



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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FIFTH CIRCUIT REJECTS EXTRA-CONTRACTUAL CLAIMS AGAINST WRITE-YOUR-OWN FLOOD INSURER

Last Tuesday, the Fifth Circuit affirmed summary judgment in favor of a write-your-own flood insurer finding that the National Flood Insurance Act (NFIA) did not expressly authorize an insured to bring extra-contractual claims against an insurer, and no federal common law claims could be inferred under the NFIA. In *Wright v. Allstate Insurance Co.*, 2007 WL 2636725 (5th Cir. (Tex.) September 11, 2007), Allstate issued a Standard Flood Insurance Policy (SFIP) under the NFIA which authorized insurers to issue flood policies under their own name (write-your-own), to Wright. A claim was presented after Tropical Storm Allison and ultimately denied by Allstate based on the insured's alleged failure to cooperate and submit a timely proof of loss. Wright attempted to assert common law causes of action for fraud and negligent misrepresentation. These claims were rejected by the district court and this appeal followed.

The insured, focusing on policy language stating that disputes are to be governed *federal common law*, asserted that the reference to common law expressly or implicitly authorized his federal common law claims for fraud and negligent misrepresentation. After examining the statute, policy language and related case law, the Fifth Circuit disagreed and held "neither the NFIA nor the SFIP expressly authorizes policyholders to file extra-contractual claims against a write-your-own insurer." Further, the court saw no evidence that Congress implicitly authorized extra-contractual claims against write-your-own insurers and, accordingly, it affirmed the district court's judgment in favor of the insurer.

COURT FINDS "LOSS OF USE" CONTEMPLATES PRE-EXISTING INTEREST AND INSURER HAD NO DUTY TO DEFEND

Last Friday, the Austin Court of Appeals examined a loss of use claim asserted under a commercial general liability to determine whether an insurer had a duty to defend a developer who allegedly failed provide a one acre lake side park to residents as promised, and later sold the land to an owner who refused or limited access to others. In *Robert Trotter Gift Fund for Thomas v. Trinity Universal Ins. Co.*, 2007 WL 2682247 (Tex.App.- Austin September 13, 2007), the Austin Court of Appeals upheld the lower court's ruling finding the allegations failed to assert a loss of use claim as needed to trigger a duty to defend under the policy. In doing so, the court agreed with the insurer's argument and held: "Loss of use of tangible property' in the policy plainly contemplates some preexisting interest in using the 'tangible property' (here, Lot 18) whose deprivation would constitute 'loss of use.' The underlying plaintiffs alleged instead that the defendants' actions caused the *absence* of such an interest. Without an interest in Lot 18 that would allow the underlying plaintiffs to use it, the

underlying plaintiffs could not state a claim for that loss of use.” Accordingly, the court affirmed the judgment in favor of the insurer finding no duty to defend.

DALLAS COURT REJECTS EFFORTS TO EXPAND *STOWERS* DUTY TO INCLUDE NEGLIGENT DEFENSE OF THE INSURED

Recently, the Dallas Court of Appeals rejected efforts to expand the *Stowers* duty to encompass a cause of action against the insurer for negligence in the defense of an underlying tort law suit. In *Cain v. Safeco Lloyds*, 2007 WL 2460074 (Tex.App. – Dallas), Cain suffered serious injuries while riding as a passenger in the insured vehicle which was involved in a single car collision. Cain rejected a pre-suit tender of policy limits, sued the insured driver and Ford Motor Company, and was awarded more than \$4 million in damages against the insured driver, but nothing against Ford. Cain then took an assignment from the insured and attempted to bring a *Stowers* action against Safeco under a “negligent defense” theory. The trial granted summary judgment against Cain and this appeal followed. In affirming the lower court’s judgment, the Dallas Court of Appeals rejected Cain’s argument that “the *Stowers* doctrine has been expanded to include the duty to provide a reasonable defense to the insured,” and held “that Texas law does not recognize a cause of action for negligent defense by an insured against his insurer.”

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