The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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THREE NEW PROPOSED CLASS ACTION LAWSUITS INVOLVING HURRICANE IKE CLAIMS ALLEGE INSURANCE COMPANIES ARE ROUTINELY FAILING TO PAY INSUREDS OVERHEAD AND PROFIT FOR PROPERTY REPAIRS

Sunday marked the one-year anniversary of Hurricane Ike. One news story reported "Ike was the costliest natural disaster in Texas history. Its powerful surge reached as high as 20 feet and its 110 mph winds caused more than $29 billion in damage. The storm caused flooding and deaths as far away as Pennsylvania and Illinois. Ike was blamed for at least 72 deaths in the U.S., including 37 in Texas." Given the surge of litigation swirling around Hurricanes Katrina and Rita in 2005, it is no surprise Plaintiffs' attorneys are focused and positioned to take aim at the Texas insurance industry one year after Ike. For example, it does not require much effort to discover multiple "training seminars" hosted each month by law firms seeking to attract referrals from public adjusters. Recent news articles have highlighted consumer complaints arising from Ike.

Last Friday, a top story in Houston highlighted three new proposed class action lawsuits filed against insurance companies who allegedly withhold overhead and profit from estimates and subsequent payments for property damage. The allegations center on the alleged non-payment of O&P "which is money insurance companies pay so consumers can afford to hire a professional general contractor when needed to oversee repairs." *See* "Some Insurance Companies May be Shorting Homeowners," by Mark Greenblatt, 11 News Defenders September 11, 2009.

At the heart of O&P litigation is a test known as the "three trade rule." To illustrate, an insured will argue to make an allowance for O&P at the time of the ACV settlement when three or more trades are anticipated in the repair of insureds' property. Insurers historically reject the validity and existence of a rigid "three trade rule" and typically argue its adjusters have independent discretion in making individual determinations as to when it is appropriate to pay insureds in advance for a general contractor's O&P. Additionally, due to the adjuster's individual discretion, the requisite individualized assessment of property damage and individualized determination of ACV in every case, as well as carrier's potential overpayments to some insureds under certain circumstances (i.e., when insured chose to repair the property and submitted supplemental claims) would require extensive individual inquiry on each claim. *See generally Burgess v. Farmers Ins. Co., Inc.*, 151 P.3d 92, 99 (Okla. 2006).

O&P claims, including class actions, have been litigated in Texas for more than a decade. They quieted down in recent years. Each of the three new Texas lawsuits assert a breach of contract cause of action which also highlights a bulletin issued in 1998 by the Texas Department of Insurance stating:

"The deduction of prospective contractors' overhead and profit and sales tax in determining the actual cash value under a replacement policy is improper, is not a reasonable interpretation of the policy, and is unfair to insureds."

After Ike, TDI issued an additional bulletin reminding insurance companies of its position regarding the payment of overhead and profits as a part of the actual cash value payment made on covered losses to homeowners. Notably, in the ten years since the TDI bulletin, the Texas Supreme Court has yet to certify a class on an O&P issue.

One attorney filing suit in Texas against five insurance companies insisted in local press coverage over the weekend that withholding overhead and profit from claims payments is "systematic" and "rampant." Like the former mold litigation surge which began with a sensational jury verdict, the new interest in litigation dealing with O&P extends from an eye-popping verdict against a homeowners carrier in Oklahoma. *See Burgess*, 151 P.3d 92. Given the Burgess class certification, regardless of several failed class certification attempts in other venues, the "three trade rule" continues to be the focus of the lawyers prosecuting these cases and will now be put to additional scrutiny in Texas in the context of Ike. MDJW is closely monitoring the active litigation in this area. For more information please contact any of our attorneys on our Insurance Team.

