



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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COURT FINDS EVIDENCE TO SUPPORT INSURER'S EQUITABLE SUBROGATION CLAIM

Last Monday, the Dallas Court of Appeals found that an insurer had presented sufficient evidence to withstand a no evidence summary judgment claim and reversed the trial court's summary judgment thereby allowing the subrogation claim to proceed. In *Frymire Engineering Co. Inc. ex. rel. Liberty Mutual Ins. Co. v. Jomar Intern., Ltd.*, 2008 WL 4838414 (Tex.App. – Dallas, Nov. 10, 2008), a subcontractor installed a valve manufactured by Jomar and a water line ruptured at the valve location. The subcontractor's insurer, Liberty Mutual, paid for the damage and then pursued subrogation. The trial court granted the manufacturer's no-evidence summary judgment finding no evidence of an actual injury suffered by the subcontractor or a causal connection between the alleged valve defect and an actual injury suffered by the subcontractor.

On appeal, the court reviewed the standard of proof required on causation for the negligence, breach of warranty and the strict liability theories of recovery alleged. The manufacturer argued that "[n]either the claim by the Renaissance or the settlement payment constitutes an injury to Frymire that was caused by any defect in the Add-A-Valve," which failed to recognize the equitable subrogation claim. Addressing the issue, the court observed: "Subrogation allows one party to take the place of another so that the new party gains the rights of the former party to pursue a claim." The court noted that "the injury at issue is not the claim by Renaissance or the settlement payment, but the water damage suffered by Renaissance" and that the evidence is undisputed that the damage occurred. Having previously found the evidence was sufficient to support its design defect claim, the Dallas Court of Appeals reversed the trial court's judgment and remanded the case for further proceedings.

FEDERAL COURT ALLOWS EXPERT TESTIMONY TO PROCEED IN UNINSURED MOTORIST CASE

Last Monday, in *Lizanetz v. St. Paul Guardian Ins. Co.*, 2008 WL 4865581 (N.D. Tex. November 10, 2008), a federal district court judge in Dallas rejected efforts by both parties to exclude the trial testimony of three mental health professionals and an economist. In doing so, the court observed "the rejection of expert testimony is the exception rather than the rule" and the court's role as the "gatekeeper" should not be used to replace the adversary system and vigorous cross-examination. In denying the motions, the court concluded: "Where, as here, qualified mental health professionals disagree as to whether and to what extent a plaintiff has suffered cognitive impairments as a result of injuries sustained in an accident, the "battle of experts" should be resolved by a jury, not by the court. The same is true for expert testimony regarding economic damages." Note: This case illustrates the ongoing trend for both state and federal courts to "let it all in" and allow the juries to sort it out.

PROPOSED TEXAS INSURANCE LEGISLATION PRE-FILED

The Legislature will not convene for the 81st Regular Session until January 13, 2009, but numerous bills that may significantly impact Texas insurers have already been filed this past week:

- 2009 TX S.B. 264 (NS) Relating to prior approval of residential property insurance rates of certain insurers
- 2009 TX S.B. 262 (NS) Relating to an exemption from public insurance adjuster license requirements for certain persons
- 2009 TX S.B. 225 (NS) Relating to the classifications used in rating personal automobile insurance.
- 2009 TX S.B. 150 (NS) Relating to the determination of the amount of payment on certain claims under residential property insurance policies
- 2009 TX S.B. 149 (NS) Relating to the availability of property insurance under the Fair Access to Insurance Requirements (FAIR) Plan
- 2009 TX S.B. 147 (NS) Relating to coverage under residential property insurance policies for certain losses incurred because of compliance with an emergency evacuation order
- 2009 TX S.B. 110 (NS) Relating to prohibition of the use of credit scoring in underwriting and rating certain personal lines of insurance coverage
- 2009 TX S.B. 103 (NS) Relating to rates charged for residential property and personal automobile insurance in certain rating territories
- 2009 TX S.B. 102 (NS) Relating to required use by insurers of certain standard insurance policy forms for residential property insurance
- 2009 TX S.B. 91 (NS) Relating to regulation of property and casualty insurance rates

We will continue to monitor these bills and other pending legislation and report as significant developments occur. Meanwhile, if you have any questions or would like copies of any of these bills, just let any of our lawyers know.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.
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