The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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November 10, 2008

HURRICANE RITA MDL PANEL ISSUES ORDERS TO CLARIFY CONFUSION ABOUT CONSOLIDATED CASES AND, IN RESPONSE, PLAINTIFFS' COUNSEL FILES MANDAMUS WITH THE TEXAS SUPREME COURT

In September, the Texas Multidistrict Litigation Panel held that multiple lawsuits with virtually identical allegations against several insurers arising from Hurricane Rita were "related" which enabled them to transfer the cases to a single pretrial judge (*See MDJW Newsbrief* dated September 8 and 29, 2008). Finding the transfer of the cases would serve the goals of Rule 13 to "(1) serve the convenience of the parties and witnesses and (2) promote the just and efficient conduct of litigation," the Panel found two of three motions, involving sixteen of the twenty-one lawsuits, were "related" so as to warrant transfer and consolidation of the cases for the purposes of addressing discovery and other pre-trial matters.

On October 8, the MDL Panel authored a brief opinion on a Motion to Vacate Order of Appointment of Pretrial Judge (Retired Judge J. Specia from Bexar County) and issued a corrected list of cases transferred to the MDL, but denied relief to the Mostyn Firm on the firm's mistaken assumption that Judge Specia would hold hearings in Bexar County. Instead, the MDL Panel issued several orders to clarify confusion indicating the cases "are transferred to whichever District Court in Jefferson County Judge Specia" determines in his discretion can best serve as the transferee court under Rule 13.2(e). Additionally, the MDL Panel ordered the pretrial hearings "shall be held in such court or in any other district court in a county where any of the cases are pending."

Not satisfied with the MDL Panel's orders, the Mostyn Firm filed a Petition for Writ of Mandamus with the Texas Supreme Court. The Original Proceeding makes the following arguments:

I. The MDL Panel applied an incorrect and arbitrary standard when determining whether cases should be consolidated; and
II. The MDL Panel should have considered the efficiency of the transfer and judicial assignment as part of its analysis.

In essence, the Petition argues the consolidated cases do not share common questions of fact regarding the insurance companies' conduct in investigating each of the individual homeowners' insurance claims. It goes on to argue the MDL Panel's reliance on the nature of plaintiffs' pleadings and discovery requests is "gravely misplaced."

We will continue to monitor this situation and provide updates as new information becomes available from the Texas Supreme Court or the parties.

FEDERAL COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF AUTO ANCE CARRIER ON UIM CLAIM BY SPOUSE BUT DENIES SUMMARY JUDGMENT ON INSURED DRIVER'S EXTRA-CONTRACTUAL CLAIMS

Last week a Dallas federal magistrate held an auto carrier was entitled to summary judgment on a spouse's extra-contractual claims related to UIM benefits, but denied summary judgment as to the insured driver's extra-contractual claims related to UIM benefits. In *Haralson v. State Farm Mutual Auto. Ins. Co*., 2008 WL 4821326 (N.D. Tex. November 5, 2008), an insured driver sustained serious bodily injuries in an accident. His spouse and daughter were following behind in another car and witnessed the accident. After accepting the liable driver's policy limits, the injured driver and his spouse filed separate claims for UIM benefits under their personal auto policy.

