The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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OWNERS OF BANKRUPT INSURED HAVE STANDING TO SUE INSURER FOR VIOLATION OF AUTOMATIC BANKRUPTCY STAY

In a case of first impression under Texas law, last Tuesday the Fifth Circuit concluded that owners and principals of a bankrupt construction company had standing to sue the insurer which issued performance bonds to the construction company. In *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 2009 WL 2501122 (5th Cir. (Tex.), August 18, 2009), the insurer brought suit against the owners and creditors seeking to hold them liable for losses on performance bonds they had issued to the bankrupt insured. The owners and principals counterclaimed against the insurer alleging that their willful violations of the bankruptcy stay and notices to creditors of the insurer's right of recovery against amounts owed to the construction company, resulted in suspension of payments by creditors, the failure of reorganization efforts and ultimate liquidation of the construction company. The owners and principals of the bankrupt company sought to recover damages against the insurer. The U.S. District Court concluded that they had no standing.

On appeal, the Fifth Circuit addressed whether the owners and principals had standing to sue the insurer for alleged violations of the automatic-stay provisions of 11 U.S.C. § 362(k) as a matter of first impression for Texas courts. This statute provides in part that "an individual injured by any willful violation of a stay…shall recover actual damages…attorney fees, and…may recover punitive damages." The insurer argued that only the insured or bankrupt entity had standing to pursue these claims a. The fifth Circuit disagreed and held that while the owners and principals had no standing as *owners/equity holders* of the company, they did have standing to assert a claim as *pre-petition* creditors to the insured entity claiming injuries as a result of an alleged violation of the automatic stay provisions. The district court's judgment was vacated and remanded.

FIFTH CIRCUIT CONCLUDES "RATE OF PAYMENT" CLAIMS ARE NOT PREEMPTED BY ERISA

In another matter of apparent first impression for Texas courts, last Thursday the Fifth Circuit held that a health service provider's claims for underpayment under a provider agreement were not preempted under ERISA. In *Lone Star OB/GYN Associates v. Aetna Healthcare*, 2009 WL 2501340 (5th Cir. (Tex.) August 18, 2009), the insurer determined reimbursement rates by referring to an ERISA benefits plan and paying a fixed percentage. But the Fifth Circuit determined that "mere consultation…is not enough to bring the claims within" the ERISA preemption. The court then noted the distinction between "rate of payment" claims and "right of payment" claims and determined that only the "right of payment" claims are preempted. Accordingly, the trial court's order was reversed and the case was remanded for further proceedings.

U.S. DISTRICT COURT HOLDS INSURER WAIVED RIGHT TO APPRAISAL

Despite the insurer's prompt request to invoke the appraisal provision following the recent Texas Supreme Court's *State Farm Lloyds v. Johnson* decision, a U.S. District Court Judge in the McAllen Division of the Southern District of Texas recently concluded the insurer waived its right to demand appraisal. In *Financial Management international, Inc. D/B/A The Summit Sports Club v. Mt. Hawley Insurance Co.*, Civil Action No. M-08-267 (S.D.Tex. August 17, 2009), the court noted that over a year had passed from the time of the demand and estimates of damage were provided. Additionally, the case had been litigated for almost a year before the motion to compel appraisal was filed. For these reasons, the court concluded that the insurer's "subsequent failure to assert this known right has amounted to waiver."