The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

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INSURANCE CODE AND DTPA DEMAND LETTER DEEMED INADEQUATE: LAWSUIT TO BE ABATED PENDING PROPER NOTICE

Last Thursday, the Fourteenth Court of Appeals in Houston considered the inadequacy of a pre-suit notice letter that was challenged by the insurer. In *In re Liberty Mutual Fire Ins. Co.*, 2010 WL 1655492 (Tex.App.—Houston [14th Dist.] April 27, 2010), Liberty Mutual adjusted the claim and paid for damage to the building based on its estimate. The insured disagreed with the estimate and demanded payment of policy limits claiming the building was a total loss. Liberty Mutual invoked appraisal and the insured asked for an extension to name its appraiser. During the requested extension, the insured filed a lawsuit against Liberty Mutual and at the same time, sent a purported insurance code and DTPA demand letter and also refused to participate in appraisal. In answer to the lawsuit, Liberty Mutual raised the statutory notice issues by filing a verified plea in abatement and subject to its verified plea, a motion to compel appraisal, motion to compel mediation, original answer, verified denials, affirmative defenses, and special exceptions. The insured did not controvert the verified plea, and instead served notices for depositions and written discovery.

Following multiple motions and hearings, the trial court refused to abate the lawsuit or stay discovery, and compelled Liberty Mutual to answer discovery. But, the trial court also granted Liberty Mutual's motion to compel appraisal. Liberty Mutual sought mandamus of the trial court's refusal to grant the abatement and the Fourteenth Court of Appeals granted a stay on the discovery pending appraisal. After appraisal determined the amount of loss, the appellate court conditionally granted the writ, finding that the insured's pre-suit notice letter was inadequate because it did not state "in enough detail for this court—knowing nothing of his claims and allegations except what he asserted in his letter—to grasp the basis of his complaints against" Liberty Mutual. Specifically, the court stated that the notice letter did not provide specific factual allegations supporting the asserted causes of action, did not specify the amount of damages sustained for the acts alleged, and did not specify the amount of damages for mental anguish. Accordingly, the lawsuit is to be abated until 60 days after a proper demand is submitted to Liberty Mutual.

Editor's Note: Martin, Disiere, Jefferson & Wisdom has the privilege of representing Liberty Mutual in this matter. Feel free to contact David D. Disiere or any of the lawyers with our firm for additional information.

PARTIES UNDER HARRIS COUNTY RESIDENTIAL HURRICANE IKE MASTER PRETRIAL ORDER MUST CHALLENGE THE PRETRIAL ORDER PRIOR TO SEEKING MANDAMUS

In another opinion issued last Thursday, the Fourteenth Court of Appeals denied mandamus relief to a party who had not obtained a ruling from the court prior to seeking mandamus relief. *In re Capital County Mut. Fire Ins. Co.*, 2010 WL 1655461 (Tex.App.—Houston[14th Dist.] April 27, 2010). In the Master Pretrial Order, the trial court has set certain limitations on the parties' ability to seek appraisal. These limitations include that a party may not set a motion to compel appraisal until after the parties have completed informal discovery and failed at mediation. Capital County sought mandamus relief for the trial court's refusal to compel appraisal as a pre-suit condition precedent. The appellate court refused to grant relief because there was no record that Capital County objected to the pretrial order or that it had given the trial court an opportunity to rule on its request for appraisal. The appellate court was not persuaded by the argument that the pretrial order prevented Capital City from obtaining such a ruling, finding that Capital County had not presented evidence that asking the trial court to consider its motion would have been futile.

CONTRACTOR WHO TOOK ASSIGNMENT OF INSURED'S INSURANCE PAYMENTS NOT ENTITLED TO RECOVER ON ASSIGNMENT AFTER BEING FIRED FROM THE JOB AND UNABLE TO SHOW IT ACTUALLY DID ANY WORK

In an opinion issued last Wednesday, a federal court in the Southern District of Texas refused to allow a contractor to recover on its claim for payment arising from an assignment of insurance proceeds of a Hurricane Ike Claim. *Hallmark Restoration Group, LLC v. Cachola Prop., LLC*, 2010 W. 1710800 (S.D. Tex. April 26, 2010). Cachola hired Hallmark to fix damage to an apartment complex after Hurricane Ike. Cachola assigned its insurance payments to Hallmark in the contract. Shortly after hiring Hallmark, Cachola fired it. Hallmark sued Cachola to recover payment.

The court found that Hallmark presented no "reliable record of the work that they did on the property." The court described the evidence of its Exactimate entries as ranging from sloppy to fraudulent. The court described instances in the evidence where Hallmark failed to remove doors and windows from the square foot calculations, and situations where Hallmark billed for high-end items and changed the description to a low-grade item. The court also commented on instances of formatting hard drives for no functional reason and other efforts to hide data from discovery. Ultimately, the court denied Hallmark's claim for damages and awarded costs to Cachola.