



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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EN BANC FIFTH CIRCUIT UPHOLDS VALIDITY OF ARBITRATION PROVISION IN INSURANCE POLICY DESPITE STATE LAW PROHIBITING ENFORCEMENT

Last Monday, the Fifth Circuit sitting en banc considered whether an arbitration provision in an international commercial transaction could be overcome by a state-law prohibiting arbitration provisions in insurance contracts, or stated differently whether the McCarran-Ferguson Act authorizes state law to reverse-preempt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's*, __ F.3d __ (5th Cir. 2009) (2009 WL 3722727). At issue was a Louisiana statute preventing insurance policies from containing arbitration agreements. As explained by the court, the Louisiana statute, as it pertains to insurance policies, conflicts with the United State's commitment under the Convention. The insured, seeking to avoid arbitration, argued that the McCarran-Ferguson Act, which prohibits acts of Congress from interfering in state regulation of insurance. The court determined that a treaty was not an act of Congress so that the McCarran-Ferguson Act did not apply. The court went on to vacate the district court's order denying arbitration and remanding the case for further proceedings.

ENDORSEMENT EXCLUDING COVERAGE FOR CLAIMS "PURSUANT TO" THE LHWCA DID NOT APPLY TO INJURED LONGSHOREMAN'S GENERAL MARITIME TORT CLAIM

Last Tuesday, in a case of first impression, a three-judge panel of the Fifth Circuit considered the meaning and scope of an endorsement to an general liability insurance policy excluding coverage for claims or suits an insured brought "pursuant to" the Longshoremen and Harbor Worker's Compensation Act ("LHWCA"). *Bayou Steel Corp. v. Evanston Ins. Co.*, 2009 WL 3753538 (5th Cir. Nov. 10, 2009) (not designated for publication). Specifically, the panel considered whether the exclusion applied to a third-party maritime tort suit brought against the insured by an injured worker covered by the LHWCA. While unloading a barge from Louisiana on the Calumet River in Illinois, an employee of the stevedoring company hired to unload the barge was injured. The injured worker sued the barge company. The barge company's wharfinger insurer accepted coverage, but its primary general liability insurer denied coverage.

Evanston argued that the injured worker's claim could only be brought pursuant to the LHWCA because the worker was a longshoreman. Thus, the claims were pursuant to the LHWCA. The insured argued that the injured worker's claims sounded in negligence in general maritime law, not the LHWCA. After reviewing the policy language, which excluded claims brought "pursuant to" the LHWCA, the paneled

reviewed the actual claims in the underlying litigation. The panel determined that the injured worker's right to bring a general maritime law claim against a third party is not impacted by the LHWCA so that the exclusion, reaching only claims "pursuant to" the LHWCA, did not reach a general maritime tort claim.

FIREMAN'S FUND WINS \$6M BAD FAITH TRIAL IN DALLAS FEDERAL COURT

Last week, Fireman's Fund Insurance Company won a defense verdict on all issues in a bad faith trial in the court of US District Court Judge David Godby in Dallas. The suit sought \$6 million in damages under a homeowners policy insuring the only Frank Lloyd Wright house in north Texas. Wright personally designed and worked on the 11,000 square foot residence and its historical significance was a major theme in Plaintiffs' case. The insureds alleged a severe hail storm in Dallas in April 2003 damaged the copper roof Wright installed on the expansive house when built. The suit was a fight over causation concerning the origin of severe water damage at the residence.

Fireman's Fund paid \$2.5 million on the claim but the insureds wanted many millions more in the suit. Fireman's Fund defended the case on the belief it paid all it owed for covered damages and, in fact, had overpaid the claim. The insureds alleged Fireman's Fund underpaid the claim, failed to adequately investigate causation, made misrepresentations as to policy limits and committed bad faith. Plaintiffs sued for breach of contract, Insurance Code violations, bad faith, and violations of the DTPA. Judge Godby allowed all issues to go to the jury. During the second week of trial, the jury returned a defense verdict for Fireman's Fund on all issues.

Christopher Martin and Greg Griffith tried the case for Fireman's Fund. We want to thank our friends at FFIC for having the courage to try this case and for the opportunity our firm had to win it. We also want to thank our trial team for their hard work which made this victory possible including associates Nejat Ahmed and Tanja Martini of the Dallas office and Legal Assistant Lana Reed from the Houston Office. This win was a great team effort and we appreciate the incredible support we received from Fireman's Fund which made it possible to win.

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