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TEXAS INSURANCE LAW NEWSBRIEF

A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

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WHAT CONSTITUTES AN EXCUSE SUFFICIENT TO EXCUSE LATE NOTICE?

Recently, in *Emcode Reimbursement Solutions, Inc. v. Nutmeg Insurance Company*, 2007 WL 803965 (March 15, 2007), one of the District Courts of the Western District of Texas addressed what circumstances, if any, may excuse late notice under a claims-made policy. In *Emcode*, Nutmeg insured Emcode under three successive one-year term claims-made policies. The terms of the policies required disclosure of pending or potential suits against the insured prior to their initial inception and before subsequent renewals. Emcode renewed the policy annually until May 16, 2005, when the policy expired.

Green County sued Emcode in March 2003 for breach of contract and conversion. Green County subsequently amended its complaint in June 2003 asserting two claims for breach of contact and a conversion claim. Thereafter, in January 2005, Green County filed a seconded amended complaint alleging, for the first time, a new cause of action for negligence based essentially on the same factual allegations asserted in its initial complaint and first amended complaint. Emcode did not timely forward a copy of the complaint or amended complaint nor did it otherwise report the existence of the lawsuit to Nutmeg until a few days after the filing of the second amended complaint in 2005.

Nutmeg extended a qualified defense to Emcode. After reviewing the complaint and the first amended complaint, Nutmeg denied coverage to Emcode. Nutmeg concluded Emcode breached the policies' conditions precedent to coverage by failing to timely report the claim during the 2002/2003 policy term when it was "first made" or during the policy's 60-day reporting period. Emcode filed a suit contending Nutmeg owed it a defense to the *Green County* litigation.

Nutmeg sought summary judgment arguing Green County's 2003 complaint alleged "wrongful acts" involving professional services against Emcode that constituted a "claim" under the policy during the 2002/2003 policy term. Nutmeg also alleged because the claim was not reported until February 2005, it was not covered under the policy because Emcode failed to report the claim as soon as practicable, but in no event later than 60 days after the expiration of the policy period, as the policy required. Because Emcode failed to comply with the conditions precedent to coverage, Nutmeg argued the policy precluded coverage for the *Green County* litigation. The policy required the insured to report any claim within the policy period in which the claim was first made, or during a 60-day tail period, immediately forward to Nutmeg any suit papers, and provide written notice of the claim details as soon as practicable. Also, Nutmeg contended the policy required immediate notice of every demand, notice, summons or other process. Because the *Green County* litigation was filed and the first claim made during the 2002/2003 policy term, Nutmeg argued Emcode was required to report the lawsuit immediately and provide additional written information as soon as practicable. According to Nutmeg, the 22-month delay in forwarding the complaint did not satisfy the policy's requirement that the insured "immediately forward process" to Nutmeg, and because Texas law clearly mandates compliance with a claims made policy's reporting requirements as a condition precedent to coverage, the failure to timely report the claim barred coverage.

Emcode argued its late notice should be excused. Specifically, Emcode noted when Green County filed its second amended complaint and for the first time made a negligence claim, Emcode promptly notified Nutmeg of the second amended complaint as required under the 2004/2005 policy. Because Green County's new negligence claims were potentially covered under the 2004/2005 policy, and because Emcode promptly tendered the required notice at that time, it argued the 2004/2005 policy covered the second amended complaint. Emcode argued Texas law excuses late notice when the insured had a reasonable and prudent belief, reached after a full investigation of all the surrounding facts and circumstances, that a claim was not covered by the policy. Based upon Emcode's investigation, it concluded that the 2002/2003 policy did not cover the types of claims alleged (breach of contract and conversion) and thus it was unnecessary to make a claim under the 2002/2003 policy.

The Court granted Nutmeg's summary judgment, and noted that Emcode failed to offer any authority for the proposition that an insured's reasonable and prudent belief that a claim was not covered excuses late notice under a claims-made policy. Although such belief may excuse late notice under an "occurrence" policy, such excuse does not recognize the critical distinctions between an "occurrence" policy and a claims made policy. Without any compelling reason or authority, the Court declined to extend the excused late notice rule to a claims-made policy.

