



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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### **TEXAS SUPREME COURT CONSTRUES OHIO AUTO INSURANCE POLICY'S INTENTIONAL INJURY EXCLUSION**

Last Friday, the Texas Supreme Court had an opportunity to construe the intentional injury exclusion in an Ohio auto insurance policy, finding that the Ohio policy requires that the driver have intended the injury which resulted. *Tanner v. Nationwide*, --- S.W.3d ----, 2009 WL 1028048 (Tex., April 17, 2009). The trial court had granted judgment to Nationwide on motion for judgment notwithstanding the verdict. Because of its procedural posture, Nationwide was required to show that the evidence conclusively proved that the driver intentionally caused the injuries and that no reasonable jury was free to think otherwise. Applying this standard, the court reviewed the evidence in light of the relevant policy language. The court determined that the evidence was not sufficient for Nationwide to prove that the driver intended the injuries as a matter of law, and the court reversed and rendered judgment on the jury verdict.

Dissenting from the majority, Justice Brister noted that Ohio courts had considered the intentional acts exclusion in a factually similar context and found that the exclusion applied. Specifically, the dissent noted that when the harm resulted from an accident following a police chase – like that here – the intentional acts exclusion applied.

### **FIFTH CIRCUIT FINDS PLAINTIFF'S TARDY INVOCATION OF ARBITRATION PROVISION AFTER INVOKING JUDICIAL PROCESS PREJUDICED DEFENDANT, WAIVING RIGHT TO ARBITRATION**

Last Wednesday, the Fifth Circuit determined that a plaintiff's tardy invocation of the arbitration provision after her motion to remand was denied prejudiced the defendant and, therefore, waived the arbitration right. *Nicholas v. KBR Inc.*, --- F.3d ----, 2009 WL 998974 (5th Cir. 2009). The widow of a former employee brought a state-court action against her husband's employer, alleging breach of severance agreement for failure to pay life insurance proceeds upon her husband's death. The employer removed the action on the grounds of preemption under the Employee Retirement Income Security Act (ERISA). The district court denied the widow's motion to remand. Thereafter, the widow moved to compel arbitration under the severance agreement's arbitration clause, which the district court also denied.

In reviewing the district court's order, the Fifth Circuit found that the widow substantially invoked the judicial process by bringing suit, as required to support a finding of waiver of arbitration. And the court found that her tardy invocation of arbitration clause prejudiced the former employer, also supporting the finding of a waiver of arbitration. The court noted that the lawsuit proceeded for more than 10 months

before the widow invoked the arbitration provision, and she only did so after the district court denied her motion to remand.

### **ALLSTATE WIN DEFAULT JUDGMENT FROM DISTRICT COURT APPOINTING UMPIRE TO PARTICIPATE IN APPRAISAL PROCESS UNDER HOMEOWNERS POLICY**

Last Thursday, Allstate won a default judgment from the Eastern District of Texas appointing an umpire to participate in an appraisal under a homeowners policy. *Allstate Texas Lloyds v. Shah*, Slip Copy, 2009 WL 1025399 (E.D.Tex. 2009.) A claim was submitted to Allstate for damage under a homeowners policy due to windstorm. The insured and Allstate disagreed as to the value of the claim. Allstate and the insured began the appraisal process by selecting appraisers. The appraisers could not agree on the value of the claim, and the appraisers could not agree on an umpire. Allstate petitioned the district court, under the Declaratory Judgment Act, to enforce the policy and appoint an umpire. The insured failed to answer. Finding that Allstate complied with the default judgment standard and that the relief was appropriate under the policy, the district court entered judgment for Allstate and appointed an umpire.

### **FEDERAL LEGISLATION INTRODUCED TO REGULATE INSURANCE COMPANIES**

On April 2, 2009, legislation was introduced that would create a federal regulator for insurance as an alternative to the current state-based regulatory structure currently in plan. The bill would create the National Insurance Consumer Protection Act and a National Insurance Commissioner with power to create National Unfair Claims Settlement Practices and National Prompt Payment of Claims Standards. The Act would exempt national insurers from almost all state regulation, notable exceptions include taxes and mandatory insurance programs. States would also not be permitted to treat national insurers differently from state insurers. The full context of the bill can be found here.

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