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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, 20th Floor Houston, Texas 77002 713.632.1700 FAX 713.222.0101
900 S Capital of Texas Hwy, Suite 425 Austin, Texas 78746 512.610.4400 FAX 512.610.4401
16000 N Dallas Parkway, Suite 800 Dallas, Texas 75248 214.420.5500 FAX 214.420.5501

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HOUSTON 14TH COURT OF APPEALS HOLDS MORTGAGOR IS NOT A THIRD PARTY BENEFICIARY OR AN INTENDED BENEFICIARY OF FORCE-PLACED INSURANCE POLICY

On May 17th, Houston's 14th Court of Appeals issued an important decision that may will likely impact future claims made under force-placed insurance policies by insured persons. *Garcia v. Bank of America Corporation, et al.*, ---S.W.3d--- Nos. 14-10-00821-CV, 14-10-0856-CV, 14-10-011145-CV, (Tex.App.—Houston [14th Dist.] May 17, 2012).

The appellant, Milton Garcia, purchased a home pursuant to a mortgage agreement requiring Garcia to maintain insurance on the property sufficient to protect the mortgagee's interest in the property. The mortgage agreement authorized the mortgagee to purchase insurance to cover its own interest in the property (i.e. the amount owed on the loan) in the event Garcia did not provide the required insurance. After Garcia failed to maintain the required insurance coverage, the mortgagee purchased a "force-placed" policy (a.k.a. "lender-placed") from Newport Insurance Company as permitted under the mortgage agreement. The policy only listed the mortgagee as an insured party. Although the policy listed Garcia as the owner of the property, he was not listed as a primary or additional insured.

When Hurricane Ike struck Texas in 2008, Garcia's home sustained some damage. Garcia sued Newport Insurance, Bank of America (the mortgagee), and BAC Home Loan Servicing (the mortgage servicing company), alleging he was not adequately compensated under the force-placed insurance policy issued by Newport. Garcia also alleged the defendants/appellees improperly switched the insurance to a lender-placed policy using escrow funds to pay premiums rather than obtaining insurance that would have protected his interests as well as the mortgagee's interests. The 11th District Court of Harris County granted summary judgment in favor of all three defendants.

Garcia appealed alleging he was a third-party creditor beneficiary of the insurance policy. The appellate court did not find Garcia's arguments persuasive, however, and affirmed the district court's summary judgment favoring Newport Insurance, Bank of America, and BAC Home Loan. Turning to existing third-party beneficiary law, the Court noted that a third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that party, and only if the contracting parties entered into the contract directly for the third party's benefit. *Citing Stine v. Steward*, 80 S.W.3d 586, 589 (Tex. 2002). In this case, the Court found the Newport policy language clearly did not reflect any intent by the parties to confer any benefits to Garcia. The court further held that Garcia failed to point out any duties the defendants/appellees owed to him under the insurance policy; therefore, Garcia could not be a credit beneficiary and had no right to enforce the contract.

Other issues before the Court included the sufficiency of an affidavit presented on behalf of Bank of America and Garcia's extensive claims against BAC Home Loan. The Court determined that Garcia's challenges to the affidavit were without merit and Garcia's claims against BAC Home Loan were unsupported in law and/or by the evidence. Thus, the Court held that the trial court did not err in granting summary judgment in favor of all defendants/appellees.

[**Editor's Note**: We wish to congratulate Newport, Bank of America, and BAC Home Loan Servicing on this big win both in the trial court and on appeal. Our firm had the privilege of representing these parties in both the trial court and on appeal. Chris Martin, Levon Hovnatanian and Todd Lonergan served as counsel.]

SUPREME COURT OF TEXAS HOLDS STOP-LOSS INSURANCE SOLD TO A SELF-FUNDED EMPLOYEE HEALTH-BENEFIT PLAN IS DIRECT INSURANCE SUBJECT TO REGULATION UNDER THE INSURANCE CODE

Last Friday, the Supreme Court of Texas held stop-loss insurance sold to a self-funded employee health-benefit plan is not reinsurance, but rather is direct insurance subject to regulation under the Insurance Code. *Texas Dept. of Ins. v. Am. Nat. Ins. Co.*, 10-0374, 2012 WL 1759457 (Tex. May 18, 2012).

In *Texas Department of Insurance v. American National Insurance Company, et al*, the Texas Supreme Court was asked whether stop-loss insurance sold by insurers to self-funded employee health-benefit plans was "direct health insurance" or "reinsurance" – a significant distinction since direct insurance is subject to state insurance regulation, while reinsurance is not. Reinsurance is not regulated because it usually involves the reallocation of risk between two insurance companies rather than a consumer-insurance transaction. Under a self-funded benefit plan, an employer assumes the risk of providing health insurance to its employees, instead of ceding the risk to a third-party insurance company. The employer then either sets aside funds for its employees' covered medical expenses or pays for such expenses out of its general accounts. Self-funded plans typically hire third parties to administer the plan and often purchase stop-loss insurance to limit financial exposure to catastrophic losses.

In the facts giving rise to the suit, the Texas Department of Insurance determined that American National Insurance Company and American National Life Insurance Company of Texas (collectively "American") had sold stop-loss policies between without paying taxes or complying with other regulatory requirements applicable to insurers. TDI found American had violated the Insurance Code by "improperly recording the direct stop-loss policy premiums obtained from the self-insured employers as 'assumed reinsurance,' " rather than as "direct written premium." TDI also found American had failed to pay assessments due the Texas Health Insurance Risk Pool on the stop-loss policies and had failed to submit the policy forms to the Department for approval or to request an exemption as required by the Administrative and Insurance Codes.

After exhausting its administrative remedies, American sued TDI seeking declaratory and injunctive relief. American contended that its stop-loss policies were reinsurance and therefore the Department lacked regulatory authority. TDI argued American's stop-loss policies were direct insurance subject to the Texas Insurance Code and its regulatory authority. Both American and TDI filed motions for summary judgment. The trial court granted TDI's motion and American appealed.

On appeal, the appellate court concluded that an employer's self-funded plan was clearly an insurer under the Texas Insurance Code and that a plan's purchase of stop-loss insurance was also clearly reinsurance

beyond the regulatory scope of the Texas Department of Insurance. The Supreme Court of Texas reversed to appellate ruling holding that the state can regulate stop-loss insurers who contract with employer's self-funded plans since stop-loss insurance is direct insurance and not reinsurance. Therefore, American was required to contribute to the Texas Health Insurance Risk Pool and to submit their policies to the Texas Department of Insurance for approval.