



The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF



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## **FEDERAL DISTRICT COURT DISMISSES ALL CLAIMS AGAINST INSURER IN HURRICANE IKE LAWSUIT**

Recently, Judge Melinda Harmon (Federal District Court Judge from the Southern District of Texas) dismissed all claims brought against Allstate Texas Lloyds' arising from alleged non-payment of insurance benefits for damage to Judy Hudgens' home caused by Hurricane Ike, including claims of breach of contract, fraud, unfair settlement practices, noncompliance with the prompt payment provisions of the Texas Insurance Code, and breach of the duty of good faith and fair dealing. *See Hudgens v. Allstate Texas Lloyd's*, C.A. No. H-11-2716, 2012 WL 2887219 (S.D. Tex. July 13, 2012).

On Allstate's motion to dismiss, the court dismissed Hudgens' claims of common law fraud, breach of duty of good faith and fair dealing, and violations of the Texas Insurance Code because she failed to meet the pleading standards and she had already had "two bites of the apple" in filing two pleadings. As examples of pleading deficiencies, the court noted Hudgens did not provide any facts that show that Allstate's liability was reasonably clear, that her claims were covered under particular provisions of the policy, what Allstate knew at the time it denied her claims, any proposed settlement within the policy limits that Allstate failed to effectuate, why and how Allstate's payments were unreasonably delayed, or where its investigation was not reasonable.

The court also granted Allstate's motion for summary judgment on Hudgens' breach of contract claim. Allstate submitted evidence proving that Hudgens voluntarily invoked the appraisal provision in the policy, that she and Allstate each appointed appraisers, and that a binding appraisal award issued on the claim that was signed by both appraisers. Allstate paid Hudgens the amount of the appraisal award after subtracting the deductible and amounts previously paid and Hudgens accepted that payment. Hudgens argued in response that the appraisal award should be set aside. The court found she failed to produce any evidence showing the grounds required to set aside an appraisal award and granted summary judgment. The most recent ruling dismissed all of the insured's remaining extra-contractual claims.

## **TYLER COURT OF APPEALS ISSUES CONDITIONAL WRIT OF MANDAMUS; TRIAL COURT IS DIRECTED TO SEVER AND ABATE EXTRA- CONTRACTUAL CLAIMS AGAINST INSURER**

The Court of Appeals in Tyler recently conditionally issued a writ of mandamus directing the trial court to sever a breach of contract claim against Texas Farm Bureau from the remaining extra-contractual claims and abate discovery regarding the remaining claims until there is a final judgment in the breach of contract claim. *See In re Texas Farm Bureau Underwriters*, --- S.W.3d ---, 2012 WL 2916959 (Tex.App. – Tyler, July 18, 2012) (orig. proceeding).

Terry Graham, Jr. shot and killed Hiram Joshua Chambers. In a civil lawsuit that followed, Graham requested a defense from Farm Bureau, but Farm Bureau denied Graham's request. Graham hired attorneys to defend him, and after a trial, a jury found that Graham was not liable. Graham brought a breach of contract claim against Texas Farm Bureau seeking reimbursement of the money he paid to his attorneys and also asserted extra-contractual claims against Farm Bureau based on the duty of good faith and fair dealing that an insurer owes to its insured.

Farm Bureau filed a motion to sever and abate Graham's extra-contractual claims. Farm Bureau alleged that it had offered to settle Graham's breach of contract claim for \$15,000, and argued that, without a severance, it would be prejudiced by evidence of that settlement offer being presented at trial. Farm Bureau also contended that the extra-contractual claims should be abated until final resolution of Graham's contractual claim because information that would be privileged from discovery on the contractual claim would be subject to discovery on the extra-contractual claims. The trial court denied Farm Bureau's motion.

In conditionally granting Farm Bureau's petition, the court of appeals concluded that all of the facts and circumstances of the case unquestionably required a severance to prevent manifest injustice. Farm Bureau offered to settle Graham's breach of contract claim for \$15,000. That evidence, which is ordinarily inadmissible in the trial of a disputed breach of contract claim, may be admissible on the extra-contractual claims to rebut evidence that the insurer acted in bad faith. The court reasoned that Farm Bureau would be unfairly prejudiced by the admission of its settlement offer in the trial of the breach of contract claim, and Graham would be unfairly prejudiced by the exclusion of the settlement offer in the trial of the extra-contractual claims.

With regard to the motion to abate the extra-contractual claims, the court noted that Graham would seek information through discovery regarding Farm Bureau's handling of the underlying claim made the basis of the breach of contract. The court stated this information is relevant and discoverable on the extra-contractual claims, but is privileged and protected from discovery when focusing only on the breach of contract claim. Thus, the court held that Farm Bureau had also shown that the trial court abused its discretion in denying its motion to abate.

