 13, 17, 19. Relying on Moylan's representations, Plaintiff Surgicenter purchased the policy. Com. at ¶¶ 11-14, 18. While coverage was not as broad as Surgicenter had been led to believe, it allegedly did not limit the rise of navigable waters resulting from a typhoon as a covered event. Com. at ¶¶ 25-26. Typhoons in Guam can lift significant amounts of seawater and dump it onto the contiguous land mass. Com. at ¶ 23.

Category 4 Typhoon Marwar caused navigable waters to rise, which damaged Surgicenter's medical equipment through submersion in water with a high salt content. Com. at ¶¶ 24, 27-28. Surgicenter submitted a timely claim to Moylan's. Com. at ¶ 29. Moylan's engaged EASCO and another commercial property loss adjuster, McLarens, to evaluate the claim. Com. at ¶ 33. Plaintiffs allege that EASCO met with Surgicenter in early June and conducted an inspection of the property. Com. at ¶ 34. Approximately a week later McLaren visited the site and asked what caused the damage but did not conduct any tests or further inspections. Com. at ¶ 35. Surgicenter's subsequent testing indicated that the medical equipment was damaged by saltwater submersion and Surgicenter sent these tests to EASCO and McLarens. Com. at ¶ 37. Notwithstanding the reports submitted, Plaintiffs allege that EASCO, on behalf of DB and Moylan's, denied

Surgicenter's claim. Com. at ¶ 38. Surgicenter was damaged by the denial of its insurance claim in the amount of roughly $3.3 million. Com. at ¶ 43.

Plaintiffs further state that they gave notice to DB and the other Defendants of its intention to pursue damages under the Deceptive Trade Practices Act. Com. at ¶¶ 41-42. Finally, Plaintiffs state that "DB Insurance is liable for the acts, omissions, and misrepresentations of its agents, Moylan's, EASCO, and McLarens." Com. at ¶ 39.

ARGUMENT

A. Standard for a Motion to Dismiss

The Court should grant a motion to dismiss when the complaining party can prove no set of facts in support of its cause of action that would entitle it to relief. *Ukau v Wang*, 2016 Guam 18, ¶¶ 23-33. A cause of action must be dismissed when it lacks a cognizable legal theory or when it fails to plead essential facts for a valid theory. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In determining whether a cause of action states a claim for relief, the Court need not rely on "labels and conclusions as the complaining party must allege more than "a formulaic recitation of the elements of a cause of action." *Core Tech International Corp. v. Hanil Engineering & Construction Co.*, 2010 Guam 13, ¶ 52.

B. All Claims of Plaintiff AC Micro Should Be Dismissed as The Complaint Alleges Virtually No Facts About this Plaintiff

The only allegation in the Complaint about AC Micro is in paragraph 4 of the Complaint which reads: "Plaintiff AC Micro Guam, LLC is, and was at all times mentioned herein, a Guam limited liability company." Com. at ¶ 4. Additionally, Plaintiffs' Factual History and Cause of Action paragraphs do not even mention AC Micro. Every Cause of

Actions seem to only be alleged by Guam Surgicenter only, and allege that Guam Surgicenter only has been damaged. See Com. at ¶¶ 50, 69, 79, 78[1], 85, 88. Lastly, in the Prayer for Relief, only Surgicenter is praying for judgement.

The only paragraph mentioning AC Micro is paragraph 4 and is obviously insufficient to support any claim against EASCO. Defendant EASCO has no notice about why AC Micro is a Plaintiff in this action or how AC Micro was damaged in any way, and accordingly, all claims of AC Micro should be dismissed for failure to state a cause of action. The Complaint states no facts sufficient to establish any claim by Plaintiff AC Micro against EASCO or any other Defendant.

C. Under Guam Law, EASCO Cannot Be Liable (1) in Tort, (2) for a Contractual Breach, or (3) Under the Provisions of the Guam Consumer Protection Act

Plaintiffs have alleged six causes of action in the Complaint, two in contract, three in tort, and one statutory count:

1. Breach of contract for failure to pay amounts due under the insurance policy;
2. Contractual breach of the implied covenant of good faith and fair dealing;
3. Tortious breach of the implied covenant of good faith and fair dealing;
4. Negligent misrepresentation;
5. Negligence; and
6. Violation of the Consumer Protection Act.

All of these claims fail to state facts sufficient to establish a claim with respect to Defendant EASCO and fail as matter of law, even when the allegations in the Complaint are viewed in the light most favorable to Plaintiffs.

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[1] This paragraph 78 refers to the duplicate and second use of the same paragraph number 78 used by Plaintiffs in the Fourth Cause of Action of their Complaint. Plaintiffs' Fourth Cause of Action reuses paragraph numbers 67 through paragraph 79, which were already used in Plaintiffs' Second and Third Causes of Action.

