The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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INSURER DOES NOT HAVE TO PAY FOR INSURED'S INDEPENDENT COUNSEL

Last week, in *Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, C.A. 4:10-cv-695 (S.D. Tex. May 9, 2011) (Milloy, J.), a U.S. magistrate judge determined that Downhole Navigator LLC is not entitled to have insurer, Nautilus Insurance Co., pay for its lawyers in a contract suit after it refused a Nautilus-chosen team. In a well-reasoned opinion, the judge granted summary judgment to Nautilus on the issue of whether its reservation of rights letter had created a conflict of interest that allowed Downhole to select independent counsel. Nautilus offered a defense subject to a reservation of rights. Downhole rejected the defense, and hired its own lawyers. Nautilus refused to pay for Downhole's chosen counsel. Downhole sued Nautilus to recoup it defense costs and other damages.

In granting summary judgment, the judge turned to a well-developed body of law in Texas regarding the duty to defend. The court noted that "[t]here is no question that an insurer's right to defend a lawsuit encompasses the authority to select the attorney who will defend that claim and to make other decisions that would normally be vested in the insured as the named party in the case." The court said that "every disagreement about how a defense should be conducted cannot amount to a conflict of interest," quoting the Texas Supreme Court. It then went on to analyze the facts to be decided in the underlying litigation as set out in the underlying petition. The court compared the facts to be determined by the jury; *i.e.* - whether Downhole was negligent - to the policy provisions Nautilus had recited in its reservation of rights letter. The judge found that the facts to be decided by the jury did not involve any issue that related to whether Downhole was entitled to coverage as set forth in the reservation of rights letter. As such, Nautilus was not required to pay for Downhole's counsel. The issue of indemnity for the underlying suit remains before the court.

[Editor's Note: Dale Jefferson and Jamie Cooper of Martin, Disiere, Jefferson & Wisdom had the privilege of representing Nautilus Insurance Company in this matter.]

TRIAL COURT ERRED IN FAILING TO DECIDE SUBSTANTIVE LEGAL ISSUE PRESENTED BY COMPETING SUMMARY JUDGMENT MOTIONS

Last Wednesday, the San Antonio Court of Appeals remanded an agreed interlocutory appeal to the trial court for it to make a substantive decision on the question of law presented by the parties' competing summary judgment motions. In *Gulley v. State Farm Lloyds*, -- S.W.3d --, 2011 WL 1796295 (Tex.App. - San Antonio 2011), Dora Gulley made a claim under her homeowners insurance policy for damage caused by foundation movement resulting from a below-slab plumbing leak. State Farm found the damage was covered under the Dwelling Foundation Endorsement to the policy; therefore, Gulley's claim was subject to the endorsement's 15% coverage limitation. Gulley accepted the payment, but later sued

State Farm for breach of contract contending she was entitled to additional benefits under a different policy endorsement she had purchased, the Water Damage Endorsement.

Both parties filed multiple competing summary judgment motions asserting their particular interpretation of the endorsements to the insurance policy was conclusively established as a matter of law. Ultimately, the trial judge signed an order denying both parties' summary judgment motions and authorizing an immediate interlocutory appeal of the "controlling question of law" of coverage under the policy. The trial court expressly stated in its order it was not making a substantive decision as to which interpretation of the policy's endorsements was correct, even though in the same order it stipulated that the "controlling legal question" was which one of two possible interpretations was correct as a matter of law.

The court of appeals concluded that if there were no disputed fact issues, as represented by the parties and the trial court, then one or the other of the competing interpretations of the policy endorsements had to be correct as a matter of law. By failing to decide which endorsement applied, the trial court failed to comply with its duty to rule on the substantive legal issue, instead opting to ask the court of appeals to make the initial "matter of law" decision through an agreed interlocutory appeal. Thus, the court of appeals concluded the trial court erred in declining to decide the substantive legal issue presented by the appeal.

COURT OF APPEALS AFFIRMS JUDGMENT AGAINST HOMEOWNER'S INSURER FOR FAILURE TO COMPLY WITH TERMS OF POLICY

Also last week, in *Cypress Texas Lloyds Prop. & Cas. Ins. Co. v. Carrington*, -- S.W.3d --, 2011 WL 1810492 (Tex.App. – Dallas 2011), the Dallas Court of Appeals affirmed a jury verdict and judgment rendered in favor of an insured under a homeowner's policy. Cypress Texas Lloyds Property and Casualty Insurance Company appealed a trial court's judgment awarding damages to Fred Carrington on his breach of contract claim. After he sustained a loss to his home when the hot water heater ruptured, Carrington made a claim on his homeowner's insurance policy issued by Cypress. The insurance policy required Cypress to pay a loss claim within five business days after it notifies the insurer that it will pay a claim. By two separate letters dated October 27, 2005, Cypress notified Carrington that Cypress agreed to pay the claim. A vendor for Cypress printed and mailed three settlement checks by regular U.S. mail to Carrington dated October 28, 2005. A fourth check was later mailed to Carrington, which he received and cashed. Although the first three checks were in the proper amounts and were properly addressed to Carrington at his home address, Carrington did not receive the checks. Stop payments were attempted, but the checks had already been deposited at a bank in Dallas. Carrington filed a police report and asked Cypress to reissue the checks because they had been stolen. Cypress refused to reissue the checks.

Carrington sued Cypress alleging a claim for breach of contract among others. The case was tried to a jury, which returned a verdict in favor of Carrington. Cypress filed a motion for judgment notwithstanding the verdict. The trial court denied the motion and rendered judgment on the jury verdict awarding damages for breach of contract. On appeal, Cypress contended that by placing the properly addressed checks in the mail, which were then presented to and honored by a bank, it satisfied its obligation under the policy. Carrington contended there was evidence to support the jury's answer because Cypress did not pay the claim within five days of its agreement to pay and it erroneously included Washington Mutual, a mortgage company, as a payee on one of the checks after Carrington submitted proof that his home was no longer subject to a mortgage.

The court of appeals stated there was evidence that at least one check was mailed more than five business days after Cypress agreed to pay the claim on October 27, 2005. And although the three stolen checks

were dated October 28, 2005, there was no evidence as to when the checks were actually mailed. Additionally, there was evidence that Cypress had made a mistake by listing Washington Mutual as a co-payee on one of the stolen checks. Accordingly, the court found there was some evidence to support the jury's answer that Cypress failed to comply with the terms of the insurance policy and it affirmed the trial court's judgment.

LEGISLATIVE UPDATE ON C.S.H.B. 274 TORT REFORM BILL

Committee Substitute House Bill 274, an amended version of House Bill 274, will be heard in the Senate State Affairs Committee this week. C.S.H.B. 274 would reform certain procedures and make new procedures available in civil litigation. Below are some of the highlights of the bill.

Early Dismissal of Actions. The supreme court would be required to adopt rules to provide for the dismissal of certain causes of action that the supreme court determines should be disposed of as a matter of law on motion and without evidence. Courts would be authorized to award costs and reasonable and necessary attorney's fees to the prevailing party in connection with a motion to dismiss.

Expedited Civil Actions. The supreme court would be required to adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, is more than $10,000 but does not exceed $100,000. The bill requires the rules to address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system.

Recovery of Attorney's Fees. The bill provides that a prevailing party, as opposed to only the claimant, may recover reasonable attorney's fees from an individual, corporation, or other legal entity if a claim is for breach of an oral or written contract.

Allocation of Litigation Costs. Among other things related to offers of settlement, the bill repeals provisions of the law relating to a limitation on recovery of litigation costs and to the awarding of litigation costs as an offset. The bill also specifies that the litigation costs that may be recovered by the offering party are limited to those litigation costs incurred by the offering party after the date the rejecting party rejected the earliest settlement offer that entitles the party to an award of litigation costs.

WEBCAST TOMORROW: NAVIGATING THE MINEFIELD OF CLAIMS INVOLVING MULTIPLE CLAIMANTS AND INADEQUATE LIMITS

Tomorrow at 1 p.m. (Central), Chris Martin of our firm and Kevin Willging of Travelers will lead a 90 minute web seminar on the complicated issue of severe claims, multiple claimants and inadequate insurance limits. An hour and a half of CLE and CE credit will be available for all who register. For more information on this DRI web seminar, call **877-880-1335** or register on line at:

http://www.legalspan.com/dri/webcasts.asp?UGUID=&CategoryID=&ItemID=20110405-176432-154316

This live webcast (audio & video) will be broadcast live over the internet on Thursday, May 19, 2011, starting 1:00 PM Central. You may access this event from anywhere with an established internet connection.

Often when a carrier determines that a claim exceeds a policy limit, it will attempt to settle the claim for that limit. But what happens when a case involves multiple claims and the aggregate value of those claims exceeds the limits? What should a carrier do when the claimants will not agree to divide the limits and settle the claims against the insured? The varying approaches taken by courts in different states and the delicate dynamics of the situation create a minefield for carriers and their counsel to navigate. Unfamiliarity with state law or failure to carefully walk through each step of this precarious process can result in extra-contractual exposure to the carrier, even though it may have been willing to pay its limits all along. This webcast will cover how various courts have addressed a carrier's responsibilities and will offer a practical "how to" guide for communicating with an insured, claimants and their counsel, with the goal of providing as much protection as possible for the insured and protecting the carrier from extra-contractual liability.

We hope you will join us for this web seminar tomorrow at 1 p.m.