



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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FIFTH CIRCUIT ALLOCATES DEFENSE COSTS AMONG THREE PRIMARY INSURERS, ALLOWS EXCESS INSURER TO RECOVER ON CONTRACTUAL SUBROGATION CLAIM

Last Wednesday, The Fifth Circuit reversed a lower court's ruling and found that an excess insurer could recover from three primary insurers who refused to defend. In *Continental Casualty Co. v. North American Capacity Insurance Co.*, 2012 WL 19641842 (5th Cir. (Tex.), May 30, 2012), Valero Refining Company contracted with Encompass Power Services to design and construct a co-generation facility at a refinery. Power outages and a fire resulted in significant damages to the refinery and Valero sought recovery against Encompass who was covered by three primary policies and an excess policy. Two of the primary insurers denied coverage; one ended its defense after paying its policy limits and then the excess insurer took over the defense until the case settled. The excess insurer then sought recovery for defense costs from the underlying insurers. The trial court held that because of a bankruptcy, assignment of claims, and the settlement, the excess insurer "stood in empty shoes" in trying to assert subrogation rights.

On appeal, the Fifth Circuit affirmed the lower court's ruling that the two primary insurers, who denied coverage, had a duty to defend. And, that the third insurer who refused to defend after paying its policy limit in a separate deal with Valero that did not end the litigation, still had a duty to defend. The Fifth Circuit then examined the contractual subrogation clause in the excess insurer's policy and determined that the excess insurer was entitled to pursue contractual subrogation against the primary insurers "who should have borne the costs that it paid." Lastly, the court found that even though the three primary insurers had vastly different policy limits, they should each bare the defense costs equally. Accordingly, the Fifth Circuit affirmed the allocation of defense costs, and reversed the lower court's decision concerning the excess insurer's subrogation claim and remanded the case for further proceedings.

COURT DENIES MOTION TO REOPEN APPRAISAL PROCESS

Recently, a federal District Court judge in the Galveston Division of the Southern District of Texas denied an insured's motion to abate an adverse appraisal award and to reopen the appraisal process to conduct discovery. In *KLM Resources, LLC v. Ohio Casualty Insurance Co.*, 2012 WL 1911801 (S.D. Tex. May 25, 2012), the insurer invoked the appraisal process to resolve a dispute over the amount owed on a business interruption claim following Hurricane Ike. The insurer's appraiser and the umpire set the amount of loss at \$5,000, substantially less than the \$92,000 estimated by the insured's appraiser and less than the \$10,000 already advanced by the insurer. Facing a summary judgment on all of its claims, the insured sought an abatement of the award to conduct discovery on the issue of whether the award resulted from mistake.

Judge Froeschner observed that the insured did not challenge the umpire's credentials, nor offered any evidence of collusion or dishonesty. The sole basis for the insured's motion was based upon a belief that the methodology used by the umpire and insurer's appraiser in reaching the amount owed was flawed. The court noted that the insured's appraiser's affidavit "simply expresses his disagreement" with the assessment methods used. Accordingly, the court denied the insured's motion to reopen the appraisal process.

COURT REJECTS THIRD-PARTY BREACH OF ORAL CONTRACT CLAIM AGAINST INSURER

Recently, the Tyler Court of Appeals rejected a third-party claimant's direct action against an insurer's managing general agent alleging breach of oral contract, after finding that the third-party lacked standing to bring the lawsuit. In *Haygood v. Hawkeye Insurance services, Inc.*, 2012 WL 1883811 (Tex.App. – Tyler, May 23, 2012), the insured vehicle rear ended the Haygood vehicle and the car was determined to be a total loss. Extensive negotiations over the next two years failed to settle the claim for damage to the vehicle and Haygood ultimately filed suit against the insured for negligence and, also Hawkeye Insurance alleging they breached three oral agreements reached during settlement negotiations. The trial court granted summary judgment in favor of Hawkeye Insurance and this appeal followed.

On appeal, the court observed that Texas law will not allow a third-party to enforce a policy directly against the insurer until the insured's obligation to pay has been finally determined. The court construed the rule as one of standing and found that there was no evidence to show any written agreement or judgment of liability against the insured. And, because this condition precedent had not been met, the court affirmed summary judgment in favor of Hawkeye Insurance.

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