



The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF



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EQUITABLE MADE-WHOLE DOCTRINE DOES NOT TRUMP INSURER'S CONTRACT-BASED SUBROGATION RIGHT

Last Friday, the Texas Supreme Court ruled that the equitable “made whole” doctrine is inapplicable when the parties’ agreed contract provides clear and specific right of subrogation. In *Fortis Benefits v. Cantu*, 2007 WL 1861000 (Tex. June 29, 2007), the Plaintiff sued multiple parties for severe injuries she sustained as the result of an auto accident. Her medical insurer intervened claiming a subrogation right under the policy. A divided court of appeals upheld a trial court finding that because Plaintiff’s medical expenses exceeded the settlement amount plus the benefits paid by the insurer, its subrogation claim was barred by the equitable “made whole” doctrine. Reversing the court of appeals decision, the Texas Supreme Court wrote, “Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates the positive law or offends public policy.”

FIFTH CIRCUIT REMANDS BAD FAITH LAWSUIT AGAINST INSURER SUA SPONTE AFTER REMOVAL BASED UPON IMPROPER JOINDER

The Fifth Circuit recently rejected the argument that an insured failed to present a colorable claim against an insurance adjuster because (1) Texas law recognizes a direct action against an individual adjuster and (2) failure to produce evidence against the adjuster would apply uniformly against both Defendants and require dismissal of the suit in its entirety. In *Gasch v. Hartford Acc. Indem. Co.*, 2007 WL 1847141 (5th Cir. June 28, 2007), Plaintiffs sued an insurer and its adjuster alleging the Defendants improperly denied Plaintiff’s claim for workers’ compensation survivor death benefits, in violation of Texas law. Defendants removed the action to the United States District Court for the Southern District of Texas based on diversity jurisdiction, asserting that the non-diverse defendant adjuster had been improperly joined. Plaintiffs did not seek to remand; in fact, they purported to stipulate that diversity jurisdiction existed. The district court then granted summary judgment for both Defendants and dismissed the Plaintiffs’ claims.

Plaintiffs appealed the dismissal, but neither they nor the Defendants addressed the jurisdictional issue. Citing a prior decision, the Court explained, “[w]hen the only proffered justification for improper joinder is that there is no reasonable basis for predicting recovery against the in-state defendant, and that showing is equally dispositive of all defendants rather than to the in-state

defendants alone, there is no improper joinder.” Stated differently, a meritless claim against an in-state defendant is not the equivalent of improper joinder. The Court concluded with the legal truism that subject matter jurisdiction “cannot be conferred by consent, agreement, or other conduct of the parties.”

FEDERAL DISTRICT COURT DENIES MOTION TO DISMISS CONCLUDING \$75,000 JURIDICTIONAL AMOUNT WAS SATISFIED

A general liability insurance carrier sought a declaratory judgment that it had no duty to defend or indemnify its insured, an alcohol-serving pool hall operator, for five personal injury lawsuits filed against it in state courts in both Texas and Oklahoma. One case involves a death claim; the other four allege serious injury. Diversity jurisdiction was asserted as the basis for federal jurisdiction. In *Liberty Surplus Ins. Corp. v. Slick Willie’s of America*, 2007 WL 1795860 (S.D. Tex. June 21, 2007) Slick Willie’s did not dispute the parties were diverse; instead, it argued that the jurisdictional amount was not satisfied and moved to dismiss under Federal Rule of Civil Procedure 12(b)(1).

The Court noted a jurisdictional-amount test begins with an examination of the pleadings, but can incorporate “summary-judgment type” evidence if it is not “facially apparent” that the claims exceed the jurisdictional amount. Here, the carrier submitted copies of each of the underlying state court petitions: In the two Oklahoma cases, the plaintiffs allege damages in excess of \$10,000; in the Texas cases, the plaintiffs did not allege a dollar amount. Other additional items of evidence provided by the carrier included a \$95,000 settlement demand in one case, discovery responses in another case stating that past hospital expenses were \$222,566.93, and a case-information sheet seeking monetary damages more than \$50,000 in a third case.

Despite taking into account a \$25,000 deductible, the Court opined that the amount in controversy would likely exceed \$75,000. United States District Judge Lee Rosenthal concluded that the amount in controversy was established by the underlying state-court petitions and the additional evidence submitted.

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