The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT HOLDS "GOOD SAMARITAN" INJURED WHILE ASSISTING A STRANDED MOTORIST WAS NOT ENTITLED TO EMPLOYERS' UNDERINSURED COVERAGE AS HE WAS NOT "OCCUPYING" HIS VEHICLE AT THE TIME OF THE ACCIDENT

On Friday the Texas Supreme Court held a "Good Samaritan" who suffered serious injuries while assisting a stranded motorist was not entitled to recover benefits under his employers' underinsured policy because he was not "occupying" his vehicle at the time of the accident. In *United States Fidelity & Guaranty Co. v. Goudeau*, 2008 WL 5266378 (Tex. December 19, 2008), Goudeau was severely injured when a third driver smashed into the two cars stopped along a Houston freeway and pinned him between the vehicles and the retaining wall. Goudeau recovered the $20,000 policy limits from the driver who caused the accident. The primary question in this case was whether Goudeau could recover under his employers' underinsured policy.

Goudeau worked for Advantage BMW and was driving one of its cars in the course of his employment at the time of the accident. Advantage MBW had two insurance policies with United States Fidelity & Guaranty Company (USF&G): a workers' compensation policy and an auto policy with uninsured/underinsured coverage. USF&G paid more than $100,000 in benefits to Goudeau and his medical providers under the compensation policy, but denied benefits under the underinsured motorist policy.

The underinsured policy covered designated employees as well as any others "occupying" an Advantage vehicle during a collision. Goudeau was not designated under the policy. The standard-form policy defined "occupying" as "in, upon, getting in, on, out or off." Goudeau asserted coverage only on the ground he was "occupying" the car by being "upon" it when he was injured. The court held since Goudeau had exited the car, closed the door, walked around the front and then the vehicle smashed into the car, he was not "occupying" it as required by the policy. An alternative issue involving a USF&G Request for Admission was also addressed, but dismissed by the court since the admission was sent to counsel for the compensation policy and <u>not</u> the underinsured policy.

TEXAS SUPREME COURT OVERRULES PRIOR DECISION ON CARRIER'S DEADLINE TO CONTEST COMPENSABILITY FOR AN INJURED WORKER'S CLAIM

Last Friday, over two and-a-half years after oral argument, the Texas Supreme Court issued a surprise decision to reverse a prior opinion (*Downs v. Continental Cas. Co.*, 81 S.W.3d 803 (Tex. 2002) related to a workers' compensation carrier's deadline to contest compensability of a claim reported by an injured

worker. In *Downs*, the Court construed section 409.021(a) of the Workers' Compensation Act to preclude the carrier from contesting the compensability of an employee's injury unless, within seven days of receiving notice of injury, it either began to pay benefits or gave written notice of its refusal to do so. This decision was in stark contrast to the Texas Workers' Compensation Commission's ("TWCC") position that a carrier had sixty days to contest compensability. Less than nine months after *Downs* was final, the Legislature amended section 409.021 to make clearer that a carrier "who fails to comply with Subsection (a) does not waive the . . . right to contest the compensability of the injury."

In this case, an employee claimed to contract Legionnaire's disease at work. The employee died four days after the employer received notice of the claim. Her spouse then claimed workers' compensation death benefits. The employer, a self-insured nonsubscriber, contested compensability forty-three days after receiving notice of the injury. Before the *Downs* decision became final the TWCC, instructed by the Office of the Attorney General, adhered to its position on timing to contest compensability. Once the *Downs* decision became final, the administrative process resumed to determine entitlement to workers' compensation death benefits. A contested case hearing was held and the hearing officer held the spouse had failed to prove the deceased employee contracted her illness in the course and scope of her employment. However, the hearing officer applied *Downs* retroactively and concluded: by failing to pay benefits or give notice of its refusal to do so within seven days of notice of the injury, the employer was precluded from contesting compensability. A series of appeals ensued culminating with the Texas Supreme Court granting the employer's petition for review.

The court reviewed the doctrine of *stare decisis* and concluded *Downs* was "simply an anomaly in the law." The court reversed the judgment of the court of appeals and remanded the case to trial court for further proceedings.

FIFTH CIRCUIT HOLDS CARRIER DID NOT ESTABLISH PREJUDICE BY VIRTUE OF UNTIMELY NOTICE AFTER AN ELECTROCUTION ACCIDENT INVOLVING A CRANE OPERATOR

This past week the Fifth Circuit, applying Texas law, affirmed a summary judgment holding the evidence failed to establish a material fact regarding prejudice on a late notice issue. In *Trumble Steel Erectors, Inc. v. Moss*, 2008 WL 5210638 (5th Cir. December 15, 2008), a portion of a crane operated by Trumble came in contact with an electric power line resulting in the electrocution death of its operator. Trumble's insurance policy required that the carrier receive notice of "occurrences" like this accident "as soon as practicable."

On the day of this accident three entities (including OSHA) undertook independent investigations that included photographing the scene and taking witness statements. The carrier did not conduct an immediate investigation because it was not aware of the incident. Three months after the incident suit was filed against Trumble and others. The carrier did not receive notice of the incident until after suit was filed. The carrier and Trumble reached a settlement agreement and the instant third-party claim surged forward against the insurance broker for failure to timely notify the carrier about the accident.

