The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME RULES NO JURISDICTION WHEN ADMINISTRATIVE REMEDIES ARE NOT EXHAUSTED IN WORKERS' COMPENSATION CLAIM

In *In re Liberty Mutual Fire Insurance Company*, 2009 WL 2666900, the Supreme Court of Texas held recently ruled that parties cannot avoid exhaustion of administrative remedies because they fear they might not prevail with respect to whether treatment sought for work-related neck and back injuries were "reasonably required," and therefore, trial court lacked jurisdiction to review claim that workers' compensation carrier denied treatment in bad faith; he was not required to obtain preauthorization for office visits but he was required to obtain preauthorization for proposed surgery, and did not, and claimant's telephone call with carrier's adjuster during which adjuster allegedly denied approval for treatment did not exhaust administrative remedies.

ADJUSTER'S NOTES MAY BE WITHHELD AS PRIVILEGED UNDER TEXAS CIVIL PROCEDURE

In *In re Certain Underwriters at Lloyd's London and Certain London Market Ins. Cos*, 2009 WL 2616252 (Tex. App. – Beaumont)(August 27, 2009), the court held that an insurer may utilize Texas Rule of Civil Procedure 193.3(d). ("*Privileged Not Waived by Production"*) as the procedural basis to obtain the return of an adjuster's notes, because under the facts of this case, the notes of conversations are privileged from discovery.

In response to a claim under a builders' risk policy, the insurer hired an adjusting company to assist in its investigation. During the investigation, one of the adjusting company employees made handwritten notes of various conversations that he had with insurer's representatives or attorneys while assisting them in their duties that included evaluating whether the policy covered the insured's claim. After the insured filed suit to pursue the claim, the insurer issued a subpoena for documents to the adjusting company, and the adjusting company responded by producing its file. The company's file contained the handwritten notes of an adjuster employee and its vice-president, about various conversations concerning the claim.

The Court reasoned that the adjuster was retained by a party to a lawsuit and the notes reveal the content of conversations with the party's representatives and the party's attorneys.

DUTY TO DEFEND ARISES WHEN THIRD PARTY PLAINTIFF'S COMPLAINT ALLEGES ANY AMOUNT OF PROPERTY DAMAGE OCCURS DURING THE POLICY PERIOD

RTJ Construction Co. Inc. was hired to repair a home's foundation. After the repair, the homeowner's filed suit alleging faulty repair. RJT sought a defense from Wilshire based on the CGL policy issued to RTJ. Wilshire, in return, filed a diversity action seeking a declaratory judgment that it had no duty to defend or indemnify. The district court granted Wilshire's motion for summary judgment, finding that because the alleged property damage was the result of foundation movement, the policy's subsidence exclusion precluded coverage. The Fifth Circuit reversed and remanded the case holding that Wilshire had a duty to defend RJT after looking to the pleadings in the underlying case and the policy language.

While using the "eight-corners rule," the court in *Wilshire Ins. Co. v. RJT Construction, Co. LLC*, 2009 WL 2605436 (5th Cir. 2009), recently held that under Texas law, in determining whether there was an occurrence within the policy period so as to trigger coverage under a commercial general liability policy, the key date is when injury happens, not when someone happens upon it. Further, the Court held if third-party plaintiff's complaint alleges any amount of property damage that occurred during the policy period and that was caused by the insured, the duty to defend arises under a commercial general liability policy. In addition, the court held the policy's subsidence exclusion did not apply when the underlying complaint alleges that the contractor's foundation repair was faulty in that it did not repair the foundation adequately to withstand subsidence.

FAILURE TO COOPERATE PRECLUDES COVERAGE

The insured shot his victim in the face with a .32 caliber automatic pistol in 2006. In 2007, the victim and his family filed a petition in the district court seeking damages against the insured. The insured then demanded that State Farm defend and indemnify him in the underlying suit pursuant to the insured's homeowner's policy. State Farm issued a reservation of rights letter notifying Brown of specific coverage questions and agreed to defend the insured pending resolution of the coverage questions. In the interim, an attorney, retained by State Farm, entered the case on behalf of the insured. After answering the petition, the insured completely refused to cooperate with his defense, including missing appointments and failing to respond to discovery. Ultimately, the retained attorney withdrew as counsel of record. State Farm then filed a declaratory judgment action in the federal district court asking for a declaration that it had no duty to defend and indemnify, because the insured violated the policy provision requiring him to cooperate with the insurer. The provision provided, among other things, that the insured shall assist in securing and giving evidence, attend hearing and trials, and assist in obtaining attendance of witnesses. The provision also stated that the insured could not, except at his own expense, voluntarily make payments, assume obligations, or incur expenses.

The Court, in *State Farm v. Brown*, 2009 WL 2902511 (N.D. Tex. September 2, 2009), while stating that it is well established under Texas law that an insured's breach of a cooperation provision relieves an insurer of liability on the policy, held that the State Farm had no duty to defend and indemnify the insured.