IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

BRENDA BARRON, TEMPORARY ADMINISTRATRIX OF THE ESTATE OF LARRY BARRON, DECEASED, Plaintiffs, v. CENTURY SURETY COMPANY, d/b/a CENTURY INSURANCE GROUP, Defendant.	NO. 1:22-CV-144-MAC-ZJH

REPORT AND RECOMMENDATION GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

This case is assigned to the Honorable Marcia A. Crone, United States District Judge. On November 9, 2023, Judge Crone referred this case to the undersigned United States Magistrate Judge for pretrial management. Doc. No. 54. Pending before the court is Defendant Century Surety Company (Century)'s *Second Amended Motion for Summary Judgment* (Doc. No. 70). After careful consideration of the filings and applicable law, the undersigned concludes that the motion should be granted with respect to Brenda Barron's claims for statutory interest and attorney fees under chapter 542 of the Texas Insurance Code.

I. Factual and Procedural Background

The issue here is whether an insured's claim for statutory interest and attorney fees under chapter 542 of the Texas Insurance Code survives their death. *See* Texas Prompt Payment of Claims Act, Tex. Ins. Code Ann. § 542.060. In February 2021, Larry Barron's commercial building was damaged by a winter storm. Doc. No. 1 at 2, ¶ 7. The building was insured by Century. *Id.* After Century refused to pay all of Barron's claim, he sued Century for breach of contract, statutory

bad faith, and statutory interest and attorney fees under chapter 542. *Id.* at ¶¶ 64–80. Following the parties' motions for summary judgment, the court dismissed his claim for bad faith.[1] Doc. No. 88.

Sadly, Larry Barron passed away on December 17, 2023. Doc. No. 59, ¶ 2. Brenda Barron replaced him in this lawsuit as the administratrix of his estate. Doc. No. 85. In Century's present motion for summary judgment, it argues that none of the insured's extra-contractual claims survive his death. Doc. No. 70, ¶ 87. In response, Barron says that at least the claim for statutory bad faith should survive.[2] Doc. No. 80, ¶ 58. But because that claim has already been dismissed, the undersigned only needs to address the remaining extra-contractual claims for statutory damages and attorney fees under chapter 542. *See* Doc. No. 88.

II. Legal Standard

Summary judgment is granted when the movant shows there is no genuine dispute of material fact and demonstrates an entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Johnston & Johnston v. Conseco Life Ins. Co.*, 732 F.3d 555, 561 (5th Cir. 2013). A dispute is genuine when the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A fact is material when it is relevant or necessary to the ultimate outcome of the case. *Id.* ("[T]he substantive law will identify which facts are material."). The court resolves any doubts and draws all reasonable inferences in

[1] For the undersigned's complete review of the facts and procedural background, see the *Report and Recommendation Granting in Part and Denying in Part Defendant's Motion for Summary Judgment* (Doc. No. 71).

[2] Barron argues that claims for mental anguish and common law bad faith also survive the insured's death. Doc. No. 80, ¶ 58. This is the first time these claims have been made. Thus, they are not properly before the undersigned and are not addressed here. *See Cutrera v. Bd. of Sup'rs of Louisiana State Univ.*, 429 F.3d 108 (5th Cir. 2005) ("A claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court.").

favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

III. Discussion

For the reasons below, Barron's remaining extra-contractual claims do not survive the insured's death. Thus, her claims for statutory damages and attorney fees under chapter 542 should be dismissed.[3]

In diversity actions, a federal court generally applies the law of the state in which it sits. *Franco v. Mabe Trucking Co., Inc.*, 3 F.4th 788, n.4 (5th Cir. 2021) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). By statute, Texas insureds are protected by Texas law. *See* Tex. Ins. Code Ann. art. 21.42. Yet, no Texas statute addresses whether claims for attorney fees and statutory interest under chapter 542 survive the death of the insured. *See Austin v. State Farm Lloyds*, No. 1:16-CV-447-DAE, 2018 WL 6588571, at *2 (W.D. Tex. Nov. 9, 2018). Without a relevant statute, the common law should guide this decision. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 784 (Tex. 2006) ("When no statute addresses the survivability of a cause of action, we apply common law rules."). But the Supreme Court of Texas has not addressed the survivability of these claims either. *See Austin*, 2018 WL 6588571, at *2. So, without direct guidance, the undersigned needs to make an *Erie* guess. *Bunker v. Dow Chem. Co.*, 111 F.4th 683, 686 (5th Cir. 2024).

