The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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MOTION TO REMAND DENIED BECAUSE TEXAS LLOYDS COMPANY WAS ONLY PARTY IN INTEREST FOR DIVERSITY PURPOSES AND LLOYD'S ENTITY WAS SUBJECT TO $75,000 AMOUNT IN CONTROVERSY

Last week in a significant federal jurisdictional decision, a Houston federal judge denied a motion for remand concluding it had jurisdiction over a removed bad faith case because of complete diversity of citizenship and the amount in controversy exceeded $75,000. In *Cronin v. State Farm Lloyds*, Vo. H-08-1983 (S.D. Tex. October 10, 2008), Plaintiffs' home suffered damage due to a nearby explosion. The insured held a homeowner's policy with State Farm and filed a claim for damages to their home allegedly sustained from the explosion. A dispute arose as to the claim and this lawsuit ensued. Subsequently, State farm removed the case to federal court based on diversity of citizenship pursuant to 28 U.S.C. § 1332. In response, the Plaintiffs filed a motion to remand arguing that a Texas Lloyds company lacked diversity jurisdiction.

The court first addressed the issue of diversity of citizenship with respect to State Farm. The insurance policy in question was issued by State Farm through its Texas Lloyd's entity. A Lloyd's plan consists of a group of at least ten underwriters who join together to write insurance by executing "articles of agreement." The Fifth Circuit has previously held a Lloyd's plan is not a corporation, but is an unincorporated association. Therefore, like all other unincorporated associations, a Lloyd's plan "is considered to have the citizenship of its members." To prove its citizenship, State Farm provided an affidavit which listed the names of all its underwriters. As Plaintiffs failed to provide any evidence to the contrary, the court concluded the complete diversity requirement had been satisfied.

The more difficult question involved the amount in controversy issue. In addition to complete diversity, Section 1332(a) requires the "matter in controversy exceeds the sum or value of $75,000." Here, a demand letter was submitted in the amount of $450,000. This amount was not disputed; instead, Plaintiffs argued State Farm had to establish the amount in controversy was at least $75,000 as to *each* of the twelve individual underwriters. State Farm argued it was liable on the Plaintiffs insurance policy, not the individual underwriters.

The court reiterated Texas Lloyd's plans such as State Farm Lloyds are singular legal entities created by Texas law. Federal courts in Texas have long recognized the underwriters of Texas Lloyd's plans "may be sued in their collective name and bound by any judgment rendered against them in that name." In this case, there was only one defendant — the State Farm Lloyd's plan. As such the amount in controversy was satisfied as it surpassed $75,000. Lastly, the court briefly addressed one reported decision with contrary analysis. In *Etan Industries, Inc. v. The Travelers Lloyds Ins. Co.*, 2008 WL 1869216 (N.D. Tex. April 28, 2008), Etan sued its insurer, a Texas Lloyd's plan in Texas state court. The matter was removed to federal court and a motion to remand was filed. The Dallas federal judge held complete diversity

existed and moved to the amount in controversy analysis. Without citing authority, the *Etan* court concluded "[e]ach of the underwriters in this case is severally liable." Accordingly, the *Etan* court declared each of the fifteen underwriters must meet the $75,000 jurisdictional amount. The *Cronin* court quickly dismissed the *Etan* court's analysis indicating its reasoning was flawed because it failed to recognize a Texas Lloyd's plan as a distinct legal entity under Texas law, and the underwriters of the Lloyd's plan insurer were neither defendants nor real parties in interest.

Editor's Note: MDJW had the privilege of representing State Farm Lloyds in this matter. This decision, in light of the *Etan* case, was a significant victory for Texas insurers utilizing the Lloyd's plan business model. The implications of an alternative *Etan*-like analysis for calculating the amount in controversy would have precluded Texas Lloyds carriers from litigating most claims in federal court.

APPELLATE COURT AFFIRMS DECISION TO DENY PLAINTIFF'S MOTION TO EXCLUDE EXPERT TESTIMONY RELATED TO EMPLOYEE'S INTOXICATION

Recently, the San Antonio Court of Appeals affirmed a lower court's decision to exclude expert testimony related to an employee's intoxicated state at the time he sustained injuries from a fall at work. In *Adkins v. Texas Mut. Ins. Co.*, 2008 WL 4500322 (Tex. App.—San Antonio (October 8, 2008), the employee was injured at work when he slipped and fell walking into a freezer. The employee filed a workers' compensation claim and prevailed at the administrative level. The workers' compensation carrier filed suit contending the employee's claim was not compensable because he was intoxicated at the time he sustained his injuries. The jury agreed, finding the employee was intoxicated. The employee filed an appeal arguing the trial court erred in denying his motion to exclude the carrier's expert testimony.

