



The Weekly Update of Texas Insurance News  
**TEXAS INSURANCE LAW NEWSBRIEF**



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## **TEXAS SUPREME COURT GRANTS MANDAMUS RELIEF TO COMPEL ARBITRATION AND ENFORCE FORUM SELECTION CLAUSE**

Last Friday, the Texas Supreme Court issued two separate per curiam opinions for conditional mandamus relief to compel arbitration in one and to enforce a forum selection clause in the other.

First, in *In re Fleetwood Homes of Texas, L.P.*, No.06-0943 (Tex. June 20, 2008), the court addressed the question whether Fleetwood impliedly waived arbitration by failing to pursue its arbitration demand for eight months while discussing a trial setting and allowing limited discovery. Specifically, Fleetwood, a mobile home manufacturer, signed a dealer agreement with a developer that contained the arbitration clause covering “any dispute, controversy or claim among the parties.”

Fleetwood canceled the agreement on the ground the developer planned to sell mobile homes outside the dealer agreement. The developer filed suit and Fleetwood answered and demanded arbitration, but did not move for arbitration for eight months. The Supreme Court ultimately concluded Fleetwood did not waive its right to arbitration and the clause was not unconscionable.

Next, the Texas Supreme Court concluded a forum selection clause was valid and should be enforced to dismiss a lawsuit. In *In re Lyon Financial Services, Inc.*, No. 07-0486 (Tex. June 20, 2008), a medical imaging center (“MNI”) entered into a Master Lease Agreement (MLA) with Lyon, the lessor of MRI equipment. The MLA included a forum-selection clause which set forth disputes arising from the MLA would be resolved in state or federal courts in the Commonwealth of Pennsylvania. Despite this clause MNI filed suit in Hidalgo County, Texas.

Lyon asserted the applicability of the forum selection clause in its answer and filed a motion to dismiss. In response, MNI argued the forum selection clause was induced by fraudulent representations, it was invalid for overreaching, and that dismissal of its suit would create an unjust result. Following a hearing, the trial court overruled Lyon’s motion without stating the reasons for doing so. The court of appeals denied mandamus relief.

As a threshold matter, the Supreme Court restated Texas law that mandamus is available to enforce a forum-selection clause. In reaching its decision, the Supreme Court concluded there was no evidence to overcome the presumption the forum-selection clause was valid and held the trial court abused its discretion in denying Lyon’s motion to dismiss.

## **DALLAS APPELLATE COURT APPLIES DOCTRINE OF CONCURRENT CAUSATION AND HOLDS REPLACEMENT COST OF ROOF MEASURED BY AMOUNT TO REPLACE HAIL-DAMAGED TILES ONLY**

Last week, the Dallas Court of Appeals held a church was entitled only to the amount necessary to repair hail-damaged tiles—not the value to replace the entire roof. In *All Saints Catholic Church v. United National Ins. Co.*, 2008 WL 2426703 (Tex. App.—Dallas June 17, 2008), United National issued a commercial insurance policy to All Saints covering its property. Under the policy hail was a covered peril, but wear and tear as well as latent defects were excluded. All Saints’ roof was made with Hardi-Slate tiles, which allegedly absorb excessive moisture and rot, break, deteriorate or otherwise fail when installed and incorporated on buildings and structures.

A hailstorm caused damage to portions of All Saints’ roof and the hail-damaged tiles could not be “spot” repaired; thus, the entire roof needed to be replaced to prevent it from leaking. United National paid All Saints the amount necessary to replace only those tiles damaged by hail. Subsequently, All Saints brought suit to recover the total cost for replacement of the roof. The trial court granted United National’s summary judgment.

The policy states United National will indemnify All Saints for loss or damage based on the lesser of the cost to repair, rebuild or replace the damaged property in a condition equal to, but not superior to, or more expensive, than its condition when new. The court applied the doctrine of concurrent causation and held All Saints was entitled only to the amount necessary to repair the hail-damaged tiles. Because All Saints had already received that amount from United National the appellate court affirmed the summary judgment.