Next, the Court addressed whether Green County's complaint constituted a "claim" that was first made under the 2002/2003 policy term, and, if so, whether coverage under the 2003/2004 and 2004/2005 policies was vitiated as a result of Emcode's late notice. Finding that Green County's 2003 complaint and amended complaint satisfied the policy's terms alleging "wrongful acts" resulting in a "claim" during the 2002/2003 policy term and these claims were not timely reported, the Court agreed with Nutmeg that Emcode's late notice precluded coverage under the subsequent policies.

INDEPENDENT ADJUSTER'S INVESTIGATION WAS WITHIN THE REALM OF "THE BUSINESS OF INSURANCE" SO AS TO RENDER HIM POTENTIALLY LIABLE FOR CLAIM

In *West End Square, Ltd. v. Great American Insurance Company of New York*, 2007 WL 804714 (March 14, 2007), the Court addressed a Motion to Remand based upon the alleged improper joinder of an individual claims adjuster. Noting that the defendants did not allege actual fraud in Plaintiff's pleadings, the Court evaluated whether Plaintiff would be able to establish a cause of action against the individual independent adjuster in state court by examining the state court petition and allegations against the individual claims examiner.

Plaintiff's state court petition alleged the claims adjuster engaged in unfair claims settlement practices by misrepresenting to the claimant a material fact or policy provision relating to coverage; by failing to attempt, in good faith, to effectuate a prompt, fair and equitable settlement of the claim; by failing within a reasonable time to affirm or deny coverage of the claim or to submit a reservation of rights to the insured; and by refusing to pay a claim without conducting a reasonable investigation with respect to the claim.

Defendants argued that the claims examiner was not a "person" under former Art. 21.21 of the Insurance Code. Relying upon *Liberty Mutual Insurance Company v. Garrison Contractors, Inc.*, 966 S.W.2d 482 (Tex. 1998), Defendants argued that not every employee of an insurance company is a "person" under Art. 21.21. An employee who has no responsibility for the sale or servicing of insurance policies and no special insurance expertise, such as a clerical worker or janitor, does not engage in the insurance business. Defendants argued that although the independent claims examiner was an adjuster, with respect to Plaintiff's claim, the adjuster had no involvement in the actual adjustment of the claim, the decision to pay, deny or investigate the claim and made no representations to the Plaintiff regarding the insurance policy or coverage. Essentially, Defendants argued the independent adjuster's only role in the claim was as an investigator/courier to gather facts and data to

be transmitted to the insurer so that the insurer could adjust the claim. The fact that the claims examiner happened to be a licensed adjuster had no bearing on his role in the case since he was uninvolved in the adjustment of the claim.

In rejecting Defendants' argument, the Court relied upon *Dagley v. Haag Engineering Company*, 18 S.W.3d 787(Tex. App. – Houston [14th Dist.] 2000, no pet.), addressing what constitutes the "business of insurance" in Texas. Although Defendants argued the claims examiner was retained solely to assist in the investigation of the claim and did not participate in the sale or servicing of Plaintiff's policy, make any representations regarding the policy's coverage, or adjust the Plaintiff's claim, the Court rejected such argument. The Court, instead, ruled the adjuster's investigative duties, although not necessitating the degree of specialized insurance knowledge that an insurance sales or servicing person may need, would not place the claims adjuster in the same category as a clerical or janitorial worker. Although the independent claims examiner may not need to utilize the specialized insurance knowledge he possessed as an adjuster in performing his investigative duties, Great American hired him as a licensed adjuster to be its investigator/courier. Therefore, the Court found "this seems to indicate that [the claims examiner]'s specialized knowledge may be beneficial in the investigative effort, a benefit that would be lacking had Great American retained a clerical/janitorial worker with no specialized insurance knowledge to gather the facts and data for Plaintiff's claim." The Court was unable to conclude that Great American and its independent adjuster demonstrated that there was no possibility of recovery by Plaintiff against the adjuster, and thus remanded the case to State court and denied the adjuster's motion to dismiss.

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