The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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SAN ANTONIO COURT OF APPEALS REVERSES TRIAL COURT AND RENDERS JUDGMENT FOR INSURED

Last Wednesday, in *Lynd Co. v. RSUI Indem. Co.*, --- S.W.3d ----, 2012 WL 1030342 (Tex.App. - San Antonio March 28, 2012), the San Antonio court of appeals reversed a trial court and rendered a $7.5 million judgment against an insurer based on stipulated facts. The insured, Lynd, manages apartment complexes across the country. RSUI provided excess property coverage for damage over a primary $20 million limit, up to $480 million per year per occurrence. On September 23, 2005, Hurricane Rita damaged fifteen Lynd apartment complexes, causing damage in excess of $24 million. Under RSUI's interpretation of the policy, RSUI owed only $701,487.83. Lynd demanded the difference of $3,842,823.08 from RSUI. Litigation followed. The trial court granted RSUI's motion for summary judgment and denied Lynd's.

Under the policy, RSUI was entitled to limit its liability to the least of the following in any one "occurrence": (a) the actual adjusted amount of the loss, less applicable deductibles and primary and underlying excess limits; or (b) 115% of the individually stated value for each scheduled item of property insured at the location which had the loss as shown on the latest Statement of Values on file with this Company, less applicable deductibles and primary and underlying excess limits. The court of appeals found it was the parties' intent to provide RSUI with a choice of one of the available limitation options when determining its liability for losses arising from one "occurrence." But the court concluded the policy requires RSUI to apply the same limitation option uniformly to all losses arising from the same "occurrence" such that RSUI may limit its liability for damages to all properties arising from one hurricane by applying either option (a) or option (b), but it may not apply both when the damage arises from the same "occurrence." Accordingly, the court of appeals rendered judgment in favor of the insured.

MORTGAGE HOLDER NEGLIGENTLY HANDLED INSURANCE CLAIM PROCEEDS

Recently, the Dallas court of appeals heard Green Tree Servicing, Inc.'s appeal of a summary judgment granted to an insured for negligent handling of insurance proceeds. *Green Tree Servicing, LLC v. Thompson*, 2012 WL 765040 (Tex.App.—Dallas, March 12, 2012) (not designated for publication.) Thompson and Richardson bought a mobile home together from Thompson's employer before getting married. The couple placed the loan with Green Tree in Richardson's name, but all of the payments were from the couple's joint checking account. When the couple divorced, Thompson was awarded the mobile home and continued to make all of the insurance payments and mortgage payments but the loan remained in Richardson's name. The mobile home was destroyed by a fire and the insurance company paid the claim to its insured, Thompson, and the mortgage holder, Green Tree. Green Tree instructed Thompson

to endorse the check to it. Thompson alleged that Green Tree told her that it would pay off the mortgage balance and send her the remainder. Green Tree paid off the mortgage and then it sent the remainder to Richardson, not Thompson. Thompson sued Green Tree and Richardson for negligence, fraud, and conversion. The trial court granted summary judgment to Thompson against Green Tree for negligence because Green Tree "breached its duty as a constructive trustee to Lana Thompson, a joint payee … by disbursing funds that rightfully belonged to the Plaintiff to ... Richardson." The court of appeals upheld the judgment in favor of Thompson against Green Tree.

ASBESTOS NOT A POLLUTANT UNDER POLLUTION EXCLUSION CLAUSE OF EXCESS POLICY

Also recently, a district court in the Marshall Division of the Eastern District of Texas ruled that asbestos is not a pollutant under the pollution-exclusion clause of an umbrella policy. *LSG Technologies v. U.S. Fire Insurance Co.*, No. 2:07-cv-00399-DF, (E. Dist. – Marshall Div., March 16, 2012) (slip opinion). The insureds are defendants in numerous asbestos and mixed dust cases in the Eastern District of Texas. The insurance company here issued excess policies to the insureds over comprehensive CGL policies. The insureds sued the insurance company for refusing to provide coverage in the various asbestos suits. The insurance company moved for summary judgment on the claim, arguing that its policy's pollution-exclusion clause precludes asbestos claims. When considering the insurance company's summary judgment motion, the court stated that it "has not found any cases where asbestos is considered a 'pollutant' … the Court declines to find that asbestos is a pollutant subject to the pollution exclusion." As an alternate holding, the court also determined that there was a fact issue as to whether asbestos-exposure claims involve "sudden and accidental" releases that would fall under the pollution-exclusion clause.

