The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT GRANTS MANDAMUS RELIEF INVOLVING FORUM SELECTION CLAUSE

Last Friday the Texas Supreme Court conditionally granted mandamus relief to enforce a forum-selection clause and dismiss a lawsuit filed against International Profit Associates, Inc. (IPA). In *In re International Profit Associates, Inc*., 2009 WL 1639750 (Tex. June 12, 2009), Riddell Plumbing, Inc. hired IPA to provide business analysis and an initial profitability recommendation. Riddell signed a contract with IPA with a forum-selection clause which required in part "that all disputes of any kind…shall be submitted to binding arbitration…exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois Law applying."

Riddell later became dissatisfied with IPA's services under the agreement, but did not elect arbitration; instead it filed suit against IPA in Dallas County, Texas. IPA filed a motion to dismiss based on the forum-selection clause. The trial court denied the motion to dismiss and explained in an official letter that IPA "did not sustain [its] burden of proving that the page of the contract containing the forum selection clause was ever presented [to Riddell]." IPA sought a writ of mandamus from the court of appeals which was denied without explanation. IPA next complained to the Texas Supreme Court that the trial court abused it discretion by requiring IPA to prove that it showed the forum-selection clause to Riddell because: (1) there is no obligation to show a specific contractual provision to a party who signs a contract, and (2) the burden of proof is not on the party seeking to enforce a forum-selection clause, but on the party challenging the clause. Riddell countered by arguing IPA's failure to show it the forum-selection clause constituted fraud or overreaching.

The Supreme Court concluded the party challenging the forum-selection clause has the burden of proving the clause is invalid, and the party seeking to enforce the clause is not obligated to prove that it specifically showed the clause to the opposing party as a condition of enforcement. Because the trial court placed the burden of proof on IPA and required it to prove that it showed the clause to Riddell, the Supreme Court held that the trial court clearly abused its discretion in denying IPA's motion to dismiss.

FEDERAL COURT HOLDS COMMERCIAL LIABILITY AUTO EXCLUSION DOES NOT APPLY TO INJURY SUSTAINED WHILE ON MOTORCYCLE

Last week a federal court concluded that a commercial liability auto exclusion did not apply to an underlying claim involving a motorcycle. In *Essex v. Long Island Owners Ass'n, Inc*. (No. B-08-179 S.D. June 19, 2009), a claim was made against the insured by a pair of motorcyclists who were hit a swing bridge traffic arm which suddenly lowered. The claimants sued Long Island Owners Association (LIOA) who in turn tendered the suit to Essex under its Commercial General Liability Policy. Essex denied the request asserting in part that the "insurance does not apply to bodily injury 'arising out of, caused by or

contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any auto.'" Essex, nevertheless, defended the lawsuit under a reservation of rights and then filed a declaratory judgment action.

Essex sought declaratory relief that it has no duty to defend or indemnify LIOA in the lawsuit brought by the claimants. The insured argued, however, that the auto exclusion does not apply because the motorcycle was merely the situs of injury. After reviewing the policy language and controlling Texas case law the court held the injuries sustained by the claimants were caused by the swing arm, not the motorcycle. And as a result, the court concluded the auto exclusion did not apply and Essex has a duty to defend LIOA in the underlying suit.

FEDERAL COURT HOLDS INSURER NOT OBLIGATED TO INDEMNIFY INSURED FOR COMMON LAW FRAUD JUDGMENT

On July 10, 2008, a memorandum opinion and order was issued by the federal district court and ruled Mid-Continent had a duty to defend Rotella in the underlying suit. Since then the parties have filed additional motions for summary judgment. Recently, the same federal district court concluded Mid-Continent had no duty to indemnify its insured for a judgment entered against it in a state-court matter involving common law fraud. In *Rotella v. Mid-Continent Cas. Co*. (No. 3:08-CV-0486-G N.D. June 10, 2009), Rotella, a custom home builder, sought indemnity from Mid-Continent for a state-court judgment entered against him by a dissatisfied customer. Mid-Continent refused to indemnify Rotella for damages stemming from his fraudulent conduct -- $718,836.33 in damages awarded for fraudulent billing and $1,437,672.66 in treble damages. Additionally, Mid-Continent argued it cannot be liable for bad faith insurance practices, penalties pursuant to the Prompt Payment Statute, and the statute of limitations bars Rotella's negligent misrepresentation claim, DTPA claim, bad faith claim, and insurance code claim.

The court held Mid-Continent did not have the duty to indemnify based on the policy language. Specifically, the definition of an "occurrence" necessarily implies a lack of intent. Here, Rotella was found to have committed fraud which has a definite intent element. Next, the court evaluated the bad faith insurance practices claim asserted by Rotella. The court also granted summary judgment on this claim as Texas law does not recognize a claim for bad faith in the third-party context – namely, refusal to defend cannot give rise to a tort claim for breach of the duty of good faith and fair dealing. The court also addressed the Prompt Payment Claim issue and applied the *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc*., 256 S.W.3d 660, 675 (Tex. 2008), decision which recognized that the insured is not entitled to relief under the statute if it is seeking coverage to satisfy a judgment a third party has against it or a "loss incurred in satisfaction of a settlement." Lastly, the court concluded the statute of limitations barred Rotella's claims for negligent misrepresentation claim and DTPA violations.