The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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AGENT NOT LIABLE FOR NOT OBTAINING UM/UIM COVERAGE EQUAL TO LIABILITY LIMITS

Last Thursday, the Fourteenth Court of Appeals in Houston considered an insurance agent's duties to an insured in the procurement of an automobile policy. *Theresa Leigh v. Richard Kuenstler Jr.*, 2009 WL 3126538 (Tex.App.—Houston [14th Dist.] October 1, 2009). Leigh first contacted Kuenstler about obtaining automobile insurance in December 1999. Leigh told Kuenstler, "I wanted coverage at least what my parents had [sic]." The automobile insurance policies procured by Kuenstler afforded her liability coverage of $300,000 per person and $500,000 per occurrence. In addition, Kuenstler had procured UM/UIM policy for Leigh with coverage limits of $50,000. In contrast, Leigh's parents had only $20,000 in UM/UIM coverage. Leigh also was covered by a $1 million umbrella policy. Although she believed that the umbrella policy would afford coverage for her own medical expenses and damages she sustained as the result of an automobile accident with an underinsured motorist, Leigh admits that she simply assumed this to be the case. In fact, the umbrella policy afforded coverage only for Leigh's liability, and not for her own damages. Leigh was injured in an automobile accident with an underinsured motorist. Leigh sued the insurers and Kuenstler. Relevant here, Leigh alleged that Kuenstler (1) was negligent in failing to obtain UM/UIM coverage in an amount at least equal to the policy limits of her liability insurance, and (2) violated the DTPA and the Texas Insurance Code by misrepresenting the terms of the insurance policies and by unconscionably failing to ensure that her UM/UIM coverage was at least equal to the policy limits provided by her primary liability policy.

The court rejected both of Leigh's arguments. As to the first, the court found that Kuenstler procured the insurance that Leigh instructed in amounts that satisfied her conditions. Further, the court held that there was no evidence of a special relationship with the agent to justify imposition of any additional duties. As to the second, the court found Leigh waived her contentions because she did not cite to any authority or evidence to support her briefing.

COURT OF APPEALS REJECTS DUAL-PERSONA DOCTRINE AS AVENUE TO OVERCOME EXCLUSIVE REMEDY PROVISION OF TEXAS WORKERS COMPENSATION ACT

In a case of first impression, the First Court of Appeals in Houston issued an opinion last Thursday addressing the applicability of the exclusive remedy provision of the Texas Workers Compensation Act to an asbestos plaintiff in his suit against the successor-in-interest to his former employer. *Union Carbide Corp. v. Smith*, --- S.W.3d ----, 2009 WL 3152138 (Tex.App.—Houston [1st Dist.] 2009.) Hexion appealed from the trial court's judgment entered in favor of Smith, after a jury trial, in the Smiths' suit against Union Carbide and Hexion arising from Oliver's exposure to asbestos and subsequent development of mesothelioma. Hexion contended that that the evidence conclusively establishes its

affirmative defense that the Smiths' claims are barred under the exclusive remedy provision of the Texas Workers' Compensation Act. The Smiths sued Hexion both in its capacity as a direct employer of Smith and in its capacity as the "successor-in-interest to the liabilities of Smith-Douglas Company, Inc.," Smith's former employer. The sole dispute presented in this appeal in regard to the workers' compensation issue was whether the exclusive remedy provision of the Act applies to the Smiths' claims made against Hexion in its capacity as successor-in-interest to Smith-Douglas that are related to Oliver's exposure at Smith-Douglas prior to the merger.

It was undisputed that after the merger, Hexion provided workers' compensation insurance to its employees at the facility, including Smith, and that this coverage remained in place for the duration of Smith's employment with Hexion. The policies provided workers' compensation coverage for injuries by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period." Thus, it is undisputed on appeal that Smith was covered by workers' compensation insurance while employed by Hexion after the merger and that this workers' compensation coverage applied to his mesothelioma. The court found Smith's employment by the predecessor company and its successor, which the workers compensation policy provided coverage for, supported application of the exclusive remedy provision.

Turning to the dual persona doctrine, the court reviewed Texas authority and that from other jurisdictions that had considered the issue. The court rejected Smith's contention that the Texas Supreme Court had effectively adopted the doctrine in *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex.1990) and *Dorchester Gas Corp. v. American Petrofina, Inc.*, 710 S.W.2d 541 (Tex.1986). It concluded that there is no authority in Texas for applying the dual-persona doctrine under these circumstances, it declined to apply it here as a means to impose liability upon Hexion in contravention of the exclusive remedy provision of the Act.

