



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101

111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401

900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

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APPELLATE COURT FINDS INSURER'S SUBROGATION NOT WAIVED, NUISANCE BASED FLOOD CLAIMS MAY PROCEED

Last Wednesday, the Houston 14th Court of Appeals examined an insurer's right to pursue a subrogation claim arising from flood damage to the insured property during Tropical Storm Allison and found that indemnity and waiver of subrogation provisions did not preclude the insurer's claims. In *Warwick Towers Council of Co-Owners v. Park Warwick, L.P.* 2009 WL 3210926 (Tex.App. – Houston (14th Dist.) October 8, 2009), St. Paul paid for water damage to the Warwick Towers and then pursued subrogation against an adjoining hotel alleging that the hotel failed to use a flood barrier system during Tropical Storm Allison and flood waters poured down a loading dock into the hotel's basement. The water then crossed under the street through tunnel connecting the properties and damaged the condominiums.

The court examined a 1980 easement agreement between prior owners of the adjoining properties and a waiver of subrogation provision between them and on behalf of their insurers. The court observed that under Texas law, "courts should not construe a contract as having been made for the benefit of third parties" unless the intent is clear. Examining the evidence presented, the court concluded that the proof offered was insufficient as a matter of law to establish waiver of subrogation claims so as to preclude St. Paul's efforts to recover. The court then examined the nuisance claims and found that the circumstances present in this case may or may not accommodate a nuisance claim but at this stage in the lawsuit, they could not say that the claims were precluded as a matter of law. Accordingly, summary judgment in favor of the hotel was reversed and remanded for further proceedings.

COURT RECOGNIZES LIMITATION ON WORKERS COMPENSATION JUDICIAL REVIEW OF NEW EVIDENCE

Last Wednesday, the Eastland Court of Appeals examined a trial court's ability to review new evidence generated after a Worker's Compensation Division finding that an injured worker was entitled to lifetime income benefits. In *Facility Insurance Corporation v. Gibbs*, 2009 WL 3219464 (Tex.App. – Eastland October 8, 2009), after multiple back surgeries, the Division found in November 2005 that the worker was entitled to lifetime income benefits. The insurer filed suit to appeal the ruling and sought to introduce evidence developed after the 2005 finding. The injured worker challenged the court's jurisdiction to hear new evidence and the trial court agreed. On appeal, the Eastland Court agreed that in order to present new evidence to the trial court, it must be first presented to the Division and the court lacked jurisdiction to hear new evidence developed after the earlier finding.

FIFTH CIRCUIT FINDS ABUSE OF DISCRETION IN INSURER'S DENIAL OF LONG TERM DISABILITY BENEFITS

Last Monday, the Fifth Circuit reversed an insurer's denial of long term disability benefits to an injured worker in *Alexander v. Hartford Life & Accident Insurance Company*, 2009 WL 3172195 (5th Cir. Tex. October 5, 2009). After noting that the insurer had "a financial conflict of interest because it was responsible both for determining eligibility for benefits and for paying benefits" the court examined the evidence presented and held that there was no rational connection between the "no disability" finding and the evidence upon which it relied. Accordingly, the court reversed summary judgment in favor of the insurer and remanded the case to determine the amount of benefits payable.

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