The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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September 29, 2008

MULTI-DISTRICT LITIGATION PANEL ISSUES ORDER TO APPOINT SAN ANTONIO JUDGE TO COORDINATE PRE-TRIAL PROCEEDINGS FOR CERTAIN HURRICANE RITA CASES FROM SOUTH EAST TEXAS

Last week, the Texas Multidistrict Litigation Panel issued an order appointing the Hon. John J. Specia, Jr., senior judge of the 225th District Court of Bexar County, as the pretrial judge in multiple lawsuits (filed in Jefferson, Jasper, Hardin and Orange Counties) filed by the same plaintiffs' firm with virtually identical allegations against several insurers arising from Hurricane Rita. In *In re Delta Lloyds Insurance Company of Houston, Texas*, No. 08-0142, *In re Hurricane Rita Homeowners Claims*, No. 08-0208, and *In Re Southeast Surplus Underwriters General Agency, Inc.* No. 08-0427, all of the plaintiffs were represented by the same law firm, The Mostyn Law Firm (from Houston and Beaumont), and in virtually identical pleadings, alleged unfair claim practices, breach of contract, fraud and bad faith arising out of the insurers' handling of Hurricane Rita claims (*See MDJW Newsbrief* dated September 8, 2008). Finding that 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.

Editor's Note: A Motion to Vacate Order of Appointment of Pretrial Judge was filed late last week by Plaintiffs' counsel. The motion argues: 1) the recent Order of Appointment allegedly contradicts the MDL Panel's September 5 opinion; 2) Bexar County is not an Appropriate, Efficient or Convenient Forum; 3) none of the parties requested a Bexar County Pre-trial Court; and 4) the courts in Jasper, Jefferson, Hardin, and Orange Counties are "open, available, and appropriate." Because many carriers have been following the MDL efforts of this small band of carriers, we will continue to monitor these cases and provide updates as new developments arise.

FEDERAL DISTRICT COURT HOLDS DUTY TO DEFEND TRIGGERED, BUT ONLY WHEN PRIMARY POLICY HAS BEEN EXHAUSTED

Recently, a Houston federal judge held a commercial carrier had a duty to defend, but only after the primary policy had been exhausted. In *Willbros RPI, Inc. v. Continental Casualty Company*, No. H-07-2479 (S.D. Tex. August 27, 2008), Shell hired Willbros, as general contractor, to construct seventy-five miles of pipeline. Willbros hired Harding as a subcontractor to perform directional drilling. Harding, in turn, subcontracted various aspects of the job. During the drilling process, one of the pipelines were

damaged. The underlying lawsuit alleged the contractors were negligent in their duties and sought compensatory and consequential damages in excess of $8 million.

Shell tendered its defense and indemnity to Willbros, who accepted it. Willbros, in turn, tendered its defense and indemnity, as well as Shell's, to Harding and its carrier, Continental Casualty Company ("CNA"). The CNA policy contained a "blanket" endorsement which extended additional insured coverage, generically, to any person or organization with whom Harding had agreed to add as an additional insured. Willbros argued that it qualified as an additional insured by way of a Master Services Agreement ("MSA") which its predecessor had negotiated. CNA refused to assume Willbros and Shell's defense and denied Willbros' indemnity demands contending it was unclear (1) whether Willbros qualified as an additional insured, (2) whether various provisions excluded coverage, and (3) whether the coverage was excess, primary, or co-primary. A Declaratory Judgment suit was filed to resolve the dispute.

The court first addressed the question whether Willbros was an insured. Applying the eight corners rule, the court evaluated the "blanket" endorsement and whether it was permissible to review extrinsic evidence (i.e. the MSA) to make a coverage determination. Citing the Texas Supreme Court decision in *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006), the court recognized the narrow exception to the extrinsic evidence rule and allowed use of the MSA for purposes of determining coverage. More importantly, the court also held, even without the exception, it could resort to the MSA because the policy's use of a "blanket" endorsement effectively incorporated any written agreement under which Harding agreed to add a person or organization as an insured. After reviewing the MSA, the court concluded Harding agreed to provide coverage to Willbros for the type of liability alleged in the underlying lawsuit.

Next, the court looked at two different exclusions. First, the court analyzed the contractual liability exclusion. Willbros' liability in the underlying suit was held outside the scope of coverage because its liability was based on the liability of a third party for which Willbros agreed to assume. More specifically, CNA argued the "insured contract" exception applies only to named insureds as the definition of "insured contract" refers to "you" and "your." The court held, even if the exclusion applied, it could not remove Willbros' entire liability from the scope of coverage and so potential coverage remained.