THREE AUTO ACCIDENTS ONE "OCCURRENCE" UNDER CGL POLICY ISSUED TO ROAD CONSTRUCTION COMPANY

In a dispute between the primary carrier and the excess carrier, a district court in the Austin Division of the Western District of Texas recently ruled that a construction defect by a road construction company that caused three car accidents was only one occurrence and not three under its CGL policy. *Twin City Fire Ins. Co. v. Illinois Nat'l Ins. Co.*, No. 1:11-cv-00144-ss (W. Dist. . – Austin Div., March 12, 2012) (slip opinion) The primary carrier, with limits of $2 million per occurrence and $4 million aggregate, argued that the event was only one occurrence. The excess carrier, with $25 million above the primary, argued that each accident should be a separate occurrence. In reaching its decision, the court reviewed the relevant policy language and Texas law concerning "occurrence" under a CGL policy. From its review of the policy and the law, the court stated "CEC's allegedly defective construction is the only event for which it is liable … once the allegedly defective road project was complete, CEC would be liable for any damages resulting therefrom … there was but a single "occurrence" that could give rise to liability …." The court entered summary judgment for the primary carrier.

FEDERAL DISTRICT JUDGE ISSUES RULINGS IN TWO WORKERS' COMPENSATION CASES AND ONE IKE LAWSUIT

Judge Melinda Harmon of the Southern District of Texas recently ruled for insurance carriers in three first-party lawsuits. In each case, she declined the insured's request to remand based on joinder of the adjuster. In two worker's compensation matters, Judge Harmon held that the Texas Supreme Court's *Ruttiger* decision precluded statutory bad faith claims even though the court had granted rehearing, but declined to conclude that common law bad faith claims were likewise barred. And in one of the worker's compensation cases and a Hurricane Ike case, she dismissed the case based on insufficient pleading.

Worker's Compensation Cases: *Alvarez v. Liberty Mutual* and *Keen v. Wausau*

Alvarez v. Liberty Mutual Fire Ins. Co., Civ. No. H-10-1292 (S.D. Tex. March 16, 2012), involved a plaintiff who was attacked and injured by unidentified assailants while working as a security guard at a retirement home. The entity who directly employed her was a non-subscriber, but a related entity did carry worker's compensation coverage. Judge Harmon first addressed the joinder of the Liberty Mutual adjuster, concluding that even though the adjuster admitted to independent responsibilities in her role as a licensed adjuster, the plaintiff's claims against the adjuster were indistinguishable from those against the insurer. Remand was therefore denied. Judge Harmon then granted summary judgment on Plaintiff's statutory claims because the Texas Supreme Court in *Ruttiger* held that private action under the Texas Insurance Code and the Texas Deceptive Trade Practices-Consumer Protection Act are foreclosed by the detailed remedies of the Worker's Compensation Act. Finally, Judge Harmon declined to hold that the plaintiff's common law bad faith claim was disallowed by *Ruttiger*, but granted summary judgment on that claim nonetheless because the evidence established as a matter of law that Liberty Mutual's claims decision was reasonably based on evidence obtained in the course of its investigation.

In *Keen v. Wausau Business Ins. Co.*, Civ. No. H-11-1415 (S.D. Tex. March 20, 2012), the insurer overcame a motion to remand on identical grounds as in *Alvarez*. The court also dismissed the plaintiff's statutory claims by applying the same *Ruttiger*-based reasoning. Judge Harmon again declined to hold that *Ruttiger* precludes liability for common law bad faith, and in this case dismissed plaintiff's bad faith claim based on insufficiently specific pleading. She criticized the Plaintiff's petition for merely presenting an "unadorned, the-defendant-unlawfully-harmed-me accusation." Judge Harmon ordered the plaintiff leave to file an amended, proper complaint within 30 days, or inform the court that he no longer wishes to pursue the claim.