## **FEDERAL DISTRICT COURT CONCLUDES INSURER MAY DENY A CLAIM AFTER APPRAISAL IF LOSS WAS NOT THE RESULT OF A COVERED CAUSE**

Last Monday, in *Amtrust Ins. Co. of Kansas, Inc. v. Starship League City, L.P.*, C.A. No. 4:11-CV-00672, 2012 WL 2997404 (E.D. Tex. July 23, 2012) (Clark, J.), Judge Ron Clark (Federal District Court Judge from the Beaumont Division of the Eastern District of Texas) denied a motion to dismiss filed by Starship League City in a declaratory judgment action initiated by its insurer, Amtrust. Amtrust filed the action seeking judgment declaring and determining the rights of the parties related to, among other things, the liability for and damage covered under the Amtrust policy and whether the insured complied with its conditions precedent to recovery. The insured filed a motion to dismiss asserting that Amtrust was precluded from challenging the appraisal award issued by an umpire regarding the cost of replacing Starship's roof. Starship argued the Texas Supreme Court made it clear in *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 891 (Tex. 2009), that the appraisal process is determinative, and the umpire's award binds the parties and forecloses further litigation by the parties. In denying the motion to dismiss, the court concluded that *Johnson* did not foreclose the rights of an insurer to deny a claim on the basis that a loss was not the result of a covered cause.

## **ALCOHOL EXCLUSION IN LIFE INSURANCE POLICY APPLIED AS WRITTEN BY FIFTH CIRCUIT**

In a case of first impression recently released, the Fifth Circuit considered a life insurance policy for accidental death benefits that excluded injuries “sustained as a result of being legally intoxicated from the use of alcohol.” *Likens v. Hartford Life and Acc. Ins. Co.*, --- F.3d ----, 2012 WL 2926966 (5th Cir. July 19, 2012). The insurer had denied the claim based on the exclusion and the beneficiary sued for breach of contract. The Fifth Circuit rejected the beneficiary’s argument that the exclusion was ambiguous. The Fifth Circuit briefly reviewed other decisions that addressed similar exclusions before turning to the Texas Penal Code for the standard for legal intoxication. The Fifth Circuit reasoned that the insured was intoxicated at the time of the injuries leading to his death because Texas defines legally intoxicated at 0.08 blood alcohol level and the insured’s was 0.262. The Fifth Circuit considered the death certificate which noted that the death was accidental but also documented that the intoxication was a contributing factor.

### **FIFTH CIRCUIT APPLIES STRICT VERSION OF EIGHT-CORNERS RULE DESPITE POLICY LANGUAGE**

The Fifth Circuit recently revisited the issue of the application of the eight-corners rule to the duty to defend. *GuideOne Specialty Mut. Ins. Co. v. Missionary Church of Disciples of Jesus Christ*, --- F.3d ----, 2012 WL 2892409 (5th Cir. July 17, 2012). It did so in the context of the insurer’s argument that the policy language at issue contracted around the eight-corners rule. The policy language provided that the insurer would only pay for covered claims, and the insurer used this language to argue that the eight-corners analysis did not apply. In a bizarre analysis, the court conceded that the parties *could* contract around the eight-corners rule but then held that they could not do so as to the duty to defend analysis. The Fifth Circuit reasoned that that the eight-corners rule is a judge-made analysis that does not find its basis in the insurance policy. The Fifth Circuit did not overrule its previous opinions that the eight-corners rule could be contractually negated.

The insurer then argued that, even if the eight-corners rule applied, it should be allowed to present extrinsic evidence under a limited exception. While the Fifth Circuit tacitly agreed that a limited exception existed, it did not find the case before it to be within the exception. The Fifth Circuit vacated the district court’s judgment, reversed the judgment, and rendered judgment that the insurer owed a defense and that the indemnity issue was not justiciable at this time.

### **“FIRST FRIDAY’S” WEB-SEMINAR CONTINUES THIS FRIDAY, AUGUST 3<sup>rd</sup>: “APPRAISALS IN TEXAS: HOT ISSUES”**

This Friday, the Insurance Practice Group at MDJW will continue our monthly continuing education program for those in the insurance industry which provides a one hour web-based program of interest to those who handle property or liability claims or those who manage insurance litigation in Texas. Lawyers from MDJW host each month’s one hour program on the first Friday of each month and each program provides one hour of CE credit from the Texas Department of Insurance. (Most programs qualify for consumer protection credit.) Each presentation is limited to one hour and can be viewed and listened to from any desktop or laptop with audio-video capabilities. The program is from noon to 1 p.m. Central each “First Friday” of the month.

The August 3<sup>rd</sup> program will feature one of the firm’s partners, Ms. Barrie Beer, who will be discussing appraisal issues of interest to insurers with Texas claims. The program will look at the recent legal

decisions on appraisals in Texas, recent claim and litigation trends involving appraisal, and practical considerations for those considering making an appraisal demand or who are currently in the middle of appraisals in Texas. Barrie's presentation will include umpire issues, scope of appraisal issues, the effects of appraisal, and other hot issues in current Texas appraisals. The program is FREE. This Friday's program can be listened to on any computer and log-in information will be sent upon completing a very short registration process.

**To register for this free CE program, send an email to: [ce@mdjwlaw.com](mailto:ce@mdjwlaw.com).** If the email contains the words "register" or "First Fridays" (or anything else close), we will reply with the necessary log-in information for Friday's program. We hope you will join us for this Friday's program on "Appraisals in Texas: Hot Issues."

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