



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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EL PASO COURT OF APPEALS REVERSES ORDER BARRING INSURED'S USE OF FUNDS RECEIVED IN SETTLEMENT OF COVERAGE DISPUTE

In multi-party litigation involving several separate lawsuits arising out of a construction dispute, American Home Insurance Company settled a coverage dispute with its insured for \$4.2 million. After the insured, E.E. Hood & Sons, Inc., informed its judgment creditor, Vernco Construction, Inc., of the settlement, Vernco obtained a temporary restraining order that barred Hood “from dissipating, transferring, spending, encumbering, or disbursing” any of the funds. In *Nelson v. Vernco Constr., Inc.*, No. 08-10-00222-CV, 2012 WL 1529844 (Tex. App.—El Paso May 2, 2010), the Court of Appeals vacated the restraining order, finding that it was obtained in violation of a prior agreement between the parties.

Vernco had obtained a judgment in April 2010 against Hood & Sons that exceeded \$5 million. Hood & Sons filed a bond for \$2.2 million — one half of its net worth at the time the bond was filed — and appealed. Meanwhile, Hood had sued AHIC for failing to provide a defense in the Vernco case. While the coverage action was pending, AHIC paid Hood & Sons \$566,000 in defense costs with a reservation of rights. Vernco learned of this payment and intervened in the coverage action in order to protect its alleged interest in these funds, but the parties entered into an agreement that Vernco would be notified of any future payments in exchange for Vernco abandoning its intervention. As part of this agreement, Vernco agreed not to interfere with any such payment unless it was represented to be for indemnity of Vernco’s judgment. AHIC and Hood & Sons eventually reached a settlement totaling \$4.2 million.

Hood & Sons sent a letter to Vernco advising it of the settlement, and explaining that it was comprised of unpaid defense costs, settlement of a separate lawsuit, consequential damages, interest, and attorney’s fees. Even though the letter expressly stated that no part of the settlement was for indemnity of Vernco’s judgment, Vernco sought a temporary restraining order “to preserve the status quo,” which the trial court granted. On appeal, the El Paso court held that the temporary restraining order ignored the parties agreement, and therefore that the status quo “is not preserved but rather nullified” by the order. The court of appeals also held that the trial court was required to find, with evidentiary support, that Hood & Sons had transferred assets, and that the Court’s implied findings in that regard were insufficient. The court of appeals therefore vacated the temporary restraining order.

FORT WORTH COURT HOLDS ISSUER’S APPROVAL NOT NEEDED TO MODIFY BUSINESS RELATIONSHIP BETWEEN POLICY SELLER, REINSURER

An action in contract between Arch Reinsurance Company and Underwriters Service Agency based on three-party reinsurance agreement between Arch, Underwriters, and State National was resolved in favor

of Underwriters because the challenged modification did not shift any of the risk of the agreement to State National. In *Arch Reinsurance Co. v. Underwriters Svc. Agency, Inc.*, No. 02-10-00365-CV, 2012 WL 1556174 (Tex. App.—Fort Worth April 26, 2012), the court of appeals held that even though State National did not agree to the modification, the only risk to State National both before and after the modification was the risk of Arch’s insolvency, and that the modification therefore “did not have a substantial impact on State National.” (State National was not a party to the appeal.)

In the underlying reinsurance contract, Arch was the reinsurer, Underwriters sold the policies, and State National issued the policies but passed all risk to Arch. Arch and Underwriters allegedly entered into a modification titled “Addendum No. 11” that increased Underwriters’ commission, among other things. Arch argued that Addendum No. 11 was required by the underlying contract to be agreed to by all three parties. Importantly, Arch contended, the addendum modified the reinsurance agreement by changing the liability for gross policy losses. Under the original agreement, Arch was liable for 100% of gross losses; as modified, Arch’s liability was capped, and some of the liability was shifted to Underwriters. Arch contended that this change constituted a substantial impact on State National for which State National’s consent was required.

The Court of Appeals disagreed. First, the court found that nothing in the original reinsurance agreement gave State National control over the business relationship between Arch and Underwriters. Second, the court concluded that even though Addendum No. 11 reallocated the risk of loss, none of the risk was shifted back to State National. Reviewing the documents as a whole, the Court concluded that the addendum required Underwriters to owe Arch for any amount over the addendum’s liability cap that Arch was required to pay to State National under the reinsurance agreement. Thus, since State National was protected after the addendum just as it was before, the Addendum had no substantial impact on State National. The addendum, therefore, was effective without State National’s agreement.

In a separate issue, the court of appeals reversed the trial court’s award of attorney’s fees to Underwriters under the declaratory judgment act. Because Underwriters’ declaratory judgment counterclaim did not have any effect beyond Arch’s original lawsuit, the counterclaim was improper, and could not support attorney’s fees.

MDJW SOUTH TEXAS INSURANCE SEMINAR – THIS FRIDAY, MAY 11, AT THE HOUSTON CLUB



Martin, Disiere, Jefferson & Wisdom
UNIVERSITY

Adjusters, claims managers, litigation managers, and in-house counsel should mark your calendars for the 2012 MDJW South Texas Insurance Seminar which will be held in downtown Houston **THIS FRIDAY, May 11th at the Houston Club from 9:30 a.m. to 4:00 p.m.** This FREE program will feature some of the state’s leading insurance lawyers from our firm who will be providing updates on the latest decisions and latest legal trends across multiple liability and property topics including Stowers problems, inadequate limits issues, primary and excess conflicts, bad faith update, appraisal issues, construction defect coverage, homeowners and auto update, and much more. Chris Martin, Dale Jefferson, David Disiere, Kenni Lucas, Andrew Schulz, Mark Dyer and several other partners in the firm will teach on cutting edge issues impacting those who handle claims or insurance litigation in Texas. 6 hours of CE and CLE credit will be provided. Lunch will be provided as well.

Some seats are still available! **To register, please send an email with your name, employer, and work address to: ce@mdjwlaw.com OR call 713-632-1737 with the same information.** Following receipt of a registration request, we will reply with more detailed information regarding the location of The Houston Club and the program. We hope to see many of our friends from the insurance industry THIS FRIDAY in Houston!

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