Hurricane Ike Case: *Novelli v. Allstate*

In *Novelli v. Allstate Texas Lloyd's*, Civ. No. H-11-2690 (S.D. Tex. March 19, 2012), Judge Harmon denied the insured's motion to remand and dismissed the case based on the pleadings. Jude Harmon observed that the claims against the individual adjuster defendant were identical to the claims against Allstate and the independent adjusting company and found that the adjuster was improperly joined. She also noted that the pleadings.

- Did not identify the particular damages that the adjuster omitted from his report;
- Did not state the true value of the purportedly omitted damages or the extent to which the claim was underpaid;
- Did not identify the manner in which the defendants attempted to effectuate the allegedly unfair settlement.

The Plaintiffs had failed to state a claim by omitting these necessary details. Moreover, relating to the plaintiffs' Texas Insurance Code claims, the original petition contained only "conclusory" allegations that failed to state "the who, what, when, where and how" of the defendants' alleged misrepresentations or concealment of facts. The court granted the defendants' motion to dismiss, but like in *Keen*, she granted Plaintiffs leave to amend their complaint.

HAYGOOD PAID-AND-INCURRED RULE HELD NOT TO APPLY TO HEALTH CARE PROVIDED FREE OF CHARGE UNDER INDIGENT CHARITY PROGRAM

The Dallas Court of appeals recently declined to extend the Texas Supreme Court's *Haygood v. Escabedo* opinion to cover health care provided as a charity. In *Big Bird Tree Service v. Gallegos*, No. 05-10-00923-CV, 2012 WL 966063 (Tex. App.—Dallas March 22, 2012), a manual laborer who fell from a ladder sued his employer for negligence, seeking to recover medical expenses, lost wages, and damages for pain and suffering. The plaintiff provided medical expense affidavits to prove that the services provided were necessary and that the amounts charged were reasonable. Among other damages, the jury awarded the entire amount reflected in the plaintiff's affidavits.

The employer appealed, arguing that *Haygood* required the plaintiff's recovery to be restricted to the amount "actually incurred," and that under the facts of this case the amount actually incurred was the plaintiff's small co-pays under a charitable program. The court of appeals disagreed. First, unlike *Haygood*, the reduction in payment in *Big Bird* was not pursuant to a contractual agreement between the provider and an insurer. Thus, there was nothing that would have prevented the hospital from charging the full value of services rendered; indeed, the evidence established that the hospital would expect to be paid if the plaintiff recovered from the defendant. Third, recovery under *Haygood* reflects charges paid or incurred by *or on behalf of* the plaintiff; here, the charges were incurred by the charitable organization on the plaintiff's behalf. Finally, allowing a negligent party to avoid liability because the plaintiff was indigent would result in a windfall to the negligent party, which would offend public policy.

In a separate issue, the employer argued that because the plaintiff failed to provide evidence of past income tax liability. The court of appeals held that the insured's testimony as to his pre-tax past earnings was sufficient to support the jury's verdict, even without evidence of his income tax payments.

MDJW LAWYERS NAMED AS RISING STARS

MDJW is pleased to announce that several of our lawyers have been named as Rising Stars by Texas Super Lawyers: Leslie Tan, Vasilia Wilkes, Jamie Cooper, Diana Perez Gomez, and Patrick Kemp.

MDJW CLOSED FRIDAY APRIL 6TH - NEWSBRIEF TO RESUME APRIL 16TH

In recognition of Good Friday and the Easter Holiday, our offices will be closed Friday April 6, 2012 and our research and writing staff will be taking the weekend off to celebrate with family and friends. The Texas Insurance Law Newsbrief will resume publication April 16, 2012. Here's wishing you and yours a very Happy Easter!