



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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HOUSTON FEDERAL JUDGE GRANTS PRELIMINARY INJUNCTION PROHIBITING LLOYD'S OF LONDON FROM WITHDRAWING PAYMENTS UNDER D&O POLICIES

Last Tuesday, in *Pendergest-Holt, R. Allen Stanford, Gilberto Lopez, et. al. v. Certain Underwriters at Lloyd's of London*, 2010 WL 317684 (S.D. Tex., January 26, 2010), Judge David Hittner granted a preliminary injunction enjoining Lloyd's from withdrawing defense payments under a directors and officers insurance policy involving the former executives of Stanford Financial arising out of the now-infamous financial fraud scandal and the resulting civil fraud allegations. Previously, the SEC initiated a civil action against several Stanford directors and officers and related Stanford entities, some of which submitted D&O claims to Lloyds. The insureds made a claim under their D&O policy and an associated excess policy for the payment of their attorneys' fees and costs associated with defending themselves against the SEC charges. Shortly thereafter, a grand jury returned a 21 count criminal indictment against the insureds. Lloyds ultimately denied the plaintiffs' claims, and the insureds filed a declaratory judgment action against Lloyds, seeking an order from the Court directing Lloyds to pay their defense costs in the SEC action and the underlying criminal action pending final adjudication in those cases. Plaintiffs also sought a preliminary injunction compelling Lloyds to withdraw its retroactive denial of coverage and pay all reasonable and necessary defense costs and expenses incurred in the SEC action and underlying criminal action until such time as the Court rules on the merits of the case.

To be awarded a preliminary injunction, a plaintiff must establish that he or she has a substantial likelihood of success on the merits of this case. Lloyds argument that it should not pay the insureds' defense costs was based on an exclusion in the policy for money laundering. The exclusion provides that allegations of money laundering will preclude payments when "it is determined that the alleged act or alleged acts did in fact occur." Lloyds argued that it should be allowed to make this "in fact" determination. It further contended that because this is not a "duty to defend" case Texas' "eight corners rule" was inapplicable. Judge David Hittner of Houston disagreed and explained that the Supreme Court of Texas has never recognized an exception to the eight corners rule, and if a duty to advance or reimburse defense costs were judged on an "actual fact" basis, an insurer's contractual obligation could change on a daily basis as additional facts are developed. Thus, chiefly based on the decision that the eight corners rule should apply in this case as opposed to using an "actual fact" test, the Court determined the insureds had met their burden of demonstrating a substantial likelihood of success on the merits of their claim in this case. Judge Hittner granted the preliminary injunction. He also determined that the plaintiffs' bond should be set at zero, because the policies required plaintiffs to reimburse Lloyds for any amounts paid if it is ultimately determined that plaintiffs are not entitled to those payments, and therefore, the advancement of legal costs placed no undue burden on Lloyds.

INVALID ADVISORIES RENDERED PREVIOUS WORKERS' COMPENSATION IMPAIRMENT RATING INVALID

Last Wednesday, in *Severiano DeLeon v. Royal Indemnity Company*, 2010 WL 323128, the 274th Judicial District Court of Hays County, Texas determined that an impairment rating (IR) based on advisories later determined to be invalid, was also invalid. Severiano DeLeon injured his back in the course and scope of his employment and, as a result, underwent a two-level fusion on his lumbar spine. Subsequently, two doctors designated by the Division of Workers Compensation determined DeLeon's whole body to have an IR of 20%, basing their opinions on two advisories related to the determination of IR. The Division held a Contested Case Hearing, at which the hearing officer approved the 20% IR. Royal appealed this decision to the Division's appeals panel, which adopted the hearing officer's final decision approving the IR. Royal then filed a petition for judicial review in the Hays County District Court. While pending, this court determined in another case that the advisories—relied upon in this case to determine IR—were invalid. Consequently, the Court held that the 20% IR issued in this case was invalid, because it was based on the subsequently invalidated advisories.

HARRIS COUNTY JURY FINDS BREACH OF CONTRACT AND BAD FAITH IN SIU/ ALLEGED THEFT TRIAL

Last Friday, a jury in Harris County found General Star Indemnity Company owed contractual and extra-contractual damages in a suit arising out of the alleged theft of security camera from a warehouse in Houston five years ago. In *Salim Saad vs. General Star Indemnity Company*, CA # 2005-63344, in the 152nd Judicial District Court of Harris County, the insured alleged that burglars broke into storage space he had rented and stole \$192,000 of security equipment. General Star's investigation revealed that the business of the insured was not yet viable, the insurance had just been purchased, the insured had questionable proof regarding the purchase of the electronics because they were allegedly part of a land swap in Lebanon, and there was no proof of purchase. During the claims investigation, a metallurgist told the carrier that the burglar bar cut in the alleged theft had been cut from the inside rather than the outside and a Lebanese investigator was unable to locate the store from which the electronics were allegedly purchased. At the time of the alleged theft, the alarm on the premises didn't activate and there was no sign of breaking and entering other than the cut security bar with the questionable cut. General Star determined that many "red flags" of fraud existed and denied the claim.

Following a three week trial, a Houston jury determined that General Star breached its contract by not paying the claim and also found that violations of the Texas Insurance Code occurred. The jury awarded damages of slightly more than \$2 million including attorney fees and various damages. Our firm will continue to monitor the case through the Houston lawyers who tried the case and will report on any appellate relief sought or obtained in this case.

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