The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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WORKERS COMPENSATION INSURER'S DECISION TO LATER PAY A PREVIOUSLY DENIED CLAIM DOES NOT ALLEVIATE NEED FOR CLAIMANT TO OBTAIN ADMIN RULING THAT INITIAL DENIAL WAS IMPROPER BEFORE SUING FOR WRONGFUL DENIAL

On October 23, 2008, the First Court of Appeals in Houston held that a workers compensation claimant was required to exhaust her administrative remedies before suing her workers' compensation insurer for unreasonable delay or denial of benefits, even though insurer ultimately agreed on medical necessity and paid for foot surgery more than a year after injury. *Schwartz v. Insurance Co. of the State of Pennsylvania*, --- S.W.3d ----, 2008 WL 4670516 (Tex.App.-Hous. [1st Dist.] 2008). The lawsuit stemmed from the insurer's initial denial of preauthorization of requested surgery, and a dispute remained for resolution by the Workers' Compensation Commission ("WCC") since ultimate authorization for the surgery was not a determination by Commission that the initial denial was improper.

The claimant argued that since the insurer agreed to pay the benefits there was no dispute for the WCC to determine. But, the court found that the lawsuit was based on the initial denial, not the later decision to pay the claims. Following the Labor Code section 413.031, the court required that the claimant must have the WCC determine that the medical treatment was entitled to preauthorization before a trial court can adjudicate a claim arising from a carrier's delay or denial of preauthorization for such treatment.

TODAY'S ELECTION HAS LOCAL JUDGES NERVOUS

Texas state court judges are elected and (unfortunately) run for election with Party affiliations. While Harris County Republican Chairman Jared Woodfill insists that Democrats will not sweep Harris County in today's judicial races the way they did in Dallas two years ago, the Houston Chronicle is reporting today that early voting indicates Democrats leading in all local judicial races. All of the incumbent judges up for re-election in Harris County are Republicans. They all have Democratic challengers this year. A Democratic sweep lead by increased voting due to interest in the Presidential race could result in a radical transformation of the Harris County Civil District Courts. Not every judicial seat is up for election this year, meaning that some Republican judges will still be running their courts regardless of the election results today. Also, two Republican judges retired to private practice in August, and the governor will fill these two seats by appointment. A Democratic sweep of all contested judicial races today would radically transform the quality of the Harris County judiciary.

Harris County is not the only jurisdiction whose judiciary is likely to be impacted by today's election. We will monitor the judicial implications of today's election in the major metro areas of Texas and will report on the results in the days to come.

AMICUS SUPPORT 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 has been approached about 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.