The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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## DALLAS COURT OF APPEALS HOLDS THAT INSURER'S DENIAL OF COVERAGE DOES NOT PRECLUDE SUIT UNDER TEXAS DECLARATORY JUDGMENT ACT

The Dallas Court of Appeals last Thursday concluded that a trial court could entertain a declaratory judgment lawsuit brought by an insurer to determine its duties to defend and indemnify an action against its insured involving a pollution cleanup in Indiana. In *Transportation Insurance Company et al v. WH Cleaners, Inc.*, No. 05-10-00654-CV, 2012 WL 2049534 (Tex. App.—Dallas June 7, 2012), the appellate court reviewed a trial court ruling that sustained a plea to the jurisdiction brought by the insured. The court of appeals reversed and remanded for further proceedings, holding that the carriers' right to a court declaration of rights under insurance policies "is clear," and rejecting WH Cleaners' arguments for an exception to that rule.

WH Cleaners' primary argument was that because the carriers had denied coverage, they had effectively determined the parties' rights, and there was nothing more that the court could do. Essentially, WH Cleaners argued that an insurer could not both deny coverage and sue for a declaration of rights under the policy. The court of appeals distinguished a Georgia case that was a primary support for WH Cleaners' arguments, and stated that "[j]ust because a carrier takes a position and denies coverage to an insured does not mean there is no coverage and that the matter has been resolved. A court can determine otherwise."

The court of appeals also rejected two alternative arguments asserted by WH Cleaners. First, the court found that there was no evidence supporting WH Cleaners' contention that it would not pursue defense and indemnity, such as a formal withdrawal of its request or some other mechanism relinquishing an entitlement to coverage. The court finally determined that the declaratory judgment action was not simply a means to determine whether the insurance contract had been breached.

Editor's Note: MDJW was honored to handle the carriers' appeal in this case. The firm's Managing Partner Levon Hovnatanian and Senior Counsel Bruce Ramage handled the appellate briefing, and Mr. Hovnatanian argued the case to the court of appeals. We are pleased to have had the opportunity to win this important case and we thank CNA for the opportunity to do so.

## FEDERAL COURT RULES THAT CGL CARRIER, NOT AUTO CARRIER, OWES INDEMNITY AFTER PATIENT FATALLY INJURED IN TRANSIT TO AMBULANCE

The U.S. District Court for the Western District of Texas last Tuesday ruled in favor of a commercial auto carrier for an ambulance company in a coverage dispute with the company's CGL carrier. The controversy arose when a patient was injured, and later died, after the stretcher she was on tilted and

dropped her. In *National Casualty Co. v. Western World Ins. Co.*, the Court held that the underlying accident was covered by the ambulance company's CGL policy, that it was not covered by the operative commercial auto policy, and that the auto carrier was entitled to subrogation in the amount that it had contributed to the settlement of the underlying lawsuit.

The parties had filed cross motions for summary judgment to construe the duty to indemnify the ambulance company for the settlement of the underlying suit. The court reviewed the facts established in the underlying lawsuit, and determined that the accident — which occurred before the stretcher had been attached to the ambulance — did not fall under the auto policy, which provided that coverage existed when an accident results from the "use of a covered auto." The "use" of the ambulance did not extend to the entire loading and unloading process, but only to the actual placement or removal of persons from the ambulance. Similarly, because the ambulance was not in "use," the accident did not fall under an exclusion from the CGL carrier's policy. Finally, the court evaluated the auto carrier's contractual subrogation rights and determined that it was entitled to recover the $100,000 it contributed to the settlement of the underlying claim.

This case was the second coverage action arising out of the same set of underlying facts. In the earlier coverage suit, the district court ruled (and the Fifth Circuit Court of Appeals affirmed in February of this year) that the auto carrier had no duty do defend, but that the question of indemnity was not yet ripe.

## COURT OF APPEALS HOLDS TRIAL COURT MAY SET ASIDE DISMISSALS ON ALLEGATION OF FORGERY BY PLAINTIFF

The Texarkana Court of Appeals on Friday held that a trial court erred when it determined that it lacked the jurisdiction to set aside dismissals on a plaintiff's request when he alleged that his signature had been forged on the settlement. In *Henderson v. Southern Farm Bureau Insurance Company*, No. 06-12-00014-CV, 2012 WL 2053203 (Tex. App.—Texarkana May 8, 2012), a plaintiff in a lawsuit arising out of a multi-vehicle traffic accident had sued a number of defendants; but, in February 2010, his lawyer filed a joint motion to dismiss the appellee insurance company and the estate of an individual. The plaintiff alleged that he had not consented to the dismissal, that his signature was forged on the settlement agreement, and that he had not received any settlement funds. (In support of his allegations, the plaintiff also provided the affidavit of the notary public stating that she did not consent to the use of her seal, and that the signature on the settlement agreement was not hers.)

The trial court denied the plaintiff's motion to set aside the dismissals, concluding that it lacked jurisdiction to grant the requested relief. The court of appeals disagreed, holding that because the dismissals did not dispose of all claims or all parties, and because there was no severance of the claims against the dismissed defendants, the dismissal orders were not final judgments. The court of appeals also held that the decision whether to reinstate the plaintiff's claims against the dismissed defendants was within the trial court's discretion, rejecting both sides' arguments that the other side's sole remedy was against the plaintiff's former attorney.