



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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### **INSURER'S UNCONDITIONAL TENDER AFTER SUIT FILED REDUCES LATE PAYMENT PENALTY**

Last Thursday, the Fort Worth Court of Appeals considered the impact of an unconditional tender of undisputed amounts owed under a commercial property policy and held that late payment penalties under Texas Prompt Payment of Claims Act were to be reduced as a result. In *GuideOne Lloyds insurance Company v. First Baptist Church of Bedford*, 2008 WL 4455699, (Tex.App. – Fort Worth, October 2, 2008), the insured's roof was damaged by a hail storm which was deemed a weather related catastrophe for claim handling purposes under Texas Prompt Payment of Claims Act – Chapter 542. While the claim was being handled, a dispute arose over the amount owed and the appropriate method of repair. The insured filed suit and a jury found in favor of the insured awarding \$765,105 in contractual and extra-contractual damages. This appeal followed.

On appeal, the court considered, in part, GuideOne's argument that an unconditional tender of \$155,000 it determined was owed for the roof damage, but paid after suit was filed, was improperly disregarded in calculating penalties and interest owed by the insurer. The court reviewed the correspondence attached to the check issued which stated in part that it was "an unconditional tender of funds" even though they believed it was "sufficient to extinguish its obligations to" the insured. Similar statements in the correspondence made it clear that the "undisputed" portion of the claim was being paid. Accordingly, the court ruled that the trial court erred in disregarding the amount paid in calculating the penalties and interest and reduced the amount of the judgment by \$34,664.

### **SUBCONTRACTOR PROTECTED BY WORKERS' COMPENSATION ACT AND OWNER CONTROLLED INSURANCE PROGRAM**

Last Wednesday, the San Antonio Court of Appeals considered the protections afforded by the exclusive remedy defense under Texas Worker's Compensation Act (Act) when one subcontractor was sued by the employee of another subcontractor and where the property owner had implemented an Owner Controlled Insurance Program (OCIP) designed to apply to all its contractors. In *Funes v. Eldridge Electric Company*, 2008 WL 4426058 (Tex.App. – San Antonio), an employee of one subcontractor tripped on a pipe left on the floor by an employee of another subcontractor and then sued that subcontractor for the injuries claimed. The trial court found that the exclusive remedies provisions of the Act precluded recovery and this appeal followed.

The San Antonio Court observed that the property owner, HEB, required the general contractor to provide workers' compensation insurance to "all employees" on the construction site under an OCIP. The contracts running between the contractors and both subcontractors recognized and agreed to the requirement. As a result, the general contractor became the statutory "employer" of all employees on the

site and the effort by one subcontractor's employee to recover for personal injury claims against another subcontractor was precluded by the exclusive remedy provision of the Act despite the creative arguments made in this case.

## **UNDERINSURED MOTORIST INSURER ENTITLED TO AMEND PLEADINGS / CLAIM OFFSET**

This past Thursday the El Paso Court of Appeals examined an insurer's right to amend its pleadings and claim an offset and concluded that under the circumstance, they had the right to do so. In *Allstate Property and Casualty Insurance Company v. Gutierrez*, 2008 WL 4445076 (Tex. App. – El Paso), Allstate's insured was involved in a three car collision and the other drivers both had insurance. At the close of the evidence, Allstate moved for directed verdict asserting that the insured had sued for breach of contract seeking only "uninsured" and not "underinsured" motorist coverage. The motion was denied and the jury found the other drivers 50% and 40% at fault and awarded the insured \$2,000 for property damage and \$20,000 for personal injury. Allstate sought leave to amend and plead its affirmative defense of offset as required by the Texas Insurance Code and Texas Rules of Civil Procedure 93(15). The trial court denied the request and this appeal followed.

The court observed that the requested amendment would conform the defendant's pleadings to the evidence and did not reshape the nature of the trial. The court also found that evidence was presented about the underlying insurance limits and therefore, the underinsured motorist issues were tried by consent. Lastly, the court examined the nature of underinsured motorist coverage which allowed recovery when the damages exceed the underlying limits. Holding that the court should have allowed the trial amendment and that Allstate was entitled to an offset greater than the recovery, the court reversed the trial court's judgment and rendered in favor of Allstate.

## **HURRICANE IKE NEWSBRIEF TO BEGIN**

Our Insurance Practice Group has been involved in insurance issues arising from Hurricane Ike since the weekend the storm hit the Texas coast three weeks ago. Beginning this week, our firm will be publishing our *Hurricane Ike Newsbrief* to update our readers with a specific interest in the storm on the latest insurance claims and insurance litigation issues arising out of Ike involving the Texas Department of Insurance, Texas courts, and the policyholder lawyers and public adjusters pushing Ike claim. Because many of our readers do not handle Ike claims, we will not be sending the Ike Newsbrief to our regular readers. **To receive it, you need to request to be added to our Hurricane Ike Newsbrief email list.** If you wish to receive this free informational update on claims and litigation news relating to Hurricane Ike insurance issues, please email your request to [tin@mdjwlaw.com](mailto:tin@mdjwlaw.com). As always, our email lists are confidential and will never be disseminated to third parties. We provide our Newsbriefs as a service to the Texas Insurance Industry and we look forward to monitoring the hot issues arising out of Hurricane Ike over the next few months.

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