The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
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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APPELLATE COURT CONDITIONALLY GRANTS WRIT TO COMPEL HURRICANE IKE APPRAISAL AND ABATES UNDERLYING BAD FAITH SUIT

Last week, a Houston appellate court determined the trial court overseeing all Hurricane Ike cases in Houston abused its discretion and conditionally granted a petition for writ of mandamus and directed the trial court to grant a carrier's combined plea in abatement and motion to compel appraisal. In *In Re Slavonic Mut. Fire Ins. Assoc*., 2010 WL 1236333 (Tex. App.—Houston [14th Dist.] April 1, 2010), the carrier issued a fire and extended coverage insurance policy to the Requenas covering their home, which was damaged by Hurricane Ike. The policy contained a standard appraisal clause with no deadline by which either side must invoke it.

After Hurricane Ike, the Requenas reported a claim for property damage and Slavonic adjusted and paid the claim. A reservation of rights letter was also issued to protect Slavonic's rights under the policy. Subsequently, the Requenas notified Slavonic that the roofing contractor wanted to replace the entire roof and the homeowner's association would not permit a partial replacement. After a re-inspection, the Requenas provided receipts and a copy of a contract for the cost of a new roof. Once Slavonic reviewed the report it issued a new check for minimal duct work and concluded complete roof replacement was not justified.

Not until several months later did Slavonic get served with a lawsuit and simultaneous notice letter claiming entitlement to economic damages, mental anguish and attorneys' fees. Within one week of being served Slavonic invoked the appraisal process. And, after receiving no response, Slavonic filed a combined plea in abatement and motion to compel appraisal. The trial court denied the motions finding waiver. Slavonic then filed this mandamus proceeding.

In analyzing the waiver issue, the appellate court noted the policy contained an anti-waiver clause and Slavonic issued a reservation of rights letter preserving its rights, which was a clear indication it had not intentionally waived its right to appraisal. On the other hand, the Requenas argued the appraisal process was waived because it was invoked 118 days after it was clear the parties disagreed about the amount of the loss. The Requenas also argued Slavonic invoked the appraisal after suit was filed and it was notified of an opinion the entire roof should be replaced.

The appellate court was not persuaded by a recent federal case, cited by the Requenas, in which the court found waiver. Instead, the court focused on the date of disagreement as the point of reference to determine whether a demand for appraisal was timely made. Here, the court concluded it was not until the Requenas issued their demand letter stating they did not accept Slavonic's determination of their claim. Slavonic then requested appraisal six days later, and the appellate court held it was not waived.

Editor's note: MDJW, led by the contributions of partners Chris Martin and Levon Hovnatanian, had the privilege of writing an amicus brief on behalf of the carrier group in this mandamus proceeding. The firm congratulates Slavonic on its courage to address the issue and is encouraged by the result given the current litigation climate for Hurricane Ike claims.

APPELLATE COURT HOLDS CARRIER AND AGENT NOT LIABLE FOR DAMAGES EXCEEDING POLICY LIMITS DUE TO ALLEGED UNDEREVALUATION OF HISTORIC HOME

At the beginning of April, the Austin Court of Appeals upheld a jury verdict in favor of a carrier and its agent that they were not liable for damages exceeding a homeowners policy related to the value to replace a historic home destroyed by fire. In *Bryce v. Unitrin Preferred Ins. Co*., 2010 WL 1253579 (Tex. App.—Austin, April 1, 2010), a fire destroyed the Bryces' historic home, which was insured by Unitrin under a replacement cost policy. As a result of the fire, Unitrin paid the full policy limits of $474,000 for the dwelling and $284,000 for the contents. The actual replacement cost for the dwelling and contents, however, far exceeded the policy limits. It was estimated the Bryces' home replacement cost was $1.7 million and their personal property was valued at $864,000. Suit was filed against Unitrin and the insurance agent alleging negligence and violations of the Texas Insurance Code.

In 1983 the Bryces purchased their home for $210,000 and immediately invested $242,000 in improvements. From the purchase date until the fire, the Bryces used the same agent to place insurance. In 1984, the Bryces requested their insurance coverage for replacement cost be increased to $285,000. This request was carried out and after 1984, no further requests were made. Policy limit increases were initiated over the years merely due to inflation. The court noted Mrs. Bryce made frequent complaints about the cost of premiums being so high at the level of coverage issued for the home. At some point the Bryces switched carriers and the new policy was discussed and the Bryces agreed to the numbers suggested for coverage. After receiving the application for coverage, a standard inspection was completed. As a result, and based on comments by the underwriting department, the coverage amount remained the same as requested under the application. In 2002, in response to a mold claim, an adjuster inspected the home and commented that the home was "way underinsured." Unitrin ordered another inspection to confirm the adjuster's comments. The inspection, though different than what was ordered, rendered a finding that the house was actually over insured. Relying on the report, Unitrin did not make any changes to the policy limits. Several conversations between Mrs. Bryce and the adjusters for Unitrin were discussed during trial, but failed to provide any information inconsistent with the policy limits previously established for the home.

