



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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### **SOUTHERN DISTRICT INDICATES THAT INSURANCE ADJUSTER WAS IMPROPERLY JOINED BUT GIVES PLAINTIFF ANOTHER CHANCE**

Last Monday, a judge in the United States District Court for the Southern District (Houston Division) issued an opinion regarding improper joinder of a defendant in the context of a motion to remand. In *Medistar Twelve Oaks Partners, Ltd. v. American Economy Insurance Company*, 2010 WL 1996596, Medistar brought suit against the insurance company defendants for various causes of action and against Nelson Architects, a company hired by the insurance company defendants to perform investigations of the property, for fraud, conspiracy to commit fraud and tortious interference with contract. Defendants removed the case based on diversity jurisdiction. Medistar file a motion to remand arguing that there was no diversity of citizenship, because both Medistar and Nelson were Texas Citizens. Defendants countered that Medistar could not establish a cause of action against Nelson in state court, and therefore was improperly joined as a defendant. Specifically, Defendants stated that Medistar did not plead any specific facts for its claims against Nelson, but instead erroneously argued that there could be no remand as long as Medistar could conceivably under some set of facts allege a cause of action against Nelson.

The Court held as a matter of law, since Medistar had no contractual or special relationship with Nelson, Medistar failed to state a claim against Nelson for tortious interference with contract and for conspiracy to defraud. The Court further explained that because Nelson was not a party to any contract with Medistar, Medistar could not assert a claim against Nelson for breach of contract or any cause of action that arises out of a contract. Therefore, to be viable, its claim for fraud against Nelson had to be independent of the contract. The Court held that, because there were essentially no facts regarding the fraud claim in Medistar's petition, a summary judgment-type inquiry was required. The Court explained that "it appear[d] . . . that Medistar would have difficulty showing that it relied on Nelson's allegedly erroneous reports since it contend[ed] that they were incorrect. . . ." The Court decided to grant Medistar an opportunity to provide supporting facts and ordered Medistar to submit within 20 days either an affidavit or deposition of someone with personal knowledge who could provide the necessary supporting facts to satisfy the Fifth Circuit pleading standards to support the elements of its fraud claim against Nelson.

(Editor's Note: Our firm has the privilege of representing Safeco in this case. For additional information on this order, please contact Chris Martin or Barrie Beer of our office.)

### **SOUTHERN DISTRICT DISMISSES INSURANCE ADJUSTER DUE TO NON INVOLVEMENT IN CLAIM AND GRANTS HIM ATTORNEYS' FEES**

Last Monday, a judge in the United States District Court for the Southern District of Texas (Houston Division) granted summary judgment in favor of an insurance adjuster due to his non-involvement in a

claim and awarded him attorneys' fees and costs. In *Riopelle v. Reid*, 2010 WL 1996534, Jamie Gladman filed a motion for summary judgment and produced proof that he performed no work on the plaintiff's claim. In addition, Gladman sought an award of attorneys' fees and costs for having to file the motion for summary judgment. In response, the plaintiff argued that she did not oppose dismissing Gladman, acknowledged his limited involvement with the claim, and realized that he should not be a party to the case. She maintained that in order to resolve the dispute, she offered to dismiss Gladman without prejudice in exchange for Gladman's withdrawal of his motion for summary judgment. Gladman responded that he wanted a dismissal *with prejudice*. Plaintiff responded that she was willing to enter into an agreement in which she would dismiss Gladman with prejudice if he would withdraw his motion. Gladman did not respond, nor withdraw his motion. Plaintiff argued that because she "made a diligent effort to work with Defendant Gladman and to dismiss Defendant Gladman from the lawsuit upon realizing the mistake, no basis exist[ed] for the issuance of attorneys fees or any other costs against Plaintiff." In addition, Plaintiff filed a motion to voluntarily dismiss Gladman *without prejudice*. The Court agreed with Gladman that under 28 U.S.C. 1927, he was entitled to an award of attorneys' fees and costs incurred in having to file his motion for summary judgment, because he demonstrated that the plaintiff's attorney "unreasonably, vexatiously, and at a minimum recklessly, after repeated notice of Goldman's non-involvement in the process of Plaintiff's claim, multiplied the proceedings against Gladman." The Court further held that the plaintiff's motion to dismiss was moot.

(Editor's Note: Our firm has the privilege of representing America First in this case. For additional information on this order, please contact Mary Ellen King of our office.)

## **SOUTHERN DISTRICT HOLDS NO DUTY TO DEFEND OR INDEMNITY DUE TO NON-COVERAGE AND POLICY EXCLUSIONS**

Last Monday, a judge in the United States District Court for the Southern District (Houston Division) held that Liberty Mutual did not owe a duty to indemnify nor defend its insured in an underlying lawsuit against the insured. In *Building Specialties, Inc. v. Liberty Mutual Fire Insurance Company*, 2010 WL 1990115, Building Specialties brought suit against Liberty Mutual for breach of the insurance contract entered into between them and sought defense costs and indemnification for an underlying lawsuit in which Lone Star Refrigeration, Inc. sued Building Specialties for allegedly faulty heating and air conditioning duct work performed by Building Specialties to a residence.

Liberty Mutual contended that, as a matter of law, there was no "property damage" alleged in the underlying suit as required to trigger coverage under the policy. The Court, utilizing an eight-corners analysis, explained that the underlying petition alleged only that the duct work was defective and had to be replaced, but there were no allegations of any resulting physical damage to the duct work itself or to other parts of the house or to the loss of use. Specifically, the petition alleged defective work by the insured but did not allege that the defective work caused physical injury or loss of use, and therefore the petition did not allege covered "property damage." Therefore, the Court held as a matter of law there was no duty to defend, because the lawsuit did not claim covered property damage.

With respect to whether Liberty Mutual owned a duty to indemnify Building Specialties for their liability in the underlying lawsuit, the Court explained that it could consider extrinsic evidence beyond the petition and the insurance policy, including an affidavit submitted by Building Specialties which supported the existence of a duty to indemnify. Liberty Mutual objected to the affidavit as inadmissible hearsay, and Building Specialties failed to identify an applicable hearsay exclusion or exception, nor was one evident from the record. Therefore, the Court sustained Liberty Mutual's objection and held that the record did

not provide evidence of “property damage,” and therefore found no duty to indemnify based on these arguments.

In addition, Liberty Mutual relied on two exclusions which precluded coverage for “property damage” to “your product” and “property damage” to “your work” arising out of it or any part of it and included in the products-completed operations hazard. The Court held that, to the extent Building Specialties claimed a duty to defend or indemnify arising out of “property damage” to the faulty product, that claim was precluded by the “your product” exclusion as a matter of law. And to the extent that Building Specialties claimed a duty to defend or indemnify arising out of “property damage” from the defective installation of the product, the “your work” exclusion applied as well. In conclusion, the Court granted Liberty Mutual’s motion for summary judgment.

(Editor's Note: Our firm has the privilege of representing Liberty Mutual in this case. For additional information on this order, please contact Chris Martin or Patrick Kemp of our office.)

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