The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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UNITED STATES ARMY HAS SUBROGATION RIGHTS AGAINST INSURED'S UIM COVERAGE

Last Wednesday, the El Paso Court of Appeals affirmed a trial court's ruling that the United States Army had subrogation rights against underinsured motorist coverage even when the insured's injuries and damages exceeded the combined limits of the other driver's insurance and the insured's underinsured motorist coverage. In *Warmbrod v. USAA County Mutual Insurance Company*, 2011 WL 1202203 (Tex.App.-El Paso, April 11, 2012), the insured was severely injured in a car accident and was treated free of charge in a U.S. Army Hospital by virtue of her husband's military status. The Army then sought to recover $26,404.96 against Warmbrod's $100,000 UIM policy with USAA, under 10 U.S.C. § 1095 and the Federal Medical Care Recovery Act (FMCRA). USAA paid its policy limits but on a separate check, protected the Army's subrogation rights by issuing a check co-payable to Warmbrod, her attorney and the Army for the amount of the Army's lien. Warmbrod sued USAA alleging breach of contract and other, extra-contractual allegations. The trial court granted summary judgment in favor of USAA and this appeal followed.

On appeal, the El Paso Court agreed with Warmbrod that the FMCRA only provides the Army with a right of recovery against responsible third-parties, but not against first party insurance proceeds. Considering 10 U.S.C. § 1095, however, the court recognized that the United States government has a right to collect reasonable expenses for care it provided from third-party payers, which is defined to include "an automobile liability insurance or no fault insurance carrier". Accordingly, the court concluded that because the United States Army has a right to recover against the UIM coverage, summary judgment in favor of USAA was proper and affirmed the trial court's ruling.

U.S. DISTRICT COURT REJECTS BORROWERS CLAIMS AGAINST LENDER'S INSURER ON FORCED-PLACED MORTGAGE PROTECTION POLICY

The U.S. District Court for the Southern District of Texas, Houston Division, recently concluded that the property owner lacked standing to assert breach of contract and extra-contractual causes of action against an insurer who provided a forced-placed mortgage protection policy to the bank, even though the owner reimbursed the bank for the premiums and repaid the mortgage loan. In *Premium Plastics v. Seattle Specialty Insurance Services, Inc. and Great American Assurance Company*, CA No.H-10-3960 (S.D. Tex. – Houston Div., March 26, 2012), Hurricane Ike caused damage to commercial property owned by Premium Plastics. After the claim was paid to the mortgage company, Premium Plastics filed suit against the mortgage-protection insurer alleging breach of contract and other, extra-contractual causes of action. The insurer paid additional amounts to the bank who signed the check over to Premium Plastics. The

insurer then moved for summary judgment arguing that Premium Plastics lacks standing to sue because they are neither the insured nor an intended third-party beneficiary.

The property owner, Premium Plastics argued that because it owned the property, reimbursed the bank for the premium payments and paid the mortgage, it was equitably subrogated to any claims the named insured - the bank – would have against the insurer and adjusting company. The court analyzed the equitable subrogation arguments under Texas law and concluded Premium Plastics had no contract with the insurer, was not a named insured, additional insured or intended third-party beneficiary. Also, because it was at most a third-party claimant and not an insured, Premium Plastics could not recover on its bad faith or insurance code claims. Lastly, because Premium Plastics was not a "consumer" as defined in the DTPA, they could not prevail on their DTPA claims. Accordingly, summary judgment was granted in favor of the insurer and adjusting company.

COURT REJECTS INSURED'S CLAIMS AGAINST EXPERT HIRED BY INSURANCE COMPANY

Recently, the Houston Court of Appeals affirmed a trial court's decision granting summary judgment in favor of an expert hired by an insurer to help investigate a third-party liability claim. In *Sears Roebuck & Co. v. ACM Engineering & Environmental Services*, 2012 WL 1137912 (Tex.App. – Houston, April 3, 2012), Sears' insurer, Liberty Mutual hired ACM to help investigate a mold claim arising from improper installation of siding. ACM incorrectly certified that the home was free of mold. And when the homeowner sued Sears, Sears filed a third-party petition against ACM for breach of contract and for breach of warranty. The trial court granted summary judgment in favor of ACM and this appeal followed.

The court observed that the dispute centers upon Sears' third-party beneficiary and undisclosed-principal theories of recovery. The court reviewed Texas law addressing these issues and noted that the law presumes that a party contracts for their own benefit "and any intent to benefit a third party must be clearly apparent and will not be presumed." And addressing the undisclosed-principal argument, the court noted that "an insurer is not an agent of the insured merely because if performs acts beneficial to the insured." Further, both arguments would undermine the rule "that a contractor hired by an insurance company owed no duty to the insured." Accordingly, the court affirmed summary judgment in favor of ACM.

U.S. DISTRICT COURT ALLOWS COMMON LAW BAD FAITH CLAIMS TO PROCEED AGAINST WORKERS' COMPENSATION INSURER

Recently, a U.S. District Court granted summary judgment in favor of a workers' compensation insurer on the plaintiff's Texas Insurance Code and Deceptive Trade Practices Act (DTPA) claims, but denied summary judgment on the common law bad faith claims. In *Barber v. Dolgencorp of Texas, Inc.*, 2012 WL 1150764 (E.D. Tex. – Sherman Div., April 5, 2012), the employee brought suit against after a dispute arose as to whether the injuries claimed were work related. The court stayed the lawsuit pending the Texas Supreme Court's ruling in *Texas Mutual Ins. Co. v. Ruttiger*. And then, in light of the Texas Supreme Court's ruling in that case, granted summary judgment on the Insurance code and DTPA claims. But as to the common law bad faith claims, based in part on the insurer's duty to reasonably investigate a claim, the court found that fact issues exist and denied summary judgment on that issue. Summary judgment was granted in part and denied in part.

MDJW SOUTH TEXAS INSURANCE SEMINAR - MAY 11 AT THE HOUSTON CLUB

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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 on Friday, May 11th at the Houston Club from 9:30 a.m. to 3:30 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 teaching 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.

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 on May 11th in Houston!