HURRICANE LITIGATION UPDATE: INSURER WINS MANDAMUS RELIEF TO SEVER CLAIMS AGAINST IT BROUGHT IN ONE LAWSUIT BY MULTIPLE INSUREDS FOR SEPARATE CLAIMS UNDER SEPARATE POLICIES ON SEPARATE DWELLINGS

Last Tuesday, the Corpus Christi Court of Appeals considered a mandamus arising from property damage claims caused by Hurricane Dolly. *In re Hochheim Prairie Farm Mut. Ins. Ass'n*, --- S.W.3d ----, 2009 WL 3114607 (Tex.App.—Corpus Christi 2009.) Hochheim provided insurance coverage under three separate policies to Maricela Pena Cantu, Rene R. Cavazos, and Jaime and Sandra Galpern, the real parties in interest, for their three separate dwellings and personal property. Real parties sustained damage to their homes as a result of windstorm, hail storm, and/or water during Hurricane Dolly. They each submitted claims to Hochheim for property damage to their respective dwellings. Alleging that their claims were mishandled and underpaid, real parties brought suit against Hochheim for breach of contract, breach of the duty of good faith and fair dealing, violations of the deceptive trade practices act, and violations of the Texas Insurance Code. Hochheim moved to sever the case into three separate proceedings so that the real parties' claims "arising from the damage to three residential dwellings may be independently evaluated, pursued, and defended efficiently."

The court rejected the insureds' contentions that their cases should be tried together for the sake of efficiency and to allow them to prove a common design or plan by Hochheim in the handling of their claims. The court of appeals held that even if common design or plan existed, any such common intention or design "does not outweigh the potential that prejudice and jury confusion will result from a single trial" of the multiple claims.

FIFTH CIRCUIT HOLDS CGL'S POLLUTION EXCLUSION DOES NOT PROVIDE COVERAGE FOR CLAIMS FOR CONSEQUENTIAL DAMAGES ARISING FROM STATE AGENCY'S INVESTIGATION OF ALLEGED POLLUTANT DUMPING

Last Tuesday, a three-judge panel of the Fifth Circuit affirmed a summary judgment entered for the insurer holding it had no duty to defend or indemnify its insured against claims arising from alleged pollutant dumping which led to administrative action. *Basic Energy Services, LP v. Great Northern Ins*., Co.Slip Copy, 2009 WL 3092466 (C.A.5 (Tex.)) The insured, Basic Energy, was sued by Smith, who alleged that Basic Energy delivered and disposed of oil-based waste, identified as being among the wastes that Smith's permit of operation from Texas allowed (when in fact it was waste that Smith was not permitted to accept), at her property in June 2002, and that she sustained damages as a result. As a result, the Texas Railroad Commission conducted an investigation of Smith, which Smith expended resources defending, and Smith lost business revenue during the investigation when waste haulers took their disposal business elsewhere. Smith sought to recover these damages from Basic Energy in the underlying lawsuit. Basic Energy argues that the damages that are alleged, primarily the cost of defending the TRC investigation and loss of business, are consequential damages of property damage caused by the waste that Basic Energy caused to be disposed at Smith's facility.

The court rejected Basic Energy's contention. Applying standard construction principles, the court found that the CGL policy used the same terms in the insuring language and in the pollution exclusion. The court then pointed out that if Basic Energy was correct and the term "property damage" was broad enough to reach the alleged damages in the insuring agreement, then the pollution exclusion's use of the same term removed them from coverage. The court noted that adopting a different construction would render one portion of the policy meaningless.

ABATEMENT PERIOD OF TEXAS INSURANCE CODE ENFORCED BY DISTRICT COURT IN RESPONSE TO PLAINTIFF'S FAILURE TO PROVIDE STATUTORILY-REQUIRED NOTICE LETTER

A district court in the Southern District of Texas enforced the Texas Insurance Code's abatement provision in response to an insurer's verified plea in abatement following removal. *Boone v. Safeco Ins. Co. of Indiana*, Slip Copy, 2009 WL 3063320 (S.D.Tex.) Safeco argued that the plaintiffs violated the Texas Insurance Code requirement that a plaintiff seeking damages under the statute must give the defendant prior written notice of the complaint and the amount of damages sought, including fees, "not later than the 61st day before the date the action is filed." Safeco asked the court to abate the suit until the 61st day after the Boones provided the statutory written notice of their claims arising from Hurricane Ike. In response, the plaintiffs contended that although they did sue Safeco before sending the statutory written notice, their demand letter, received by Safeco nine days after being served with the plaintiffs' petition, satisfied the notice requirement. Alternatively, the plaintiffs argue that the abatement period provided for in the Texas Insurance Code lapsed.

