

# TEXAS INSURANCE LAW NEWSBRIEF

OCTOBER 21, 2013

## RELYING ON RUTTIGER OPINION, AUSTIN COURT OF APPEALS UPHOLDS SUMMARY JUDGMENT AGAINST WORKERS' COMP PLAINTIFF

Texas courts are still addressing the impact of the Texas Supreme Court's ground-breaking *Ruttiger* opinion and its effect on suits arising out of bad faith allegations based on Texas' workers' compensation claims. In *Hopper v. Argonaut Insurance Company*, No. 03-12-00734, — WL — (Tex. App.—Austin Oct. 18, 2013), the plaintiffs were the wife and child of the recipient of worker's comp benefits who died of a painkiller overdose approximately three years after the injury. The insurer first disputed whether the claimants were in fact beneficiaries, and then whether the decedent's death was related to the covered injury. Two years after the decedent's death, the claims were resolved following a benefit review conference, and the insurer agreed that the decedent's wife and two of her children were beneficiaries, and that the compensable injury was a producing cause of the decedent's death.

Nevertheless, the beneficiaries sued the insurer and the insurer's adjuster for mishandling the claim and delaying payment of death benefits. Among other claims, the beneficiaries asserted that the insurer and the adjuster made negligent, malicious, and knowingly false statements that the beneficiaries were not entitled to coverage. The insurer and adjuster filed motions for summary judgment based in significant part on *Texas Mutual Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012), in which the Texas Supreme Court abolished the common law duty of good faith and fair dealing in workers' compensation cases. The trial court granted summary judgment and the Austin Court of Appeals affirmed, holding the beneficiaries' misrepresentation-based statutory claims did not fall within the *Ruttiger* opinion's narrow exception for false statements relating to the policy. The court of appeals noted the beneficiaries' allegations only concerned statements relating to whether the claim was covered. Similarly, the court of appeals held that common law claims of fraud, negligent misrepresentation, and unconscionability failed because there was no evidence of improper conduct other than those allegations related to the claim-settlement process, and all such claims based on claims conduct were foreclosed by *Ruttiger*.

## ATTORNEYS' FEE AWARD TO INSURER IN SUBROGATION RECOVERY REVERSED UNDER STATE COURT'S APPLICATION OF FEDERAL STATUTE

Federal law pre-empted recovery for attorneys' fees in an insurer's subrogation action to recover for a loss suffered during interstate transportation of computer equipment, the Fourteenth Court of Appeals in Houston held last Tuesday. *Daybreak Express, Inc. v. Lexington Insurance Company*, No. 14-09-01032, 2013 WL 5629813 (Tex. App.—Houston [14th Dist.] Oct. 15, 2013) concerned the insurer's claim for damages based on a shipper's delivery of damaged goods. The insurer filed suit asserting a claim for breach of contract, which under Texas law permits the recovery of attorneys' fees, and the trial court awarded \$85,800 in damages plus attorneys' fees.

In the initial appeal, the court of appeals reversed the entirety of the trial court judgment. The Texas Supreme Court's January 2013 opinion on rehearing in *Lexington Ins. Co. v. Daybreak Express, Inc.*, 393 S.W.3d 242 (Tex. 2013), reversed the court of appeals and reinstated the trial court's judgment as to actual damages, but remanded for further proceedings with respect to attorneys' fees. In its opinion on remand, the court of appeals held that the federal Carmack Amendment, which was enacted to create uniformity in damage awards arising out of interstate transportation, "impliedly preempts all state law claims arising in connection with this dispute involving interstate transportation of goods by a common carrier." The Carmack Amendment does not provide an award of attorney's fees, and therefore Texas law awarding fees in a breach of contract case was preempted by the federal statute. The court of appeals accordingly reversed the award of attorneys' fees.

## SOUTHERN DISTRICT JUDGE REJECTS INSURED'S ATTEMPT TO RENEW CHALLENGE TO VALIDITY OF INSURANCE CHECK INCLUDING MORTGAGEE

A prior final judgment precluded a subsequent action concerning the disposition of a settlement check made payable to the insureds and the insureds' mortgagee, a federal judge ruled last Tuesday. In *Campos v. Ocwen Loan Servicing, LLC*, Civ. No. H-13-2062, 2013 WL 6514317 (S.D. Tex. Oct. 14, 2013), District Judge Ewing Werlein held a prior ruling of Judge Keith Ellison precluded the plaintiffs' declaratory judgment action concerning whether a check in payment of a Hurricane Ike insurance claim belonged entirely to the plaintiffs. Judge Ellison had ruled against the plaintiffs on motion to dismiss a previous lawsuit in which the plaintiffs sought to prevent foreclosure based on an erroneous description of the property in the operative lien. Judge Ellison had given leave to the plaintiffs to amend their pleadings, but they did not, and the judgment became final.

In the subsequent case, the plaintiffs changed the focus from foreclosure to entitlement to insurance proceeds, but the underlying issue remained the same — the plaintiffs were challenging the validity of the lien on the property due to a flawed description of the property. Thus, the doctrine of *res judicata* precluded Plaintiff's suit, and Judge Werlein entered an order dismissing the suit with prejudice.

## MDJW First Friday Webinar - Legislative Changes to Surplus Lines Insurance Regulations

### Wayne Pickering - Presenter



Our next First Friday will be held on November 1, 2013 at noon **Central** Time.

Wayne Pickering, a partner in the Houston office, will present Legislative Changes to Surplus Lines Insurance Regulations. Legislation from the 2013 Regular Session of the Texas Legislature significantly revises Chapter 981 of the Texas Insurance Code regarding several aspects of surplus lines insurance regulation. This legislation brings Texas into compliance with the mandates imposed by Congress in the "Non-Admitted and Reinsurance Reform Act" (NARRA) of 2010 in regulating surplus lines insurance. This presentation summarizes pertinent parts of the Texas legislation and NARRA that most significantly impact Texas insurers. Several potential issues are likely to arise as to the interpretation of this legislation. These issues are likely to transcend state boundaries, however, and may be issues for insurers in all states to consider.

Mr. Pickering's legal experience includes many years of experience at both the trial and appellate level in numerous facets of insurance litigation, including coverage issues, bad faith and extra-contractual claims, as well as litigating professional liability claims against insurance agents, brokers and claims adjusters. Mr. Pickering's experience also includes the representation of automobile manufacturers and manufacturers of commercial equipment and consumer products in products liability actions and warranty claims. Mr. Pickering also has authored or co-authored numerous articles and edited treatises in the field of insurance law.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit. Insurance professionals accredited by the Texas Department of Insurance should have their license number available during the training in order to request credit for the course.

Register for this webinar at: <https://student.gototraining.com/r/8614551911724824576>. After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar.