The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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JURY FINDS INSURER NOT RESPONSIBLE FOR INSURED'S CONTRACTOR'S FAILURE TO PERFORM

Last Wednesday, in *Jaster v. Shelter Mutual Insurance Company*, 2011 WL 386856, (Tex. App.—Dallas February 8, 2011, n.p.h.), the Dallas Court of Appeals upheld a jury's decision that Shelter Insurance Company did not breach its contract and did not commit any extra-contractual violations. The case involved Howard Jaster's move from Tennessee to Texas. After his arrival, the U-Haul truck containing his personal property was stolen. His property included valuable antique furniture, paintings, and other valuable pieces – much of which belonged to the Edinburgh Trust, which his parents had created. Jaster filed a claim with his insurer, Shelter Mutual Insurance Company. Shelter hired Cornerstone Replacement Services to appraise the property's value. Cornerstone completed the appraisal and Jaster hired Cornerstone to replace the property. Jaster requested that Shelter pay Cornerstone directly. Shelter required the settlement funds be paid to the Trust, Jaster, and Cornerstone. All parties consented and the funds were issued. The Trust and Jaster endorsed the funds and delivered them to Cornerstone.

Shortly thereafter, Jaster decided not to use Cornerstone and demanded a refund. Cornerstone issued a refund but the check bounced. Cornerstone managed to refund $140,000 of the original $189,875.03 paid on the claim. Jaster asked Shelter to replace the funds. Shelter refused. Jaster sued Shelter and Cornerstone for the remaining funds. At trial, Jaster testified that he did not understand that he had a choice to use another contractor. Other testimony, including Shelter's adjuster and claim file, reflected that Shelter communicated to Jaster his right to choose his contractor. The jury found that Shelter did not breach its contract with Jaster and did not commit any extra-contractual violations. The trial judge entered a take-nothing judgment against Shelter, which means that Jaster lost against Shelter, and the Dallas Court of Appeals upheld the decision.

AGREEMENT TO SETTLE INSURANCE LAWSUIT NOT ENFORCEABLE BECAUSE PARTIES NEGOTIATING DIFFERENT CLAIMS SUBJECT TO THE AGREEMENT

Last Thursday, a three-judge panel of the Fifth Circuit considered a long-term disability claimant's motion to enforce a settlement agreement with his plan fiduciary. *Crowell v. CIGNA Group Ins. Co.*, 2011 WL 365284 (5th Cir. February 7, 2011). The claimant, an ERISA plan beneficiary, underwent treatment for serious heart problems in 2004. He received short-term disability benefits and, when those ended, long-term disability benefits. His plan fiduciary continued to monitor his progress. When his treating physician reported that he could return to work, the fiduciary notified the claimant, Crowell, that long-term disability benefits would end. Crowell's appeal was denied and Crowell sued.

During the litigation, Crowell's attorney and the fiduciary's attorney's entered into settlement negotiations. Crowell sent a demand letter. An exchange of emails between the two attorneys followed regarding the details of the settlement. But, the parties never expressly decided some of the some terms, including confidentiality and the terms of the release. The fiduciary filed a notice of settlement with the court. But, before the funds were paid, the parties fell into a disagreement over which claims would be included in the settlement. Crowell had two long-term disability claims – one from 2004 and one from 2008. The fiduciary argued that the settlement addressed both claims. Crowell argued that only the 2004 claim was the subject of the settlement.

On Crowell's motion to enforce the settlement agreement, the panel determined that there was no meeting of the minds so as to create an enforceable agreement. The court noted that a meeting of the minds is a necessary element for an agreement. And, the court determined that since the parties were negotiating different claims there was no meeting of the minds. The panel went on to determine that the fiduciary's decision to deny the continued long-term benefits was not arbitrary or capricious. So, Crowell lost both his motion to enforce the settlement agreement and his argument that he should have received long-term disability benefits on the 2004 claim.

PERFORMANCE BOND'S PLAIN MEANING CONTROLS DISPUTE OVER CONTRACTOR'S RIGHT TO RECOVER FOR SUBCONTRACTOR'S FAILURE TO PERFORM

In a case of first impression, Houston's Fourteenth Court of Appeals decided last Wednesday that a contractor's demand under a performance bond for payment did not require the contractor to terminate the subcontractor and that the notice of claim on the bond was reasonable. *Nova Cas. Co. v. Turner Construction Co.*, Cause No. 14-09-00733- CV (Tex. App.—Houston [14th Dist.] February 10, 2011, n.p.h.) (slip opinion) (opinion on rehearing). Turner contracted with the City of Houston to build a new cargo facility at Bush Airport. Turner hired Box or Container Automation, Inc. ("BOCA") to fabricate and install a baggage handling system. The subcontract gave Turner the right to terminate BOCA or to complete the work itself, required BOCA to obtain a performance bond, and provided a time is of the essence clause. BOCA obtained a standard performance bond from Nova, an A-311 bond. The bond incorporated the terms of the subcontract and gave Nova the right to promptly remedy the situation.

BOCA had trouble on the project. Turner sent several letters to BOCA detailing the problems. On November 9, 2004, Turner invoked its right to have BOCA cure the deficiencies. Turner took over the project when BOCA could not cure. On December 15, 2004, Turner notified Nova that BOCA had defaulted because BOCA abandoned the project. Nova hired a consultant to investigate the default and Turner cooperated with that investigation. On January 21, 2005, Nova notified Turner that it had to terminate BOCA from the project. Turner took the position that BOCA's default, without termination was sufficient to trigger the bond. Turner completed the project for $900,000, more than double the amount of the penal sum of the performance bond. Nova rejected the bond claim on the grounds that BOCA's default was a condition precedent to performance. Turner then sued both BOCA and Nova.

On cross motions for summary judgment, the court had to determine whether BOCA's default was sufficient to trigger the bond or if Turner had to terminate BOCA. As a matter of first impression, the court determined that BOCA's default was sufficient. In reaching its decision, the court relied on the plain language of the A-311 bond. The court also rejected Nova's argument that Turner's notice of claim was unreasonable. Nova argued that the notice of claim was unreasonable because Turner took over the project prior to giving notice of the default. In rejecting the argument, the court noted that the bond incorporated the underlying contract with BOCA which specifically gave Turner the option to take over

the work. The court's decision upheld judgment for Turner against Nova on the performance bond on all issues presented.