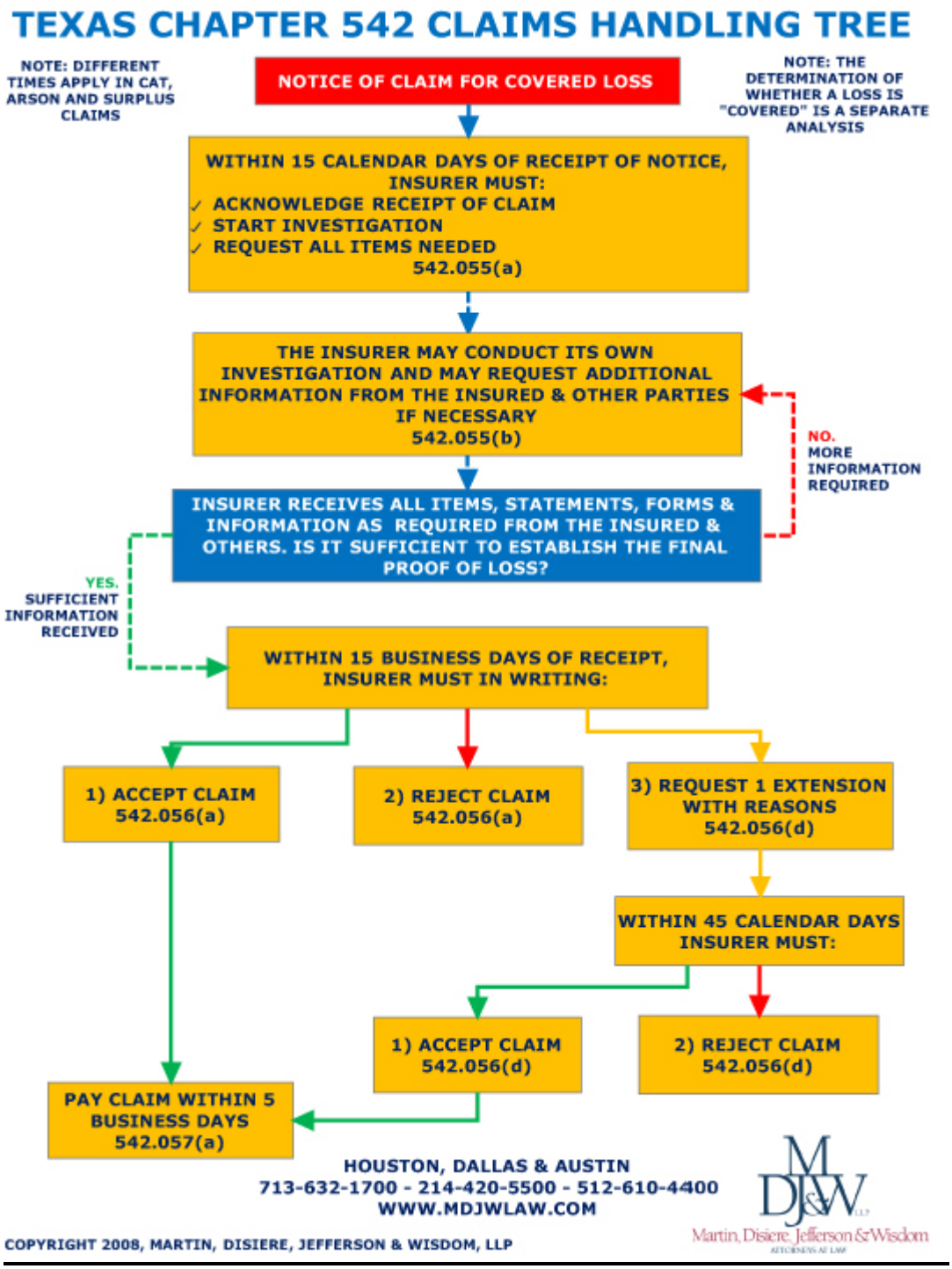
Subsequently, State Farm tendered its UIM policy limits (per person not per accident) payable to both the injured driver and his spouse. The next day, the insureds, through their attorney, rejected the check because it purported to settle both claims. Unable to resolve this dispute through negotiation, the insureds filed separate lawsuits which were later removed to federal court and consolidated. Later, the carrier tendered another check for policy limits payable only to the injured driver. This second check was also rejected.

The underlying UIM claim proceeded to trial on the issues of liability and damages. At the conclusion of the trial, State Farm moved for summary judgment on the insureds' claims for breach of contract and violations of the Texas Insurance Code. The insureds argued State Farm breached the insurance contract and violated state law by failing to pay each of them $50,000 UIM policy limits in a timely manner. In response, State Farm argued the injured driver's spouse is not entitled to recover on her contract and extra-contractual claims because she was paid in full within 60 days after the court established the amount of her bodily injury damages. Under Texas law, a "UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability of the underinsured status of the other motorist." The trial court agreed and held the carrier was entitled to summary judgment on the spouse's claims as she had been compensated. The court reached a different conclusion with respect to the claims for the injured driver.

Unlike the spouse's claims for damages, the court noted the carrier never disputed the injured driver was legally entitled to recover his damages. The court then noted the carrier waited 10 months after the accident to issue a settlement draft to the injured driver and his attorney. Prior to that time, the spouse had been included on the settlement check. Denying summary judgment against the injured driver, the court concluded if the injured driver could convince a jury the carrier improperly conditioned payment of his UIM claim on the release of the spouse's claim for bodily injury damages, the carrier may be liable for breach of contract and delay damages under the Texas Insurance Code.

Editor's note: This case provides a good lesson and predictor on a growing trend of artificially created opportunities to "set up" a carrier for bad faith claims even though the carrier attempts to pay a claim in a fair and timely fashion. In this case payment was issued within 30 days of the accident to both the injured driver and spouse. According to the court, if the carrier had issued payment only to the driver, then it could have avoided a potential EC claim for its delay in payment and alleged breach of contract. It appears the insured's counsel manipulated the circumstances to set up the carrier in this instance.

To provide some clarification on Texas Insurance Code prompt payment issues MDJW has developed this graphic representation of the statutory prompt payment rules in Texas. Hard copies can be obtained from any of our attorneys or you may click on the graphic for a PDF version.



