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The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF



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## RELEASE PRECLUDES RECOVERY & 21.55 DOES NOT APPLY TO INDEMNITY CLAIM AGAINST EXCESS LIABILITY INSURER

Last Thursday, the Fort Worth Court of Appeals held that Texas' Prompt Payment of Claims Act, Insurance Code Article 21.55 (now Chapter 542), does *not* apply to indemnity claims against an excess insurer for liability payments issued to settle an liability claim. The court also found that a release of the insured obtained by the primary insurer in exchange for payments exceeding its policy limits precluded the insured's claims against the excess insurer. In *American National Fire Ins. Co. v. Hammer Trucking, Inc.*, 2006 WL 3247906 (Tex.App.-Fort Worth, November 9, 2006), an employee of Hammer Trucking was involved in an accident while driving a tractor-trailer leased to JTM Materials, Inc. The employee was arrested and later pleaded guilty to driving while intoxicated.

The injured party sued Hammer Trucking, the employee and also JTM Materials, Inc asserting vicarious liability and similar tort claims. JTM Materials, Inc. had a \$1 million primary insurance policy with St. Paul and an excess policy with American National Insurance Company. JTM was granted summary judgment by the trial court and was dismissed from the case. After the JTM dismissal, Hammer Trucking and the driver, evidently uninsured, represented themselves in a one day trial which resulted in a judgment in excess of \$3 million. The appellate court later reversed the summary judgment in favor of JTM Materials. Hammer Trucking and the driver then sued St. Paul seeking coverage for the loss plus damages under Article 21.55. St. Paul ultimately settled the judgment against Hammer Trucking and the driver for \$1.9 million and obtained a full release on their behalf. Hammer Trucking and the driver continued to pursue the excess insurer, American National, for indemnity for the amount of the excess verdict plus damages under Article 21.55, and it ultimately obtained a \$1.3 million judgment. This appeal followed.

Addressing the Article 21.55 claims, the court examined the statute, observed the distinction between first and third-party claims and noted that Article 21.55 only applies to "first-party" claims "that must be paid by the insurer directly to the insured or beneficiary." The court concluded that Hammer was not seeking recovery "from American for losses it suffered as a result of the accident." Instead, Hammer sought to be indemnified for the amount of the underlying judgment exceeding the \$1.9 million settlement paid by St. Paul. Accordingly, the court held that the claim was not a "first-party claim" under article 21.55 and reversed the trial court's judgment in favor of Hammer on the 21.55 damage award.

The court then examined the breach of contract claims against American National and their duties under the excess policy. Following Texas rules of policy contract construction, the court observed that American's policy provided for indemnification for those sums owed "in excess" of the underlying insurance that the insured becomes "legally obligated to pay" as damages. In this case, the court concluded that the duty "was never triggered in this case because there was no excess for which Hammer became "legally obligated to pay." Under the 2002 settlement, Hammer was released from its liability when St. Paul settled the claims. Accordingly, summary judgment in favor of Hammer was reversed and a take nothing judgment was entered.

## **INSURER'S ATTORNEY-IN-FACT PROPERLY DISMISSED & STATUTE OF LIMITATIONS BARRED LIABILITY**

The Fifth Circuit recently upheld summary judgment in favor of a Lloyds insurer's attorney-in-fact as improperly joined and based on the statute of limitations. In *Martinez v. State Farm Lloyds*, 2006 WL 3147505 (5<sup>th</sup> Cir. (Tex.) November 3, 2006), the insureds sued State Farm Lloyds and its "attorney-in-fact," State Farm Lloyds, Inc. The suit asserted breach of contract and extra-contractual causes of action. State Farm removed the lawsuit to federal court, obtained a dismissal for State Farm Lloyds, Inc. and won a summary judgment based on limitations for State Farm Lloyds.

Upholding the judgment for State Farm Lloyds, Inc., the statutorily required attorney-in-fact, the Fifth Circuit observed that under "Texas law, agents are generally not liable for contracts entered into on behalf of a principal, or for any actions that are within their scope of authority." Finding no legal arguments or evidence in this case to support any such finding; the Fifth Circuit upheld the dismissal of State Farm Lloyds, Inc.

The court then examined the insureds' argument that by discussing the possibility of mediating the claims limitations did not begin to run until January 2005. Noting that State Farm had clearly communicated its denial of the claim in writing in February 2002, the court found "no evidence that State Farm was attempting to string the insureds along without denying or paying the claim." Even though plaintiffs filed their lawsuit timely in 2003, they failed to exercise due diligence in serving State Farm until August 2005, after the statute of limitations had run. Accordingly, summary judgment in State Farm's favor was upheld.

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