Here are links to the court documents: Quezada Amended Petition, Quezada Motion for Status Conference, Guerra Original Petition, Berrara Original Petition

TEXAS SUPREME COURT CONDITIONALLY GRANTS MANDAMUS RELIEF AND DIRECTS TRIAL COURT TO ORDER PLEA TO THE JURISDICTION IN WORKERS' COMPENSATION BAD FAITH SUIT

Recently, the Texas Supreme Court conditionally granted mandamus relief and directed the trial court to order a plea to the jurisdiction in a workers' compensation suit involving allegations of bad faith. In *In re Liberty Mutual Fire Insurance Company*, 2009 WL (Tex. August 28, 2009), an injured employee sought bad-faith damages against his workers' compensation carrier for allegedly delaying preauthorization of medical treatment. For example, the employee alleged the carrier turned down office visits (preauthorization not required) and possible back surgery (preauthorization not sought).

The injured employee alleged total and permanent back and neck injuries from a work-related incident. After failing to timely dispute compensability, Liberty paid temporary income benefits for seven months and medical care that included weekly chiropractic treatments. Liberty stopped paying temporary income benefits when a designated doctor found the employee had reached maximum medical improvement and issued an impairment rating of zero percent.

The employee opposed dismissal on three grounds. First, he argued he is entitled to ongoing medical treatment. While true, the court reasoned whether further care was reasonably required was an administrative question. Next, relying upon Fifth Circuit law, the employee argued remedy exhaustion was not required because there were no administrative remedies to exhaust. The court correctly noted the authority cited by the employee was inapplicable to this matter as the treatment here was not incident to a preauthorized procedure. Lastly, the employee argued he had exhausted his administrative remedies by requesting approval for treatment which Liberty's adjuster denied in a phone conversation. The court dismissed this last argument finding the employee did not properly request preauthorization.

Here, by demanding preauthorization when it was not required and failing to request it when it was, the employee avoided all the administrative remedies that governed his claim. Because a bad faith suit cannot be brought before first exhausting the administrative remedies, the Supreme Court concluded the trial court erred by denying Liberty's plea to the jurisdiction.

FIFTH CIRCUIT AFFIRMS DECISION DENYING COVERAGE FOR DEATH BENEFITS CLAIM BROUGHT BY SPOUSE OF DECEDENT WHO DROWNED ON HONEYMOON CRUISE EXCURSION

Recently, the Fifth Circuit affirmed a ruling to deny coverage to a widow who claimed death benefits for her husband who drowned during a honeymoon cruise excursion. In *National Union Fire Insurance Co. of Pittsburgh v. McMurray*, 2009 WL 2710076 (5th Cir. August 27, 2009), the court evaluated a claim for accidental death benefits under a blanket accident insurance policy issued by National Union. The carrier denied coverage for the claim on the grounds the circumstances of death did not fall within the policy's coverage.

The deceased purchased the cruise with his Platinum Select Citibank MasterCard, which included a $1,000,000 accidental death or dismemberment insurance policy. Among the covered hazards for which accidental death benefits were provided was injury or death that occurred while an insured person was "riding as a passenger in or on any Common Carrier." While on the cruise, the couple purchased a separate whitewater rafting excursion which tragically ended in the death of Plaintiff's husband. National Union denied the claim for death benefits, concluding the raft was not a common carrier and the deceased was not a passenger as defined under the policy.

National Union then filed a declaratory judgment action seeking a determination of the policy's coverage and a declaration that no benefits were owed. The Plaintiff filed a counter claim alleging breach of express and implied warranties, breach of contract, breach of the duty of good faith and fair dealing, and breach of a Texas prompt payment of claims statute. The district court granted National Union's summary judgment holding benefits were not payable because the excursion raft was not a common carrier under the policy. National Union also obtained a judgment as a matter of law on the counterclaims. The Fifth Circuit affirmed the decision and approved the lower court's use of common law for assistance in interpreting undefined terms within the policy's common carrier definition. Lastly, the court concluded under the Texas prompt payment of claims provision, there can be no liability unless the insurance claim should have been paid.