The Weekly Update of Texas Insurance News
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FIFTH CIRCUIT REFUSES TO EXTEND MID-CONTINENT V. LIBERTY MUTUAL TO ACTION TO RECOVER DEFENSE COSTS

Last Tuesday, in a case of first impression, a three-judge panel of the Fifth Circuit considered whether "the holding in *Mid-Continent* extends to an insurer's duty to defend its insured. If [it] does not apply, then we must decide whether insurance companies that pay defense costs may recoup a portion of those costs from a co-insurer that fails to defend a common insured." *Trinity Univ. Ins. Co. v. Employers Mut. Cas. Co.*, __ F.3d __, Cause No. 08-20532 (January 4, 2010) (slip opinion). Multiple insurers issued CGL policies to Lacy Masonry, Inc. The policies contained materially identical *pro rata* "other insurance" clauses. Employers' policy contained an exclusion for EIFS work. When Lacy Masonry was sued for construction defects, the non Employers policies accepted the claims, and shared the defense costs. Employers denied the claim and refused to participate in the defense.

The panel began its analysis by determining that the Employer's policy provided coverage despite the EIFS exclusion. The panel then turned to the question of the day – whether the defending insurers could recover a portion of their defense costs from Employers. The panel distinguished *Mid-Continent*, reading it to apply on to indemnity costs. The panel then set forth the requirements for a contribution claim under Texas law and, based on its review of the evidence, determined whether the elements were satisfied. Notably, the panel did not cite to any decisions by Texas state courts on whether *Mid-Continent* applies to the defense costs.

INSURED'S THIRD-PARTY CUSTOMER MAY RELY ON AGENT STATEMENTS AND CERTIFICATE OF INSURANCE TO BRING CLAIMS AGAINST AGENT AND INSURER WHEN COVERAGE IS NOT AS EXPECTED

In another case of first impression, the First Court of Appeals in Houston decided that a third-party may rely on representations of coverage and a certificate of insurance to pursue the agent and insurer because of incorrect information about the scope of coverage. *Brown & Brown of Texas, Inc. v. Omni Metals, Inc.*, __S.W.3d __, 2009 WL 4856782 (Tex. App.—Houston [1st Dist.] 2009). Port Metals Processing stored and processed metals for Omni. Port Metals purchased insurance for its operations. Omni required, as a condition of doing business with Port Metals, that the insurance provide coverage for Omni's products stored at Port Metals. A fire occurred at Port Metal's facility that damaged Omni's products. A dispute concerning the loss to Omni's steel arose. Omni sued the agent and the insurer who provided the insurance coverage to Port Metals that was supposed to provide coverage for Omni's product. A jury found for Omni on its allegations of negligent misrepresentation, and violations of Article 21.21 and the DTPA.

The agent and insurer appealed the jury verdict offering the court multiple grounds to prevent Omni, a third-party to the insurance contract, from recovering. After reviewing the evidence, the majority held that Omni could recover on its theories. It rejected the insurer's and agent's arguments that Omni should not be able to rely on the agent's statements or the certificate of insurance as a third-party to the insurance policy. The court rejected the arguments that Omni should not be able to rely on the certificate of insurance, which no one read. The court focused on the agent's failure to tell Port Metal that the insurance policy changed over time, including an exclusion in later years that it had not had when first issued. Lastly, the court distinguished the *Safety Net* decisions in which it was held *additional insureds* – as opposed to *customers* – could not bring the claims that Omni brought here.

In a well-reasoned and succinct dissent, Justice Nuchia would hold that a person who is not a party to an insurance policy cannot recover from the insurance company or agent based on information outside of the actual policy. The dissent would apply the Texas Supreme Court's decision in *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006), which held that additional insureds do not have causes of action that the court allows non parties to pursue here.

INSURER WINS DECLARATION THAT IT DID NOT VIOLATE INSURANCE CODE BY SELLING STOP-LOSS POLICIES TO SELF-FUNDED PLANS

In a case of first impression issued recently, the Austin Court of Appeals held that self-funded plans are insurers under Texas law and that self-funded plans purchase reinsurance when they purchase stop-loss policies. *American Nat'l Ins. Co. v. Texas Dept. of Ins.*, 2009 WL 4878676 (Tex. App.—Austin Dec. 16, 2009). In a regular audit of American National, the TDI determined that it had failed to properly report and pay fees related to the sale of stop-loss insurance coverage, also known as excess-loss insurance, to various governmental and private self-funded employee benefit plans. Stop-loss coverage allows self-funded plans to minimize risk by shifting some of the risk onto an insurance carrier.

American National contended that the alleged violations only applied if the policies were considered direct insurance as opposed to reinsurance because the TDI has no authority to regulate reinsurance. After reviewing the applicable statutes and codes, the court agreed with American National. The court rejected the TDI's argument that self-funded plans were not permitted to purchase reinsurance under the insurance code, and that stop-loss policies cannot be reinsurance.

UM/UIM COVERAGE NOT AVAILABLE TO INSURED INJURED BY SELF-INSURER OWNED VEHICLE, DESPITE INSURED INABILITY TO PURSUE SELF-INSURER

Recently, a federal court in the Northern District of Texas considered whether UM/UIM benefits were available to a claimant when the uninsured vehicle is owned by a rental company and no cause of action is available against the rental company. *McQuinne v. American Home Assur. Co.*, 2009 WL 5033946 (N.D. Tex. Dec. 22, 2009). McQuinne was injured in an auto accident involving a rental vehicle. The rental vehicle's driver paid its $50,000 liability limits. McQuinne contended his injuries exceeded the liability limit and submitted a claim for UM/UIM coverage to his insurer. His insurer rejected the claim, relying on the definition of an uninsured motor vehicle which specifically excludes vehicles owned or operated by self-insurers, like rental companies.

Reading and enforcing the UM/UIM provisions of the Texas Standard Auto Policy as written, the court agreed with American Home Mortgage. The court rejected McQuinne's arguments that the exception

should not apply when the victim is unable to pursue the self-insurer. Under McQuinne's argument, the exception would only apply if the victim could sue the self-insurer, which would allow the victim to be made whole. The court noted that the UM/UIM provision could have included the exception McQuinne suggested.