1. Plaintiffs Fail to State Facts Sufficient to Establish any Tort Claim Against EASCO (Counts 3-5)

Plaintiffs' tort claims contained in counts 3-5 are based on three allegations: (1) a breach of the duty to investigate, process and evaluate Surgicenter's claims, (2) Moylan's negligent misrepresentation of the coverage of the insurance policy, and (3) Moylan's breach of a duty to recommend insurance products and evaluate claims. See Com. at ¶ 71, 69-74[2], and 80.

EASCO is not an insurer like DB Insurance, nor is it an insurer's authorized agent like Moylan's Insurance. Rather EASCO is an adjusting company that evaluates claims and makes recommendations to an insurer on how the insurer should resolve the claim. The adjusting company itself does not approve or deny any claim.

It is clear from Guam law that EASCO, as in insurance adjuster, cannot be liable in tort for any damage caused by DB's denial of Surgicenter's claims. In the Guam Code, the term 'adjuster' is defined twice. The first definition, in 22 GCA Section 12104(e), indicates that "Adjuster means any person who acts for or on behalf of an insurer or an insured in determining and making settlement of the amount payable to the insured for any loss or damage under a policy."

The second definition, 22 GCA Section 15902(a), states that "*Adjuster* means an individual, a business entity, an independent contractor, or an employee of a contractor, who contracts for compensation with insurers or self-insurers, and who investigates,

[2] These paragraphs refer to the duplicate and second use of the same paragraph numbers used by Plaintiffs in the Fourth Cause of Action of their Complaint. Plaintiffs' Fourth Cause of Action reuses paragraph numbers 67 through paragraph 79, which were already used in Plaintiffs' Second and Third Causes of Action.

negotiates, or settles claims for insurers or for self-insurers." This definition states that an adjustor has a contractual relationship with the insurer, as is alleged in the Plaintiffs' Complaint. Notably, Plaintiffs also allege that DB, the insurer, is liable for the acts, omissions, and misrepresentations of its agents, Moylan's, EASCO, and McLarens. Com. at ¶ 39.

A recent order from the Guam Superior Court addresses a situation analogous to the present dispute in *De Vera v. Payless Supermarkets & Clifford J. Ruder*, 2022 Guam Trial Order LEXIS 103. In *De Vera,* Plaintiff unsuccessfully attempted to sue the insurance adjuster for the denial of a claim. *Id.* Consistent with Surgicenter's allegations in ¶ 39 of the Complaint, *De Vera* affirmed that insurers' adjusters are insulated from liability by their agency relationship with the insurer and adjusters are not liable in tort:

> Courts examining similar scenarios generally find that insurance adjusters lack any duty to personal tort victims. Generally, an adjuster's sole duty is to its principal-the insurer. The insurer, and not a third party, is the entity in privity with the adjuster. ***Further, the majority of states hold that the adjuster's status as the agent of the insurer insulates it from liability.*** *See Lodholtz v. York Risk Servs. Group*, (collecting cases from 14 states). Courts also note that allowing such claims against adjusters contradict traditional insurance law principles which dictate that claims against adjusters arising out of the handling of insurance claims are properly brought against the insurer. *Sutor v. F.E.M.A.*, 2009 WL 2004375 at *6 (E.D. Pa.).
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> *De Vera v. Payless Supermarkets & Clifford J. Ruder*, 2022 Guam Trial Order LEXIS 103, *5 (emphasis added).

This case states that an adjuster does not owe any duty to a third party, and the adjuster's sole duty it to the insurer, because the adjuster and insurer are in privity with each other. Furthermore, this case states that a third party that would have a claim against the adjuster should bring the claim against the insurer, and not the adjuster. Therefore in this matter, EASCO cannot be liable to Plaintiffs in tort because it owes no duty to Plaintiffs.

A seminal case on adjuster liability, *Sanchez v. Lindsey Morden Claims Services, Inc.*, 72 Cal. App. 4th 249 (1999), *rev. den.*, 1999 Cal. LEXIS 5244 (1999), explains that the relationship between the insurer and the adjuster "militates against imposing [] a new duty of care owed by insurer-retained adjusters to insureds." *Id.* at 803. In reaching this conclusion, the court reasoned that the insurer-retained adjuster is under the control of the insurer, and it is the insurer not the adjuster that has the power to grant or deny coverage. Id. at 801. The adjuster has a duty only to the insurer, which could be irreconcilable with imposing an adjuster's duty to the insured. *Id.* at 802. In addition, the adjuster is not in a contractual relationship with the insured and would not have the opportunity to negotiate to limit its liability to the insured. *Id.* And, since the insurer is liable for unreasonable investigation or deficient claims handling, making the adjuster liable directly to the insured would confer few additional benefits. *Id.*

Sanchez further discussed the role of agency law in its analysis:

> Our conclusion is also consistent with the general law of agency. **An adjuster is an agent hired by a principal, the insurer, to investigate a claim. Agents are not liable to third parties for economic loss[.]**

Thus, the adjuster cannot be liable for any claim on the insurance policy or for damages resulting from the denial thereof.