When making an *Erie* guess, the undersigned must predict how the Texas Supreme Court would decide given the same facts. *Ironshore Europe DAC v. Schiff Hardin, L.L.P.*, 912 F.3d 759,

[3] The undersigned's decision here does not affect Barron's remaining claim for breach of contract, which is not discussed in Century's *Second Motion for Summary Judgment*. *See* Doc. No. 70, ¶¶ 86–93. She may still pursue attorney fees under that cause of action even if she cannot do so under chapter 542.

764 (5th Cir. 2019). Texas appellate courts are treated as the strongest indicator of what the Texas Supreme Court would do, absent a compelling reason to believe otherwise. *Id.*

In Texas, no cause of action survives the death of a party unless the damages "grow out of acts affecting property rights of the injured party." *Johnson v. Rolls*, 79 S.W. 513, 514 (Tex. 1904); *see also Landers v. B.F. Goodrich Co.*, 369 S.W.2d 33, 34 (Tex. 1963) (refusing to depart from long-standing rule that an action for damage to real or personal property survives the death of the owner). Thus, "a cause of action that is penal or personal in nature typically does not survive, while claims that are contractual in nature or affect property rights survive the death of either party." *Belt*, 192 S.W.3d at 784.

In Century's *Second Motion for Summary Judgment*, it argues that Barron's extra-contractual claims do not survive because they are penal and personal in nature. Doc. No. 70, ¶ 88. Century explains how Texas courts have applied the state's survival standard to deny claims that are similar to chapter 542, including the Deceptive Trade Practices Act and chapter 541 of the Texas Insurance Code. *Id.*, ¶¶ 87–90. Century also highlights one federal court's decision that—as an *Erie* guess—denies the survivability of claims under chapter 542. *See Austin*, 2018 WL 6588571, at *3. In her response and sur-reply, Barron fails to offer a substantive rebuttal to these arguments.[4] *See* Doc. No. 80, ¶ 22; *see also* Doc. No. 86, ¶ 5. Despite this absence, Texas courts have supplied sufficient guidance to predict how the Texas Supreme Court would decide in this case.

In general, statutory interest and attorney fees under chapter 542 are penal in nature and, as a result, do not survive. A statute is penal if it "permits a recovery . . . for the purpose of

[4] Barron argues that Century's reply is untimely with respect to issues that have since been ruled on during the initial round of summary judgment motions. Doc. No. 86. Her argument is no longer relevant because the court has already ruled on Century's initial motion for summary judgment.

enforcing obedience to the mandate of the law." *Nautilus Ins. Co. v. Int'l House of Pancakes, Inc.*, 622 F. Supp. 2d 470 (S.D. Tex. 2009) (quoting 82 C.J.S. Statutes § 378). In contrast, a statute is remedial if the recovery "is permitted as a remedy for the injury or loss suffered." *Id.* Neither statutory interest nor attorney fees are designed to remediate harm from a plaintiff's injury. *See, e.g.*, *Texas Farmers Ins. Co. v. Cameron*, 24 S.W.3d 386, 399 (Tex. App.—Dallas 2000, pet. denied) ("[T]he award [of statutory interest under chapter 542's predecessor statute] is made without reference to any harm actually suffered by the insured.").

