



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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RESTITUTION UNINSURABLE UNDER TEXAS LAW AS A “LOSS” UNDER EXECUTIVE AND ORGANIZATION LIABILITY COVERAGE

Last Wednesday in a case of first impression, a three-judge panel of the Fifth Circuit upheld a summary judgment entered for National Union on the basis that the return of funds due to a fraudulent transfer constitutes restitution, which is uninsurable under Texas law. In *the matter of Transtexas Gas Corp.*, __ F.3d __ 2010 WL 447323 (5th Cir. Feb. 10, 2010), TransTexas purchased executive and organization liability coverage from National Union. Shortly thereafter, TransTexas’ CEO resigned and TransTexas agreed to pay him \$3 million in installments as severance pay. A few months later TransTexas filed bankruptcy. In an adversary proceedings, the bankruptcy court determined that the severance payments were unlawful preferences and fraudulent transfers, ordering the CEO to repay the installments he had received. National Union had defended the CEO in the adversary proceeding pursuant to a reservation of rights. Following the bankruptcy court’s decision, National Union filed a declaratory judgment action as to whether the repayment of the installments payments was covered by the policy.

In reaching its decision, the panel looked to the policy language defining “loss” and the nature of the claims determined in the adversary proceeding. The panel also looked to a similar decision from the Seventh Circuit reaching the same result. The judgment creditor argued the policy should provide coverage because the CEO was entitled to severance payments under his separation agreement. But the panel disagreed declaring that “payments fraudulent as to creditors that must therefore be repaid ... is a disgorgement of ill-gotten gains and a restitutionary payment.”

SAN ANTONIO COURT OF APPEALS DETERMINES THAT ACCIDENT CAUSED BY ICE FALLING FROM PASSING TRACTOR TRAILER DOES NOT SATISFY ACTUAL PHYSICAL CONTACT REQUIREMENT OF UM/UIM POLICY

Last Wednesday, the San Antonio Court of Appeals determined that a driver was not entitled to recover under his uninsured/underinsured motorist coverage of his personal auto policy for an accident caused by ice falling from a passing tractor trailer. *Hernandez v. Allstate County Mut. Ins. Co.*, 2010 WL 454949 (Tex. App.—San Antonio Feb. 10, 2010). The policyholder alleged ice falling from a passing tractor trailer struck his vehicle, causing him to lose control and have an accident. Citing the relevant policy language and the Texas Supreme Court’s decision in *Nationwide Ins. Co. v. Elchehimi*, 249 S.W.3d 430, 435-436 (Tex. 2008), the court of appeals held the Texas UM/UIM policy did not provide coverage since Hernandez’ vehicle did not come into actual physical contact with another vehicle.

HOUSTON COURT OF APPEALS CONSIDERS MANDAMUS OF DENIAL OF APPRAISAL BY HARRIS COUNTY HURRICANE IKE RESIDENTIAL CLAIM UNDER MASTER PRE-TRIAL ORDER

As of last Tuesday, the Fourteenth Court of Appeals has before it on full briefing an order denying appraisal entered by the Harris County trial court which has been assigned all residential Hurricane Ike claims for pre-trial purposes. *In re Slavonic Mut. Fire. Ins. Ass.*, Cause No. 14-09-01057-CV. In the mandamus, Slavonic appeals the trial court's denial of its motion to enforce the policy's appraisal provision. Among other things, the policyholder has argued that Slavonic waived the provision when it paid the undisputed portion of the claim and waited until after a lawsuit was filed to invoke the provision. The briefings of the parties can be found here: [Petition](#) / [Response](#)

[Editor's Note: our firm is currently involved in the drafting of an amicus brief on behalf of certain carriers interested in these appraisal issues. Any carrier interested in considering joining the industry efforts on this important issues, please contact Chris Martin or Levon Hovnatanian at 713-632-1700. We will continue to monitor this mandamus proceeding along with several others currently pending on the appraisal issue. If you need more information concerning this mandamus or any of the others, we invite you to contact any of the lawyers on our insurance team to obtain more information.]

MDJW WELCOMES OUR NEWEST INSURANCE LAWYERS

MDJW is pleased to welcome several new lawyers to our Insurance Team. George Lankford has joined the firm as a Partner in our Dallas office. Over the last 25 years, George has developed a great reputation as a first-rate insurance coverage and bad-faith trial lawyer, and we are thrilled he is now on our team. He has extensive experience in almost every type of insurance claim and insurance lawsuit which our firm handles, and we are very fortunate to have a lawyer of his caliber to anchor our North Texas insurance work.

Nejat Ahmed has also joined the Dallas office as Of Counsel. She is a 2002 graduate from Baylor Law School and has extensive experience in hurricane, liability, and property loss claims. We are thrilled to have her on our team as well.

Ashley Applewhite has joined the Austin office as an Associate. She is a graduate from South Texas College of Law and has worked on insurance coverage and bad faith lawsuits for most of her legal career. She has a great depth of experience in the exact types of coverage and bad faith cases we handle.

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