The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, 20th Floor Houston, Texas 77002 713.632.1700 FAX 713.222.0101
900 S Capital of Texas Hwy, Suite 425 Austin, Texas 78746 512.610.4400 FAX 512.610.4401
16000 N Dallas Parkway, Suite 800 Dallas, Texas 75248 214.420.5500 FAX 214.420.5501

February 27, 2012

FIFTH CIRCUIT FINDS INSURED CONTRACT EXCEPTION INAPPLICABLE AND REVERSES DISTRICT COURT

Last Monday, in *Colony Nat'l Ins. Co. v. Manitex, L.L.C.*, No. 11-50068 (5th Cir. Feb. 20, 2012), the Fifth Circuit reversed a district court's order granting summary judgment in favor of Manitex, L.L.C. and remanded the case for entry of summary judgment in favor of Colony National Insurance. JLG Industries, Inc. manufactured and sold a boom truck crane line of products to Powerscreen, USC, Inc., and Powerscreen assumed JLG's liabilities associated with the cranes. Powerscreen later sold the cranes to Manitex. On November 8, 2006, a JLG-manufactured crane allegedly malfunctioned, injuring Hugh Hawkins and Joshua Martin, who subsequently sued JLG. Manitex defended JLG based upon its perceived obligation to do so under its purchase agreement with Powerscreen. Manitex's insurer, Colony, sought a declaratory judgment from the district court that it had no duty to defend or indemnify Manitex. Manitex, in turn, sought a declaratory judgment that the policy covered defense of the Hawkins/Martin suit against JLG and indemnity for damages arising out of it. On cross-motions for summary judgment, the district court denied Colony's motion and granted Manitex's motion. An appeal followed.

The Colony policy issued to Manitex excludes "contractual liability"; i.e. - "'bodily injury' or 'property damage' for which the insured is obligated to pay damages by the reasons of the assumption of liability in a contract or agreement." An exception to the contractual liability applies when liability is assumed in an "insured contract," which is a contract or agreement under which Manitex assumed the tort liability of another party that would be imposed by law in the absence of any contract or agreement.

The Court of Appeals found that Manitex did not assume tort liability of JLG through the Powerscreen-Manitex Purchase Agreement. Manitex assumed Powerscreen's liability, which arose strictly from a contract, namely, its purchase agreement with JLG. If that contract did not exist, then Powerscreen would have had no liability related to the Hawkins and Martin claims. Powerscreen's liability, therefore, was not one that "would be imposed by law in the absence of any contract or agreement." Therefore, it was not "tort liability." Given that Manitex did not assume tort liability through the Powerscreen–Manitex Purchase Agreement, that Agreement was not an "insured contract," and the exception to the contractual liability exclusion did not apply.

FIFTH CIRCUIT FINDS "AUTO" EXCLUSION APPLIED TO INJURIES CAUSED BY RUPTURED HOSE CONNECTED TO OIL TRUCK

Last week, the Fifth Circuit addressed another common exclusion – the "auto" exclusion – in *Salcedo v. Evanston Ins. Co.*, No. 11-50686 (5th Cir. Feb. 22, 2012). Salcedo sued Evanston after he obtained a final judgment against Evanston's insured, Villegas, which was entered by the 448th District Court of El Paso County, Texas for $1.1 million plus interest. Evanston denied coverage based on the "auto"

exclusion in its CGL policy. The district court granted Evanston's motion for summary judgment and the Fifth Circuit affirmed.

The injury took place at Villegas's asphalt plant. On the day of the accident, Salcedo was assisting with the upload of a shipment of oil when a hose attached from the plant's asphalt reservoir to an oil truck ruptured, causing him to be burned by the hot oil. The policy excluded bodily injury "arising out of, caused by, or contributed to by the ownership, non-ownership, maintenance, use, or entrustment to others of any aircraft, 'auto,' or watercraft. Use includes operations and 'loading and unloading.'" The parties stipulated that the oil truck in question was an "auto," and the court noted that it was essentially undisputed that Salcedo was "unloading" the truck at the time of the accident.

Salcedo argued the injuries did not "arise out of the use" of an auto. Applying the framework set forth by the Texas Supreme Court in *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999), the Fifth Circuit found the exclusion applied. Salcedo's injury
occurred while the oil truck was being used as it was inherently intended – uploading oil. The accident occurred within the truck's natural territorial limits,
before the actual use terminated; the use – uploading oil – was still in progress. The oil truck produced the injury in question, rather than merely contributing to it. That is, but for the use of the oil truck in its expected and intended state of uploading oil, Salcedo would not have been injured.

Salcedo also argued that for the "auto" exclusion to apply, the insured, Villegas, must have been the one doing the unloading or, at least, causing it to be done. In this case, Villegas had loaned its plant to another entity prior to the time of the accident. The court found the unambiguous language in the policy did not require the insured do anything with the auto for the exclusion to apply.

TEXAS SUPREME COURT DENIES PETITION FOR REVIEW OF ORDER DENYING DISMISSAL OF CLAIMS BROUGHT BY AN AUTO INSURER AGAINST MEDICAL PROVIDERS

Last Friday, the Texas Supreme Court denied a Petition for Review filed by two doctors and other entities providing medical services. The medial providers were seeking review of the decision by a Houston Court of Appeals in *Shanti v. Allstate Insurance Company*, 356 S.W.3d 705 (Tex.App. – Houston [14th Dist.] 2011, pet. denied), which affirmed the denial of a motion to dismiss brought by the medical providers. A report on this decision was included in our November 8, 2011 edition of *Texas Insurance Law Newsbrief*.

Briefly, the pending lawsuit against the medical providers was filed by Allstate entities alleging causes of action for fraud, conspiracy, unjust enrichment, and claiming damages resulting from settlements paid in reliance on false billing and other records prepared by the medical providers and relied upon by the insurers. The medical providers sought dismissal of the lawsuit under the Texas Medical Liability Act (TLMA) because the insurers did not timely file an expert report under the TMLA in support of their claims. The court of appeals rejected the medical providers' arguments that Allstate's claims are health care liability claims recast as fraud, conspiracy and unjust enrichment and held that Allstate was not a claimant under the TMLA subject to its report requirements.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.
If you would like to add additional recipients or would like to unsubscribe , please reply to this e-mail with your request
For past copies of the *Newsbrief* go to www.mdjwlaw.com and click on our Texas Insurance News page.