The employee admitted he had smoked marijuana several days prior to the incident. The employee, however, denied being under the influence of marijuana on the date of his fall. Before any testimony was offered at trial, the employee moved to exclude expert testimony related to the intoxication issue. The expert's opinion focused primarily on an interpretation of the drug test results. In the expert's opinion, there was no doubt that the employee was intoxicated at the time of the accident. The appellate court reviewed the intoxication defense and applied the Robinson factor analysis and the Gammill analytical gap test to determine whether the trial court properly admitted expert testimony. The court held, although the evidence was prejudicial to the employee, it was not unfairly prejudicial because the results of the test relate directly to the carrier's defense. And it found no abuse of discretion as the expert testimony was reliable and, therefore, admissible.

APPELLATE COURT ISSUES RARE DECISION TO OVERRULE AN ADMINISTRATIVE AGENCY'S INTERPRETATION OF ITS OWN STATUTE LEADING TO A REVERSED DISMISSAL AND ATTORNEYS' FEE AWARD

Recently, the Dallas Court of Appeals issued a rare decision to overrule the Texas Workers' Compensation Commission's ("TWCC") interpretation of its own mailbox rule and, in turn, impacted the timeliness of an appeal to the TWCC appeals panel. In *Combined Specialty Ins. Co. v. Deese*, 2008 WL 4491555 (Tex. App.—San Antonio (October 8, 2008), an employee filed a workers' compensation claim alleging an on-the-job injury related to her back. After a Contested Case Hearing, the carrier was ordered to pay medical and income benefits. The carrier attempted to appeal the decision, but the appeals panel concluded it was untimely.

The carrier filed a lawsuit seeking to set aside the appeal panel's decisions. The employee counterclaimed for attorneys' fees under the Labor Code. The employee filed a plea to the jurisdiction claiming, among other issues, the carrier's failure to timely appeal constituted an incurable failure to exhaust administrative remedies. Eventually, the court granted the employee's plea to the jurisdiction and signed an order granting attorneys' fees and expenses in the amount of $65,000.

As a threshold matter, the court reiterated a party does not exhaust its administrative remedies if it fails to make a timely appeal. Here, by statute the carrier was required to file a written request for appeal with the TWCC "not later than the 15th day after the date on which the decision of the hearing officer" was received. *See* TEX. LAB. CODE § 410.202(a). Under the TWCC's version of the mailbox rule, a request for review of a hearing officer's decision will be presumed timely filed "if it is: (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision . . . and (2) received by the [TWCC] not later than the 20th day after the date of receipt of the hearing officer's decision." *See* 28 TEX. ADMIN CODE § 143.3(e). After reviewing the timeline of events, the appeals panel concluded the carrier did not timely perfect its appeal.

The carrier argued it complied with the mailbox rule because the evidence showed it mailed a request for review within the fifteen-day deadline and the TWCC received a faxed copy, identical (but not the same paper—as the original was received after the deadline) to the mailed request for review on the twentieth day. The appeals panel interpreted its mailbox rule to mean the same piece of paper must be both sent and received to satisfy both the fifteen-day mailing rule and the twenty-day receipt rule.

The appellate court noted the Texas Supreme Court offers judicial deference to an administrative agency interpreting its regulations, but its review is "limited to determining whether the administrative interpretation is plainly erroneous or inconsistent with the regulation . . . . However, if the [agency] has failed to follow the clear, unambiguous language of its own regulation [the Supreme Court] must reverse its action as arbitrary and capricious." Applying this standard, and after reviewing the Texas Register comments on the mailbox rule, the appellate court held (1) the appeal panel's interpretation of the mailbox rule was unreasonable (and plainly erroneous) and (2) reversed its dismissal and attorneys' fee award and remanded the case.

MULTIDISTRICT LITIGATION PANEL DENIES MOTION FOR RECONSIDERATION AND CLARIFICATION FOR TRANSFER OF ADDITIONAL LAWSUITS TO A SINGLE PRETRIAL JUDGE

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). 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.

Recently, the MDL Panel authored a brief opinion on a Motion for Reconsideration and Clarification related to five lawsuits that were not transferred. Like the other sixteen cases, Standard Guaranty Insurance Company's ("SGIC") requested transfer of five cases to a single pretrial judge. The MDL Panel noted as to the Carriers cases (the 16 transferred lawsuits) SGIC failed to establish the claims in its cases were based on standard practices and procedures common to all the Carriers or the claims arise from

the same standardized policy language. Stated differently, the MDL Panel did not believe the cases were "related" under Rule 13.

HURRICANE IKE INSURANCE UPDATE

Last week, our firm issued our first Hurricane Ike Insurance Newsbrief to interested individuals. We will be publishing regular special reports of this nature in an effort to keep our readers updated on the latest trends in new claim arguments, new lawsuits, legal decisions and orders, TDI activity and orders, and other relevant news items of interest to insurers dealing with Ike issues. Our Hurricane Ike Insurance Newsbrief is **not** automatically sent to all subscribers of our Texas Insurance Newsbrief. **If you or others with whom you work wish to receive our firm's updates of the weekly developments in Hurricane Ike claims, lawsuits and regulatory activities, please send a request to be added to the Hurricane Ike Newsbrief (along with all email addresses to be added) to tin@mdjwlaw.com.**