## **HOUSTON APPELLATE COURT AFFIRMS DECISION TO GRANT PLEA TO JURISDICTION BECAUSE PLAINTIFF FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES**

Last Thursday a Houston appellate court affirmed an insurance carrier’s plea to the jurisdiction because the Plaintiff failed to exhaust her administrative remedies. In *Schwartz v. Gallagher Basset Services, Inc.*, 2008 WL 2466258 (Tex. App.—Houston [1st Dist.] June 19, 2008), Plaintiff sued Gallagher for damages arising from Gallagher’s alleged unreasonable delay and denial in authorizing her requested foot surgery necessitated by an on-the-job injury.

After a preauthorization request for surgery was denied Plaintiff underwent an Independent Medical Examination which revealed she needed toe surgery as well as a possible procedure to treat a neuroma deformity on her foot. Gallagher approved the foot surgery, but the doctor who performed the surgery reported the delay in timely approval for the initial surgery had caused the injury to develop into a more serious condition which required additional treatment including a second surgery. Plaintiff sued Gallagher alleging claims for violations of the Texas Insurance Code and DTPA, breach of the duty of good faith and fair dealing, and legal malice. Several months later the parties entered into a benefit dispute agreement that the neuroma deformity was compensable.

Gallagher later filed a plea to the jurisdiction and the trial court granted it and dismissed the suit. Plaintiff appealed the denial of a new trial. Plaintiff argued the exhaustion of remedies doctrine is inapplicable because she had no administrative remedies to exhaust. According to Plaintiff, there was no dispute as to the medical necessity of her surgery at the time the underlying suit was filed, because Gallagher ultimately agreed the surgery was necessary. The court concluded the plea to the jurisdiction was proper

because neither Plaintiff's petition nor the record indicated Plaintiff exhausted her administrative remedies and obtained a Commission determination that the surgery was medically necessary when first requested. The court went on to dismiss Plaintiff's claims since the impediment to jurisdiction could not be removed.

## **FIFTH CIRCUIT FINDS COVERAGE FOR PUNITIVE DAMAGES UNAVAILABLE GIVEN THE "EXTREME CIRCUMSTANCES" SURROUNDING INSURED'S TORTOUS CONDUCT**

Since we initially reported the Fifth Circuit's opinion in *American Intern. Specialty Lines Ins. Co. v. Res-Care Inc.*, --- F.3d ----, 2008 WL 2232089 (5th Cir. 2008) (Newsbrief June 9, 2008), this case has received significant attention from the plaintiff's bar for its potential impact on the availability of insurance coverage for punitive damages. As we initially reported, the Fifth Circuit found that the policy at issue did not cover punitive damages, under the facts before it, as a matter of public policy. The dispute involved the insurer's right to reimbursement after it settled claims, covered and uncovered, against the insured under a non-waiver agreement. The trial court had refused to allow coverage for punitive damages under the primary policy, which was silent as to coverage for punitive damages. The excess policy, on the other hand, specifically excluded punitive damages.

In this well-reasoned treatment of the issues, the Fifth Circuit looked to the Texas Supreme Court's decision in *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex.2008) (Newsbrief February 18, 2008) for guidance, noting that the Supreme Court had expressly considered whether public policy precludes insurance coverage of punitive damages in the workers' compensation regime and also provided guidance for consideration of the issue in other contexts. Following *Fairfield*, the Fifth Circuit engaged in a two-step analysis: (1) the plain language of the policy, and (2) legislative policy decisions. The court found that the policy, through its silence, provided coverage for punitive damages. Turning to the next issue, the court found that the Texas legislature has precluded coverage for punitive damages for some health care providers. The court noted that the type of health care provider in this case, an intermediate care facility for the mentally retarded, did not fall within the statute. The court then turned to general public policy considerations, weighing the right to freedom of contract against the purpose of punitive damages.

In finding that the purpose of punitive damages outweighed the right to freedom of contract, the court returned to the *Fairfield* opinion's concern for "[e]xtreme circumstances' where 'extreme and avoidable conduct that causes injury' may warrant different considerations... 'Were the existence of insurance coverage to completely eviscerate the punitive purpose behind awarding exemplary damages, it could defeat not only an explicit legislative policy but also the court's traditional role in deterring conscious indifference.'" The Fifth Circuit then found that "extreme circumstances" were present given the insured's documented systemic problems of care and the circumstances of the patient's death at issue.

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