Second, CNA relied on the professional services exclusion as a basis to deny coverage. CNA argued coverage was precluded because the conduct forming the basis of the liability qualified as a professional service. Here, the provision specified which acts qualified as a professional service, and the duty CNA cited was not expressly listed. The court reviewed the underlying pleadings and noted the well-established Texas rule "[i]f any allegation in the complaint is even potentially covered by the policy then the insurer has the duty to defend its insured. *See Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F3d 546, 552 (5th Cir. 2004). Because the underlying claim was independently supported and actually caused by multiple, alternative acts or omissions were didn't implicate the exclusions, CNA had a duty to defend the entire suit — but not for Shell or Shell's General Partner since they did not qualify as an insured.

Lastly, the court held CNA's insurer obligation was secondary to Willbros' insurer's primary coverage. The "other insurance" clauses contained in the Willbros and CNA policies did not require CNA to step in

and provide primary insurance for the underlying suit. Therefore, the court held CNA owed Willbros a duty to defend, but only after the primary policy had been exhausted.

FEDERAL COURT DENIES PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT IN AN ATTEMPT TO JOIN NON-DIVERSE DEFENDANT

Recently, a Dallas federal judge denied a Plaintiffs' request for leave to add an additional and non-diverse party. In *Alba v. Southern Farm Bureau Cas. Ins. Co*., 2008 WL 4287786 (N.D. Tex. September 19, 2008), Plaintiffs obtained a default judgment against an individual in Texas county court. The county court then issued a turnover order assigning to plaintiff all causes of action the individual had against Walters, Balido & Crain ("WBC") for legal malpractice and breach of fiduciary duty. Plaintiffs filed suit against the individual's carrier, Southern Farm Bureau Casualty Insurance Company ("Southern") and Southern removed the lawsuit to federal court. Plaintiffs subsequently filed a motion seeking to add WBC as a defendant.

Southern opposed the motion, among other reasons, because plaintiffs were attempting to defeat diversity jurisdiction. When a plaintiff seeks to join a non-diverse defendant after a case is removed based on diversity, 28 U.S.C. § 1447(e) gives the court the discretion to deny joinder or permit it and remand the case to state court. In determining whether to allow a non-diverse party to be joined, the court considers four factors known in Texas as the *Hensgens* factors: (1) whether plaintiffs' purpose is to defeat federal jurisdiction; (2) whether plaintiffs have been dilatory in asking for an amendment; (3) whether plaintiffs will be significantly injured if amendment is not allowed; and (4) any other factors bearing on the equities.

Applying the *Hensgens* factors to the this case, the court focused on the fact the plaintiffs waited until after removal to assert claims against a non-diverse defendant of which the plaintiffs had been aware since before filing suit. The court's suspicion about plaintiffs' tactics was amplified because plaintiffs had failed to offer any another explanation. The court evaluated the possible prejudice to the plaintiffs and concluded a state court cause of action was still a viable option against WBC.

APPELATE COURT HOLDS *RES JUDICATA* BARS BAD FAITH LITIGATION AGAINST INSURANCE COMPANY

Last Thursday the Texarkana Court of Appeals held the doctrine of *res judicata* applied to bar a second lawsuit stemming from an earlier insurance claim and companion lawsuit. In *McKnight v. Am. Mercury Ins. Co*., 2008 WL 4328925 (Tex. App.—Texarkana September 24, 2008), the insureds made a claim with their insurer, American Mercury Insurance Company (American Mercury), seeking payment for damage to their metal building resulting from a hailstorm in March of 2000. Initially, American Mercury issued a check for $24,055.70 to pay for the damage assessed. When the insureds, dissatisfied with the amount paid, refused to accept the check and, instead, filed suit in Upshur County, American Mercury reinvestigated the claim. Upon its reinvestigation, American Mercury discovered the damage, if there ever was any, had been cured by natural processes. So, during the Upshur County litigation, American Mercury maintained its position that it owed nothing because there was no remaining discernible damage to the building.

Several years later and following a trial to an Upshur County jury, the trial court entered a take nothing judgment. The insureds then tried to deposit the check that American Mercury had initially issued several years earlier. American Mercury refused to honor that check. The insureds then sued again, this time in Gregg County alleging breach of contract, violation of the DTPA, and violations of the Texas Insurance Code. American Mercury moved for summary judgment on the ground that the doctrine of *res judicata* barred the Gregg County litigation. The trial court agreed and granted summary judgment that the insureds take nothing. This appeal followed.

The court swiftly set forth the parameters for a *res judicata* analysis and listed the factors it would rely upon. To successfully assert the affirmative defense of *res judicata*, a defendant must prove the following well-established elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. After reviewing the record, the court concluded the insurance claim issues had been litigated and, even cast under a different legal theory, the insureds' claims were barred.