APPELLATE COURT REVERSES COUNTY COURT VENUE RULING AND REMANDS CASE TO TRANSFER VENUE

Recently the Houston 1st Court of Appeals issued a ruling to reverse and remand a case to county court to issue an order to transfer a case to a different venue. In *Cramer v. State Farm Mutual Auto. Ins. Co.*, No. 01-0800270-CV (Tex. App.—Houston [1st Dist.] November 6, 2008), State Farm filed suit against the

Cramers in McLennan County's Justice of the Peace Court to recover a double payment. The Cramers filed a motion to transfer venue which the justice court denied. After the justice court entered judgment in favor of State Farm, the Cramers appealed the decision to the County Court at Law No. 1 in McLennan County. In the county court, the Cramers again filed a motion to transfer venue. The county court also denied the motion to transfer. The Cramers did not appear for trial and the county court signed a judgment in favor of State Farm.

The sole issue on appeal was whether the county court erred in denying the Cramers' motion to transfer. The appellate court conducted a de novo review. After a swift recitation of the Texas venue rules the court concluded at no point did State Farm show that venue was proper in McLennan County. Unlike other courts, an appeal from a justice court is tried de novo. The appellate court then reversed the judgment of the county court and remanded the case to the county court to issue an order transferring the case.

AMICUS SUPPORT NEEDED FROM ANY INTERESTED CARRIERS ON *MID-CONTINENT V. LIBERTY* ISSUES BEFORE THE 5TH CIRCUIT

Last year's decision by the Texas Supreme Court in *Mid-Continent vs. Liberty Mutual* addressed the issue of when a liability carrier who pays indemnity benefits to settle claims against an insured can sue a non-participating liability carrier to recover its share of the settlement. Great confusion has resulted as carriers in Texas have attempted to determine the scope of *Mid-Continent vs. Liberty Mutual*. The issue is now before the 5th Circuit Court of Appeals and amicus involvement is needed from any interested carriers.

In *Trinity Universal Insurance Co. v. Employers Mutual Casualty Co*., No. H-07-0878, in the United States District Court for the Southern District of Texas, three insurers -- Trinity Universal Insurance Company, Utica National Insurance, and National American Insurance Company -- sued Employers Mutual Casualty Company for breach of contract and contribution and sought a declaration that Employers has a duty to defend Lacy Masonry in an underlying suit in which Lacy was sued by a hospital for negligent design, construction, and improvement of a building. The plaintiffs' and Employers' CGL policies contained identical "other insurance" clauses" which provided a method of sharing the obligations for the loss with other insurers. The District Court Judge, Ewing Werlein, declared Employers had a duty to defend Lacy but rejected the plaintiffs' claims for contribution.

Applying the Texas Supreme Court's recent decision in *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co*., 236 S.W.3d 765 (Tex. 2007), the high court held that the presence of the "other insurance" clauses foreclosed the plaintiffs' ability to recover from Employers its share of costs already incurred in defending Lacy in the underlying suit. The supreme court held in *Mid-Continent* that when co-primary insurance policies contain "other insurance" clauses, a co-insurer that pays more than its proportionate share of a settlement has no right to reimbursement from another co-insurer through contribution, and no recovery through equitable or contractual subrogation if the insured was fully indemnified. The CGL policies in *Mid-Continent* contained "other insurance" clauses identical to the ones here. The district court held that *Mid-Continent* "applies squarely to Plaintiffs' claim for contribution. . . . The inclusion of 'other insurance' clauses in the parties' policies defeats Plaintiffs' contribution claim by transforming their otherwise shared contractual obligations – including to defend – into independent duties that only be enforced, if at all, by Lacy Masonry."

The trial court in this case further held that "*Mid-Continent* forecloses contractual and equitable subrogation claims between co-insurers when the insured has been fully compensated," as here. "*Mid-Continent's* rejection of subrogation in this context derives from the principle that an insured cannot

obtain more than a single recovery for any loss, and that an insurer asserting rights in subrogation stands in the shoes of its insured. . . . Under *Mid-Continent's* rationale, the absence of any loss to Lacy Masonry precludes Plaintiffs' subrogation claim." The court granted summary judgment to Employers on the plaintiffs' claims for contribution and breach of contract and dismissed those claims on the merits.

An appeal has now been filed with the Fifth Circuit Court of Appeals. The Appellant carriers seek to have the Fifth Circuit clarify when carriers who contribute to a settlement may seek contribution from another carrier. Our firm is preparing an amicus brief to the Fifth Circuit in support of the carriers seeking to preserve a contribution right under Texas law in this context. Any interested carrier who wishes to further discuss the positions being appealed in this case and its importance to the Texas insurance industry should contact Chris Martin or Levon Hovnatanian at 713-632-1700.