



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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### **DALLAS FEDERAL COURT RULES ON CARRIER'S ENVIRONMENTAL COVERAGE CLAIMS REGARDING WASTE MIGRATION FROM ADJOINING PROPERTY**

In *American International Specialty Lines Insurance Company v. 7-Eleven, Inc.*, No. 3:08-cv-807-M, 2010 WL 184444 (N.D. Tex. Jan. 19, 2010), American International Specialty Lines Insurance Company ("AISLIC") was the insurer of a property formerly used as a gas station that adjoined a property currently owned by 7-Eleven, Inc., and used as a gas station. AISLIC claimed that gasoline leaked from underground storage tanks under the 7-Eleven station and seeped into the soil and groundwater under the insured property. The Texas Commission on Environmental Quality (the "TCEQ") required AISLIC to investigate and clean up the contamination on the insured property. AISLIC sought (i) injunctive relief requiring 7-Eleven to investigate and remediate the contamination on the insured property, under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*; (ii) summary judgment on a claim for reimbursement of AISLIC's prior investigation and remediation costs, under the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. § 361.444 ("SWDA"); (iii) a declaratory judgment that 7-Eleven was liable for AISLIC's past and future costs of clean up for the insured property; and (iv) summary judgment on 7-Eleven's affirmative defense that AISLIC "made insufficient and dilatory efforts" to respond to the contamination. In response, 7-Eleven sought summary judgment on AISLIC's RCRA claim." The Court held that AISLIC was entitled to summary judgment on its SWDA claim but that all other claims for relief should be denied.

AISLIC proved that (i) 7-Eleven was the owner or operator of a waste treatment, storage, or disposal facility, namely the 7-Eleven gas station that contained underground storage tanks for 20 years; and (ii) 7-Eleven was responsible for the storage of hazardous waste (petroleum hydrocarbons) on the site, as defined as "contributing to" a waste release that occurred while 7-Eleven owned and operated the property. Also, AISLIC showed that its clean up actions were "necessary" merely because there was contamination, and that its costs were "reasonable and necessary" because it performed typical remediation efforts that reduced contamination on the site. Separately, the Court held that genuine issues of fact existed as to whether the contamination caused by the seepage constituted an imminent threat to human health or the environment because, although contamination levels existed for decades, they did exceed state-approved contamination levels. Finally, the Court held that the commingling of migrating contamination with existing on-site contamination precluded summary judgment on the issue of whether a two-year delay in remediation efforts constituted "insufficient and dilatory" response efforts.

### **HARTFORD DID NOT ABUSE DISCRETION IN REVIEWING CLAIMANT'S DISABILITY CLAIM**

Darlene McDonald, an office manager, suffered from degenerative disc disease in her spine. Following a surgical procedure intended to alleviate her back pain, she ceased working and applied for long-term

disability benefits under her employer's ERISA plan with Hartford Life Group Insurance Company. After reviewing McDonald's medical records and interviewing her treating physicians, Hartford denied benefits, finding that she was capable of performing sedentary work and therefore did not meet the plan's definition of "disabled." McDonald brought two administrative appeals, both of which Hartford denied. McDonald brought suit, alleging Hartford abused its discretion by denying her claim. The district court granted summary judgment for Hartford, and McDonald appeals. The Fifth Circuit affirmed the ruling of the district court last week in *McDonald v. Hartford Life Group Insurance Company*, 2001 WL 183431 (5th Cir. 2010).

McDonald argued that Hartford's dual role as insurer and plan administrator created a conflict of interest to change the standard of review, and the court rejected this argument stating "Hartford's dual role as both insurer and plan administrator may create a conflict, that conflict is not a significant factor that would justify a change in the standard of review." Next, McDonald argued that because the three reviewing physicians are employed by agencies that contract with Hartford, the physicians were biased in favor of Hartford. Again, the court rejected this argument because McDonald failed to pursue discovery on the issue or present evidence to show abuse of discretion or justify a change in the standard of review. The court stated that the evidence she provided failed to rise past the level of conclusory allegations. Third, McDonald argued that Hartford abused its discretion by failing to order a new physical examination as recommended by doctors in the administrative review process. The court rejected this argument, because the policy placed the burden of proof of loss on the claimant and she failed to meet the burden. Fourth, McDonald argued that Hartford abused discretion by improperly discounting the opinions of her treating physicians. The court, recognizing that the Supreme Court has rejected this argument in the ERISA context, rejected this argument. Fifth, McDonald argued that Hartford abused its discretion by failing to give adequate weight to her consistent complaints of pain. In rejecting this claim, the court found that Hartford's reviewing physicians clearly "considered, evaluated, and addressed" McDonald's subjective complaints of pain. Finally, McDonald argued that Hartford "cherry-picked" quotes and facts out of the administrative record to support its decision to deny her claim for benefits. The court rejected this argument recognizing that "under Fifth Circuit law, Hartford has discretion under the plan to investigate the claim and draw the conclusions it deems proper. The law requires only that substantial evidence support a plan fiduciary's decisions, including those to deny or to terminate benefits, not that substantial evidence (or, for that matter, even a preponderance) exists to support the employee's claim of disability."

## **WELCOME UH LAW SCHOOL PROPERTY & CASUALTY LAW STUDENTS**

For the past decade, three MDJW partners have taught various insurance law courses at the University of Houston Law School. MDJW Insurance Partners David Disiere and Jamie Cooper welcome their most recent University of Houston Law Center Property and Casualty Insurance Law students as new subscribers to the Newsbrief - not only a great resource, but also a great teaching tool. The firm wishes them all the best this semester. (The bonus for tomorrow's class is "fortuity doctrine.")

Our firm's commitment to remain on the cutting edge of the ever-evolving nature of Texas Insurance Law manifests in many ways including legal scholarship, academic teaching, industry training, legal publishing, and professional development teaching. It is an honor that the University of Houston Law School turns to our partners semester after semester to teach its students what they need to know about different aspects of Texas insurance law and we appreciate the opportunities to do so.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.  
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