The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT CONDITIONALLY GRANTS MANDAMUS RELIEF TO CLARIFY PRIOR DECISION DID NOT IMPOSE A PRESUMPTION AGAINST CONTRACTUAL JURY WAIVER

Recently the Texas Supreme Court conditionally granted a petition for writ of mandamus to clarify its decision in *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 30-33 (Tex. 2004)(holding contractual waiver of jury trial was enforceable), did not impose a presumption against a contractual jury waiver. In *In re Bank of America, N.A.*, 2009 WL 490065 (February 27, 2009) the parties executed a real estate contract and a two-page Bank of America Mortgage Addendum, which contained a jury-waiver provision. Both parties signed the contract and afterwards separately executed the addendum. One paragraph in the addendum stated:

13. **Waiver of Trial by Jury**. Seller and buyer knowingly and conclusively waive all rights to trial by jury, in any action or proceeding relating to this Contract.

The Plaintiff sued Bank of America ("BOA") over the execution of the real estate contract claiming breach of contract, breach of warranty, misrepresentation, fraud, negligence, and violations of the Deceptive Trade Practices Act. When Plaintiff made a jury demand, BOA moved to enforce the jury waiver provision. The trial court signed an order waiving the jury trial and Plaintiff appealed. The court of appeals reversed, holding BOA did not meet its burden of producing prima facie evidence that Plaintiff knowingly and voluntarily waived their constitutional right to a jury.

After a swift analysis of its prior decision, the court concluded *In re Prudential* does not impose a presumption against jury waivers that places the burden on BOA to prove the waiver was executed knowingly and voluntarily.

ANOTHER TEXAS APPELLATE COURT INTERPRETS TRCP 41.0105 AND HOLDS FOR THE FIRST TIME PLAINTIFF'S MEDICAL BILLS DISCHARGED IN BANKRUPTCY WERE NEITHER PAID NOR INCURRED UNDER THE STATUTE

Last week a Texas appellate court held for the first time medical bills discharged in bankruptcy were not "paid or incurred" for purposes of section 41.0105 of the Texas Civil Practices and Remedies Code. In *Tate v. Hernandez*, 2009 WL 562981 (Tex. App.—Amarillo (March 5, 2009), Hernandez filed a Chapter 13 bankruptcy petition and six months later was involved in an automobile accident with Tate.

Hernandez incurred medical bills as a result of the accident. Hernandez listed certain medical bills owed to several providers on his Debtors Statement. Subsequent to filing this suit, the bankruptcy court entered an order discharging Hernandez's debts, including his medical bills.

Hernandez's personal injury action was later tried to a jury and the jury returned a verdict in favor of Hernandez. Following two hearings on damages issues, the trial court entered judgment against Tate in the amount of $7,017.92. The appellate court recognized because a debt for medical expenses is merely evidence of a plaintiff's damages, once incurred, the subsequent discharge of the debt in bankruptcy does not prohibit a plaintiff from offering proof of those pat medical expenses as evidence of a component element of his damages. The court then turned to the limitation imposed by section 41.0105.

Applying the leading case law in Texas on this issue, the court concluded an interpretation of section 41.0105 that limits an injured party's recovery of medical or health care expenses to those amounts necessary to *compensate* the injured party for sums "actually paid or incurred" is consistent not only with the Legislature's intent, but also with its jurisprudential philosophy. Because Hernandez's medical bills were discharged in bankruptcy, recovery of those sums was not necessary to *compensate* him for his injuries. For purposes of section 41.0105, those expenses were neither paid nor "actually incurred."

Editor's Note: This decision, among others, will be important to consider during litigation in combination with a slumping economy. As a practical tip, in light of decisions like this one, the financial backgrounds of parties who file suit should always be explored at the outset of litigation. Additionally, the issue of "actually paid or incurred" medical expenses promises to be addressed during this legislative session and MDJW will continue to monitor bills which will impact this issue.

MDJW recently reported on yet another decision interpreting section 41.0105 in *Garza de Escabedo v. Haygood*, 2009 WL 387153 (Tex. App.—Tyler, February 18, 2009)(*MDJW Newsbrief* February 23, 2009). To date, the leading case is *Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App. —San Antonio 2007, no pet.). In a plurality decision, the court held that section 41.0105 limited a plaintiff's recovery for past medical expenses to the amounts "actually paid or incurred," thereby prohibiting recovery of medical or health care expenses that had been discounted, adjusted, or written off. For a discussion of some of the issues surrounding interpretation of section 41.0105, s*ee* Judge Randy Wilson, *"An Enigma Shrouded in a Puzzle,"* 71 Tex. B.J. 812, November 2008.