In order to establish prejudice, an insurer must demonstrate the loss of a valuable right or benefit. Here, the carrier complained it experienced prejudice given it was unable to conduct its normal "shock-loss investigation" directly after the accident. In the carrier's view, OSHA's and the local authorities' investigations did not alleviate the alleged prejudice because only the carrier's specialized "shock-loss investigation" inquires into essential issues and immediately takes post-accident measures in an effort to

decrease liability. The question thus posed to the Fifth Circuit was whether sufficient prejudice had arisen to relieve the insurer of liability.

The court ultimately held although failure to receive timely notice deprived the carrier of its desired shock-loss investigation, the carrier did have an opportunity to rely on and collaborate with the three other investigating entities and also had the ability to complete its own investigation and discovery soon after suit was filed. The court went on to state: "Without more specific evidence regarding the prejudice that arose from the insurer's inability to investigate, courts are powerless to bridge the gap between the creation of an environment in which prejudice *could* occur and the requisite prejudice showing."

FIFTH CIRCUIT APPLIES *MID-CONTINENT V. LIBERTY MUTUAL* DECISION AND HOLDS NO RIGHT OF SUBROGATION AFTER FULL INDEMNIFICATION

Last week the Fifth Circuit held a primary liability carrier had no right to reimbursement from another co-primary insurer under Texas law based on last year's blockbuster reimbursement decision from the Texas Supreme Court. In *Nautilus Ins. Co. v. Pacific Employers Ins. Co*., 2008 WL 5232222 (5th Cir. December 16, 2008), Nautilus pursued a portion of funds it paid to settle the insured's claims under an argument expressly rejected by the Texas Supreme Court last year. *See Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765 (Tex. 2007)(*see also MDJW Newsbrief* dated October 15, 2007 for full report).

The insured in the underlying case, EOG Resources, Inc. ("EOG") entered into several contracts as part of its oilfield operations. EOG contracted with J.R. Nichols, L.L.C. ("Nichols") to determine the owners of surface and mineral estates within a certain space and survey the land. Nautilus insured Nichols and listed EOG as an additional insured under the policy. EOG also contracted with Veritas DGC Land, Inc. ("Veritas") to perform seismic dynamite blasting. Pacific insured Veritas and also listed EOG as an additional insured under Veritas' policy. Both the Nautilus policy and the Pacific policy were primary insurance policies, and both contained identical pro rata provisions.

As a result of the seismic activity several homeowners sued EOG and some of its contractors alleging the seismic activity caused foundation defects. As the case proceeded towards trial, Nautilus and several other insurance companies made settlement payments. Nautilus argued a portion of a voluntary settlement included a sum Pacific should have paid to satisfy its obligations to EOG. Pacific refused to pay and proceeded to trial. A jury ruled against thirty of the homeowners' claims and the court granted summary judgment on the remaining homeowners' claims. Therefore, Pacific did not contribute to the settlement and did not pay anything in the underlying state court actions.

Nautilus filed suit against Pacific and argued, under the subrogation clause, it became contractually and equitably subrogated to the rights of EOG to seek compensation for the amounts Nautilus paid on behalf of EOG that Pacific should have paid instead. Applying the *Mid-Continent* decision, the district court granted summary judgment in favor of Pacific. Nautilus appealed. The sole question on appeal was whether the district court properly applied *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*

After a lengthy recitation of the *Mid-Continent* decision, the court noted settlement of the cases fully indemnified EOG for those claims and, under *Mid-Continent*, EOG had no rights to enforce against Pacific. Therefore, Nautilus could not stand in EOG's shoes and recover from Pacific. Nautilus responded and argued the *Mid-Continent* decision was narrow and applies only when an insurer settles a case to "protect its own coffers," a circumstance missing in this case. Nautilus made several other policy

arguments related to subrogation rights. In the end, the Fifth Circuit carefully followed the language in *Mid-Continent*, which involved the exact issue and affirmed summary judgment.

NEWSBRIEF TO RESUME JANUARY 12, 2009
MDJ&W WISHES ALL OF OUR READERS A VERY MERRY CHRISTMAS AND A HAPPY AND PROSPEROUS NEW YEAR!

Our offices will be closed this Wednesday, Thursday and Friday, December 24th through 26th, for the Christmas Holiday, as well as Thursday, January 1st, for the New Year's holiday. Our Texas Insurance Law Newsbrief research and writing staff will also be taking those days off to spend time with family and friends. The Newsbrief will resume publication January 12, 2009 and will continue weekly in 2009 as we have for the past 9 years. As we have done before, if the courts of Texas (particularly the Texas Supreme Court) issue any *significant* decisions before January 7th, we will issue a special report to keep our readers updated on any ground-breaking developments. We also intend to release our 2008 year-in-review over the next two weeks where we will recap the year's biggest appellate decisions impacting Texas insurers. Otherwise, we will resume our weekly reporting on January 12th. Until then, we want to offer our special thanks to our clients and friends in the insurance industry who contributed in many different ways in making 2008 successful on many different judicial, appellate, legislative, regulatory and business fronts. We want to wish all of our readers a very Merry Christmas and a Happy and Prosperous New Year!