This is in line with majority view on adjuster liability. In *Halliday v. Great Lakes Ins. SE*, the court noted "that most jurisdictions to address this issue have found that a duty of care does not extend from an insurance adjuster to an insurance claimant." *Halliday v. Great Lakes Ins. SE*, No. 3:18-cv-00072, 2019 U.S. Dist. LEXIS 128364, at *18 (D.V.I.

Aug. 1, 2019) (collecting cases from 10 jurisdictions for the majority view). *Halliday* held that adjusters were categorically exempted from claims of negligence. *Id.* at 25.

Accordingly, Plaintiffs' tort claims against EASCO in Counts 3-5 should be dismissed for failure to state a cause of action.

2. <u>Plaintiffs Fail to State Facts Sufficient to Establish any Contract Claim Against EASCO (Counts 1 and 2)</u>

Plaintiffs have not alleged and cannot allege a contractual relationship with EASCO, and therefore Plaintiffs have not stated sufficient facts to establish any contractual claim against EASCO. The insurance contract or policy is clearly between the insurer, DB Insurance, and the insured, Plaintiffs. There is no contract between EASCO and Plaintiffs. Accordingly, EASCO clearly cannot be liable to Plaintiffs for Breach of Contract (Count 1) as there is no privity of contract between EASCO and Plaintiffs.

EASCO also cannot be liable for Contractual Breach of Implied Covenant of Good Fatih and Fair Dealing (Count 2) as a result of the absence of a contract between EASCO and Plaintiffs. As explained in *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695 (Tex. 1994), *reh'g overruled* (Tex. June 8, 1994), privity is a necessary for a duty of good faith and fair dealing, and plaintiff's "contractual privity is only with her employer and [the insurer] National Union. [She] is owed a duty of good faith and fair dealing from [the insurer] National Union. This duty is non-delegable." *Natividad,* at 698 (footnote omitted);[3] *see also*, *Benjamin v. Thomas Howell Grp.*, Civ. No. 1996-071, 2002 U.S. Dist. LEXIS

[3] The court further noted that "[b]y imposing a non-delegable duty of good faith and fair dealing on insurance companies we are sending a clear message -- the buck stops with them. The insurance companies must answer for the "sins" of their agents. *Id.* at n.7.

7687, at *7-8 (D.V.I. Apr. 22, 2002) ("Moreover, even though a party may have a duty of good faith and fair dealing to another, such a duty is limited to those instances where a contract exists.")(Not for Publication).

Thus, Plaintiffs' contract claims against EASCO in Counts 1 and 2 should be dismissed for failure to state a cause of action.

3. Plaintiffs Fail to State Facts Sufficient to Establish any Claim Against EASCO

Plaintiffs' claim for a Violation of the Guam Consumer Protection (Count 6)

The Guam Consumer Protection Act ("Act") contains a lengthy list of items that constitute false, misleading, and deceptive acts by person or merchants that are prohibited in 5 GCA § 32201. The Act lists 28 specific types of prohibited acts and a catchall provision at the end, namely, "(29) Doing any other act which is prohibited by the laws of Guam to mislead a consumer to his detriment or to induce another person to buy or sell goods or services to such person's detriment." 5 GCA Section 32201.

In its Complaint, Plaintiffs allege that Defendants made misleading and deceptive representations regarding the insurance policy. Com. at ¶ 86. But, nothing in the Complaint alleges that EASCO made any representations or attempted to induce any person to buy or sell goods or services, much less in a misleading fashion or to the person's detriment. EASCO is not an insurer and does not offer or sell insurance policies to any person or entity. EASCO is merely an insurance adjuster which deals with claims. EASCO had no communications with Plaintiffs until after Plaintiffs had purchased the insurance policy, and could not have done anything to mislead Plaintiffs to buy any services.

Accordingly, the claim for a violation of the Act, Count 6, must also be dismissed as to EASCO as it fails to state a cause of action and because the cause of action fails as a matter of law.

CONCLUSION

For the foregoing reasons, Defendant EASCO respectfully requests that the entirety of Plaintiffs' Complaint against it be dismissed pursuant to GRCP 12(b)(6) or as justice so requires.

DATED: December 13, 2024

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By ______________________________
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