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

March 22, 2010

INSURER HAS NO DUTY TO WARN OF SALVAGED-TITLED CAR'S CONDITION WHEN SOLD UNDER TEXAS TRANSPORTATION CODE SECTION 501.092

In a decision of first impression issued last Wednesday, the San Antonio court of appeals rejected the notion that an insurer must warn purchasers of a salvaged-titled car of the car's safety and suitability for rebuilding, reconditioning, or repair when, as here, the car was sold in an auto auction in its visibly unrepaired condition with salvage-title. *Leal v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 962286 (Tex. App.—San Antonio, March 17, 2010). In 1995, State Farm paid for damage to its insured's auto and exercised its contractual right to take the vehicle for salvage. Then, pursuant to section 501.092 of the Texas Transportation Code, State Farm then obtained a salvage title for the car and sold the visibly unrepaired vehicle at auction. The car was repaired and sold, eventually making its way back onto the streets where it was involved in an accident that killed three passengers in the vehicle.

The plaintiffs, representative of the deceased passengers, sued State Farm under theories of negligence and strict liability for its role in selling the salvaged-titled car at auction. The trial court granted summary judgment to State Farm, finding it had complied with the Texas Transportation Code and had no additional duties to warn. In upholding the summary judgment, the court of appeals relied on the Texas Transportation Code section and the well-developed body of law surrounding products-liability claims when the product's risks are obvious.

FIFTH CIRCUIT JUDGES ASK COURT TO RECONSIDER EN BANC ITS "OTHER INSURANCE" ANALYSIS

In a concurring opinion issued last Tuesday, Judges Emilio Garza and Jennifer Elrod asked the Fifth Circuit to en banc reconsider its "Other Insurance" analysis under *Hardware Dealers Mutual Fire Insurance Co. v. Farmers Insurance Exchange*, 444 S.W.2d 583 (1969). The judges concurred in a three-judge panel decision that found two insurance policies' "other insurance" provisions to be in *conflict* even though one specifically stated it would be primary and the other stated it would be excess. *Willbros RPI, Inc. v. Continental Cas. Co.*, --- F.3d ----, 2010 WL 924703 (5th Cir. 2010). The concurring opinion criticized another panel's decision, *Royal Insurance Co. of America v. Hartford Underwriters Insurance Co.*, 391 F.3d 639 (5th Cir.2004), which adopted a new conflict analysis for the Fifth Circuit. After discussing Texas law on conflicting "other insurance" provisions and the development of the doctrine in the Fifth Circuit, concurring opinion explains that the *Royal Insurance* opinion ignores the plain language of the insurance policies at issue. As explained by the concurring opinion, the *Royal Insurance* analysis creates an artificial conflict in "other insurance" provisions.

FEDERAL MAGISTRATE REFUSES TO ABATE LAWSUIT UNTIL INSURED COMPLIES WITH REQUEST FOR EXAMINATION UNDER OATH

In an order issued last Monday, a federal magistrate judge refused to abate a lawsuit against the independent adjuster and its employee who investigated the plaintiff's Hurricane Ike claim. *PJC Bros., LLC v. S & S Claims Service, Inc.*, --- F.R.D. ----, 2010 WL 961795 (S.D.Tex. March 15, 2010). Plaintiffs have sued for failure to pay enough on its claim under a commercial property policy. The insurer, Certain Underwriters at Lloyds, was not a party at the time the order was entered. The claim was filed on September 17, 2008. The claim was initially denied on February 6, 2009. The lawsuit was filed on September 10, 2009. After the suit was filed, but before service, the examination under oath was requested. The defendants moved to abate until the EUO was completed.

In denying the request, the order considers the insurance policy's provision for an EUO to be subject to the Federal Rules of Procedure. And, as such, the Federal Rules control not the insurance policy. The order cites Texas law that the refusal to comply with a request for an EUO relieves the insurer of its burden to pay the loss. But, the order finds that "the abatement sought here would be contrary to the cardinal principle that the rules of procedure be administered 'to secure the just, speedy, and inexpensive determination of every action.' Fed. R. Civ. P. 1."