The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
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

March 16, 2009

WRITTEN AGREEMENT BETWEEN AGENT AND INSURED DID NOT GIVE RISE TO FIDUCIARY DUTY IN OBTAINING INSURANCE

Last Thursday, Houston's Fourteenth Court of Appeals determined that an insurance broker did not owe a fiduciary duty to a contractor for whom it had contractually agreed to act as an agent in matters involving the contractor's attorneys. *Horizon Offshore Contractors, Inc. v. Aon Risk Services of Texas, Inc.*, --- S.W.3d ----, 2009 WL 620257 (Tex.App.—Houston [14 Dist.] March 12, 2009). Aon served as Horizon's insurance broker and, in 2004, entered into an agreement with Horizon regarding Aon's services for a one-year period beginning February 20, 2004 and running through February 19, 2005. Under the Agreement, Horizon paid Aon a base fee of $400,000, and Aon agreed to perform a variety of services, including the procurement of insurance. The court examined the contract and determined that the broker was only the contractor's agent when dealing with the contractor's attorney in order to preserve privileged communications. The court upheld the summary judgment on this issue. But, the court remanded the case to the trial court for consideration of Horizon's remaining claims for breach of contract, negligence, and negligent misrepresentation.

EMPLOYEE'S INJURIES, WHILE NOT DIRECTLY TO FEET AND HANDS, SUFFICIENT TO SUPPORT LOSS OF USE JURY FINDING FOR LIFETIME INCOME BENEFITS UNDER WORKERS COMPENSATION LAW

Also on Thursday, the Dallas Court of Appeals resolved a workers compensation appeal in favor of an employee who had won a jury verdict awarding her lifetime income benefits (LIB) for the loss of both feet at or above the ankle or loss of one foot at or above the ankle and loss of one hand at or above the wrist. *Insurance Co. of State of Pennsylvania v. Muro*, --- S.W.3d ----, 2009 WL 620990 (Tex.App.—Dallas March 12, 2009). Following her work-related accident, Muro underwent several surgeries, including generally: (1) a cervical fusion; (2) total right hip replacement; (3) total left hip replacement; (3) revision of left hip replacement due to manufacturer recall; (4) reduction of dislocated left hip; (5) another revision of left hip replacement; and (6) right shoulder surgery. In their verdict, the jury found that Muro had (1) the total and permanent loss of use of both feet at or above the ankle and (2) the total and permanent loss of use of one foot at or above the ankle and the total and permanent loss of use of one hand at or above the wrist.

The carrier argued there was no evidence of "injury" directly to Muro's feet and right hand which would have entitled Muro to LIBS, but only evidence of other injuries which indirectly affected her feet and right hand. The carrier also argued because Muro only suffered a direct injury to her shoulder, neck,

lower back, and hips; her injuries could not fall within the group of injuries which entitle a person to LIBS. It also argued the trial court incorrectly instructed the jury as to the meaning of "loss of use." Lastly, the carrier argued Muro did not obtain jury findings to support her award of attorneys fees.

The Dallas court was not persuaded by the carrier's arguments. The court determined the evidence, which it evaluated from the record, supported the jury's verdict. The court then rejected the carrier's legal argument that LIB requires a direct injury to both feet or feet and hands. The court also upheld the trial court's jury instruction as to "loss of use" because the trial court had directly followed the Texas Supreme Court's definition in *Navarette v. Temple Ind. School Dist.*, 706 S.W.2d 308 (Tex.1986). Lastly, the court determined that a jury finding was not required by the Texas Labor Code to support the award of attorney's fees.

UNDER FORMER SECTION 74 REGARDING HEALTH CARE LIABILITY CLAIMS, REQUIREMENT OF SERVICE OF EXPERT REPORT CANNOT BE OVERCOME BY PROVIDING TO INSURER OR COURT AND NO EXCEPTION FOR DILIGENCE EXISTS

Last Wednesday, the Dallas Court of Appeals ruled a plaintiff cannot satisfy former section 74.351(b) of the Texas Civil Practice and Remedies Code's expert report service requirement by providing the report to the defendant doctor's insurer or filing it with the court. *Offenbach v. Stockton*, --- S.W.3d ----, 2009 WL 606709 (Tex.App.—Dallas March 11, 2009.) Stockton sued Offenbach, asserting a health care liability claim. Offenbach moved to dismiss the suit for failure to timely serve an expert report. Stockton was unable to serve Offenbach in a timely manner because his last known address had changed. She presented evidence of diligence in requesting permission to serve Offenbach with the lawsuit by alternative means and that she had provided the expert report to Offenbach's insurer and filed it with the court. Stockton also challenged the constitutionality of the prior statute.

The Dallas court determined that Stockton's efforts failed to satisfy the statute's requirement of service on the defendant doctor or his attorney. The court found no authority to support Stockton's argument that her due diligence or alternative efforts should satisfy the statute. The Dallas court further held that Stockton did not show the statute to be unconstitutional. Having resolved all issues against Stockton, the Dallas court reversed and remanded the appeal to the trial court for dismissal of the claims.

UNITED STATES SUPREME COURT GRANTS TIME TO INSURER AT ORAL ARGUMENT IN APPEAL OF BANKRUPTCY JURISDICTION OVER ASBESTOS VICTIM DIRECT-ACTION SUITS AGAINST INSURERS

Last Monday, the United States Supreme Court granted Chubb Indemnity Insurance Company's motion for divided argument. The Court granted the Asbestos Claimants 20 minutes, and Chubb 10 minutes. The appeal involves the ability of claimants to pursue the insurers directly outside of the settlement fund that was created for asbestos claimants.

DRI's 9th Annual Insurance Coverage and Claims Institute
April 1-3, 2009 in Chicago.

This program offers three excellent seminars for the price of one! The Insurance Coverage and Claims Institute is a unique opportunity for insurance professionals and the attorneys who advise them to learn the latest developments and issues in insurance coverage and claims handling. The seminar is ideal for both the seasoned veteran or someone new to coverage. This year, attendees are able to select from two different tracks of presentations: one focused on personal lines and the other on commercial lines issues.

This is also an excellent networking opportunity to learn about the topics (and meet the people) that will help your coverage practice thrive in these difficult times. You are invited to: Wednesday night Networking Reception, Thursday Welcome Breakfast, the Insurance Law Committee Business Meeting, and nightly dine-arounds.

Chris Martin from our office will be speaking on Thursday on practical tips in trying insurance coverage cases. The program features two days of some the best insurance coverage lawyers from the country discussing many of the cutting edge issues affecting insurers and the lawyers who represent them in coverage disputes.

For more information on this program, go to: www.dri.org