The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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IN A MATTER OF FIRST IMPRESSION FOR TEXAS COURTS: COMPARATIVE LIABILITY IS ASSESSED BEFORE "ACTUALLY PAID OR INCURRED" LIMITATION ON RECOVERY IS APPLIED

Last Monday, the Dallas Court of Appeals examined whether a finding of comparative liability under § 33.012(a) of the Texas Civil Practices and Remedies Code should be assessed before or after a statutory limitation on recovery to the amount of medical bills paid or incurred under § 41.0105 of the Texas Civil Practices and Remedies Code was applied. In this case, the answer made a $22,000 impact on the recovery. In *Irving Holdings, Inc. v. Brown*, 2009 WL 18713 (Tex. App. – Dallas January 5, 2009), the claimant was injured in an automobile accident and incurred $45,429.95 in medical bills actually paid by his workers compensation carrier. The jury awarded $89,000 for past medical expenses and also found the claimant to be 50% at fault. The claimant argued, and the trial court found, that comparative responsibility of 50% should be applied to the $89,000, thus resulting in an award of $44,500 because it was done before applying the statutory limitation for amounts paid or incurred, which in this case failed to further limit recovery. The defendant, however, argued the "actually paid or incurred" limitation should be applied first, reducing the jury finding to $45,429.95, then applying comparative responsibility to reduce the recovery to $22,714.97. This appeal followed.

As a matter of first impression for Texas courts, the Dallas Court of Appeals examined both statutory provisions referenced above and the few cases interpreting various aspects of the "actually paid or incurred" provision and determined that comparative responsibility should be applied before the reduction of the "*recovery*" based on amounts "actually paid or incurred" was made. And because the amount paid or incurred - $45,429.95 - was greater than the amount of the damage award - $44,500 - no further reduction was required. The trial court's judgment was affirmed.

RESPONSIBLE THIRD-PARTY DESIGNATION CANNOT BE USED TO CIRCUMVENT HEALTH CARE LIABILITY LIMITATION PERIOD

The San Antonio Court of Appeals recently held that the designation of a responsible third-party by a defendant in health care liability claim, and the plaintiff's ability to join a designated person as a defendant within 60 days despite limitations, did not apply to health care liability claims based on the wording of that statute. In *Kimbrell, M.D. v. Molinet*, 2008 WL 5423131 (Tex.App.- San Antonio December 31, 2008), the court examined the wording of the statute setting forth the two year statute of limitations period for health care liability claims in § 74.251 of the Texas Civil Practices and Remedies Code, and compared that provision to the responsible third party designation statute, § 33.004(e) of the Texas Civil Practices and Remedies Code, and determined that the "notwithstanding any other law" language in § 74.251 created an absolute limitations period without exception, precluding plaintiffs ability

to circumvent limitations period when a responsible third party is designated. Note: the dissenting opinion provides a good discussion and some legislative history addressing the issues in this case.

MANSLAUGHTER CONVICTION INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT ON "EXPECTED OR INTENDED" EXCLUSION

The U.S. District Court for the Eastern District of Texas recently denied motions for summary judgment after finding that the legal standard applied in convicting an insured of the crime of manslaughter was insufficient to preclude coverage under a homeowners' policy based on the "expected or intended" exclusion. In *State Farm Lloyds v. Jones*, 2008 WL 5243093 (E.D.Tex. December 30, 2008), the court made an *Erie* guess and found a fact issue in the analytical gap between the criminal standard of "*recklessly"* causing the death of an individual and "expected or intended" requirements of the exclusion.