Indeed, the Texas Supreme Court has often treated statutory interest as penal in nature. *State Farm Life Ins. Co. v. Martinez*, 216 S.W.3d 799, 804–05 (Tex. 2007) (describing chapter 542's statutory interest as "penalty interest" and its predecessor statutes as being "considered penal"); *McFarland v. Franklin Life Ins. Co.*, 416 S.W.2d 378 (Tex. 1967) (explaining how a twelve-percent penalty for an insurer's failure to pay a claim is "penal in nature"); *see also Washington Fid. Nat. Ins. Co. v. Williams*, 49 S.W.2d 1093, 1094 (Tex. Comm'n App. 1932, holding approved) (calling a twelve-percent penalty "highly penal"). And Texas appellate courts have hewed to this characterization. *See, e.g.*, *Cameron*, 24 S.W.3d at 399; *J.C. Penney Life Ins. Co. v. Heinrich*, 32 S.W.3d 280, 289 (Tex. App.—San Antonio 2000, pet. denied). Likewise, the Texas Supreme Court has also described attorney fees in the same way. *See Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 58 (Tex. 2008); *Martinez*, 216 S.W.3d 799, 804–05 (Tex. 2007). Accordingly, neither claim survives the insured's death. *See Austin*, 2018 WL 6588571, at *3.

This conclusion is supported by Texas courts' characterization of claims for statutory interest as personal to the insured. *See Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 675 (Tex. 2008) (noting that the Texas legislature "intended that article 21.55 apply

to claims personal to the insured"); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 19–20 (Tex. 2007) (reviewing the legislative history of Chapter 542 and concluding that the legislators "intended that [chapter 542] apply to claims [that are] personal to the insured"); *First Nat. Bank of Kerrville v. Hackworth*, 673 S.W.2d 218, 220 (Tex. App.—San Antonio 1984) ("The right to recover punitive damages is considered a purely personal right."); *see also Am. S. Ins. Co. v. Buckley*, 748 F. Supp. 2d 610, 626 (E.D. Tex. 2010) ("[S]tatutory remedies under [chapter 542 of] the Texas Insurance Code are personal and punitive in nature and the [Texas] Insurance Code makes no provision for assignability."). Here, there is no evidence that Brenda Barron is an insured or beneficiary of Larry Barron's policy. Therefore, she is not entitled to statutory interest or attorney fees under Chapter 542.[5] *See Austin*, 2018 WL 6588571, at *3.

IV. Conclusion

Based on the above reasoning, the undersigned concludes that Century's *Second Motion for Summary Judgment* (Doc. No. 70) should be **GRANTED**.

V. Objections

Under 28 U.S.C. § 636(b)(1)(C), each party has the right to file objections to this Report and Recommendation. Objections to this Report must (1) be in writing, (2) specifically identify those findings or recommendations to which the party objects, (3) be served and filed within fourteen (14) days after being served with a copy of this Report, and (4) be no more than eight (8) pages in length. *See* 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b)(2); E.D. TEX. CIV. R. CV-

[5] This is how the undersigned believes that the Texas Supreme Court would handle this issue. But like all *Erie* guesses, the undersigned is only able to make a guess—even on an issue as important as this one. *See* John L. Watkins, *Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It*, 21 CONN. INS. L.J. 455, 473–74 (2015) (describing how an incorrect *Erie* guess may deprive insureds of substantive rights). Other federal courts have acknowledged that the survivability of Texas Insurance Code claims is not settled until the Texas Supreme Court says so. *See Luna v. Feliciano*, No. 6:18-CV-00340-ADA-JCM, 2019 WL 10349406 (W.D. Tex. Jan. 29, 2019) (denying an insurer's claim for fraudulent joinder of an in-state defendant because it was possible for a claim under chapter 541 to survive the death of an insured); *but see Austin*, 2018 WL 6588571, at *1 (denying an insured's claim under chapter 541 because it did not survive). Until then, the undersigned is only able to offer the most credible understanding of the law as it now exists.

72(c). A party who objects to this Report is entitled to a *de novo* determination by the United States District Judge of those proposed findings and recommendations to which a specific objection is timely made. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b)(3).

A party's failure to file specific, written objections to the proposed findings of fact and conclusions of law contained in this Report, within fourteen (14) days of being served with a copy of this Report, bars that party from: (1) entitlement to *de novo* review by the United States District Judge of the findings of fact and conclusions of law, and (2) appellate review, except on grounds of plain error, of any such findings of fact and conclusions of law accepted by the United States District Judge. *See Rodriguez v. Bowen*, 857 F.2d 275, 276–77 (5th Cir. 1988); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED this 4th day of October, 2024.

Zack Hawthorn
United States Magistrate Judge