After hearing all the evidence, the jury returned a unanimous verdict that the Bryces' negligence alone proximately caused their home to be underinsured. The jury further found that neither Unitrin nor its agent committed unfair or deceptive acts in violation of the Texas Insurance Code. On appeal, the Bryces argued three issues: 1.) the trial court erred by including the Bryces in the negligence question submitted to the jury, 2.) the jury's finding that the Bryce's' negligence alone proximately caused their home to be underinsured was not supported by factually sufficient evidence, and 3.) the jury's finding that neither Unitrin nor its agent made any misrepresentations in violation of the Insurance Code was not supported by factually sufficient evidence. In affirming the trial court's judgment, the appellate court held the Bryces waived their first argument and held there was factually sufficient evidence to support the jury's findings.

FEDERAL COURT HOLDS CARRIER FULFILLED ITS DUTY TO INDEMNIFY FOR CONSTRUCTION DAMAGES AFTER OBTAINING A VALID RELEASE FROM HOMEOWNER

Last Monday a federal court held Mid-Continent satisfied any duty to indemnify its insured through payment of a settlement and through obtaining a valid release. In *Rotella v. Mid-Continent Cas. Co.*, 2010 WL 1330449 (N.D. Tex. April 5, 2010), Rotella, a homebuilder, sought indemnity from Mid-Continent for damages stemming from a judgment arising from an underlying suit with claims for fraudulent billing practices, breach of contract, and construction defects. The duty to indemnify was the single issue left from an original petition seeking damages for breach of contract, bad-faith insurance practices, deceptive trade practices, and negligent misrepresentation. The duty to indemnify was further narrowed as the court held Mid-Continent was not responsible for damages related to fraud and overbilling. Therefore, the issue before the court was whether Mid-Continent had a duty to indemnify Rotella for construction defect damages amounting to $514,678.27.

Even though Mid-Continent contested it had a duty to indemnify Rotella for the construction-defect damages, it nonetheless entered into a settlement with the homeowner. Mid-Continent moved for summary judgment on the basis that it had obtained a settlement agreement and valid release of the homeowner's claims to the construction defect damages. Rotella also filed a summary judgment on the indemnity issue. Rotella argued that Mid-Continent's duty to indemnify was to him rather than to the homeowner. And, Mid-Continent could not perform its duty by paying the homeowner. The court quickly dismissed this argument recognizing the Texas Supreme Court has held a loss which triggers an insurer's duty to indemnify under a CGL policy is the property of the party who suffered the loss, not the party insured by the policy. As a result the court held Mid-Continent was entitled to judgment as a matter of law on Rotella's duty to indemnify claim.

COURT STAYS WORKERS' COMPENSATION BAD-FAITH SUIT INDEFINITELY PENDING RESOLUTION OF THE *RUTTIGER* CASE SET FOR ORAL ARGUMENT WITH THE TEXAS SUPREME COURT ON APRIL 14, 2010

Last Monday, a judge in Guadalupe County, Texas indefinitely stayed a workers' compensation bad-faith suit until the Texas Supreme Court issues a ruling in the *Texas Mut. Ins. Co. v. Ruttiger* (Cause No. 08-0751) matter set for oral hearing this Wednesday at 9 a.m. MDJW represented Liberty Mutual and its adjuster against Kathryne Vause and her lawyers, the Doyle Raizner firm, in obtaining the indefinite stay. The court recognized the need and opportunity for the Texas high court to weigh in on the debate related to the existence of bad faith in the workers' compensation context. Trial in the Vause matter was set to begin in May 2010.

Editor's Note: We track all insurance coverage and bad faith cases of any significance through the Texas appellate courts to the best of our ability and the *Ruttiger* case, now before the Texas Supreme Court, is one which we are following very carefully given the explosion of workers comp bad faith cases in Texas over the past 18 months. We will have lawyers in attendance at this week's oral argument in *Ruttiger* and we will report next week on any developments.