The court rejected the plaintiffs' contentions. First, the court held that the demand letter could not satisfy the statute's requirements. The plaintiffs filed their suit on April 21, 2009. They did not send Safeco their demand letter until three days later. Safeco did not receive the demand letter until April 30, 2009. The court noted that the Texas Insurance Code specifically states that written notice must be given to a defendant "not later than the 61st day *before* the date the action is filed."

Second, the court determined that the letter failed to substantively meet the statute's requirements. The court detailed the letter's insufficiencies: it contains no factual information about the cause of action; it states that the Boones did not receive full payment under the insurance policy and that Safeco and its adjuster, George Echols, were liable for "misrepresenting and/or failing to discuss with Donna Boone and Dennis K. Boone pertinent facts or policy provisions relating to coverage as an issue"; for "failing to acknowledge with reasonable promptness, pertinent communications with respect to the claim arising under its policy"; "failing to adopt reasonable standards for prompt investigation of the claim arising under its policy"; "not attempting in good faith to effectuate prompt, fair and equitable settlement of the claim submitted in which liability has become reasonably clear"; "failing to provide promptly to a policyholder a reasonable explanation of the basis in the insurance policy, in relation to the facts or applicable law for denial of the claim or for the offer of a compromise settlement"; "failing to affirm or deny coverage of claim to a policyholder within a reasonable time after proof of loss statements have been completed"; and "refusing to pay the claims without conducting a reasonable investigation based upon all available information;" it parroted the Texas Insurance Code violations.

Lastly, the court found that Safeco's request was timely even though it was made 45 days after the answer was filed. The court noted that Safeco's request was made "while the purpose of notice-settlement and avoidance of litigation expense remains viable. Thus, defendant must request an abatement with the filing of an answer or very soon thereafter." The court ordered the case abated until 60 days after receipt of a proper notice letter.

Editor's Note: Christopher W. Martin and Barrie Jean Beer of Martin, Disiere, Jefferson & Wisdom had the pleasure of representing Safeco in this matter.

PROMPT PAYMENT OF CLAIMS ACT APPLIES TO CLAIM FOR INDEMNIFICATION OF LEGAL FEES

In a case of first impression, a district court sitting in the Western District of Texas interpreted and applied an excess CGL policy's Allocated Loss Adjustment Expense (ALAE) provision, which provision discusses a duty to reimburse under the insurance contract for certain legal expenses. *Basic Energy Services, Inc. v. Liberty Mut. Ins. Co.*,--- F.Supp.2d ----, 2009 WL 2998134 (W.D.Tex. 2009.) The policy that the court considered provided for occurrence-based property damage coverage, which the policy agrees to indemnify the insured for sums in excess of the "self-insured amount" for property damage to which the insurance applies. The insuring agreement states that "No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for in Section VII-Supplementary Payments/ Allocated Loss Adjustment Expense."

The court found that any obligation to reimburse an insured for incurred legal expenses should be analyzed using the Eight Corners Rule. In applying this finding to its analysis, the court refused to consider extrinsic evidence. The court found that this evidence used employee testimony to assert facts and opinions about the accident that is the subject of the underlying complaint in an effort to clarify whether the oil well involved in the underlying claim is unitary in nature, which goes past the simple issue of coverage. The court then found that the underlying petition provided for coverage within the policy.

Lastly, the court considered when payment was due under the ALAE provision and whether it was subject to the Prompt Payment of Claims Act. The court found that Liberty Mutual improperly denied Basic Energy's claim in the underlying lawsuit and was subject to pay the amount of the claims plus interest at a rate of 18% annually, plus reasonable attorney's fees. In reaching its finding, the court considered

applicability of the Act as it hinges on whether the claim is a first-party claim paid directly to the insured. As the court noted, according to the policy at issue, the reimbursement claim does not pay to a third party, but rather "reimburses" the insured. Thus, the court found that reimbursement of defense cost claims are first-party claims.

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