The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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February 14, 2012

CITY-OWNED VEHICLE IS NOT "UNINSURED MOTOR VEHICLE" AS DEFINED BY AUTO LIABILITY POLICY

Last Wednesday, in a case of first impression, the Austin court of appeals determined that a city-owned vehicle did not meet the definition of "uninsured motor vehicle" as contained in a personal auto policy issued by GEICO. *Nealey Michelle Malham v. GEICO*, --- S.W.3d ----, 2012 WL 413969 (Tex.App.—Austin February 8, 2012), Malham was injured in a motor vehicle accident in which the car in which she was a passenger was struck by a pickup truck owned by the City of Killeen and driven by a city employee while in the course and scope of his employment. Malham settled her claims against the City and the employee in exchange for payment to her of $87,500. Thereafter, Malham filed a claim under the uninsured motorist coverage provision of her GEICO policy seeking to recover medical expenses related to back surgery she alleges was recommended to treat injuries sustained in the accident.

Malham sought a declaration that the City vehicle that struck the car she was riding in was an "uninsured motor vehicle," as that term is defined in her contract with GEICO, and that she was entitled to recover $300,000 from GEICO under the terms and conditions of her uninsured-motorist coverage. The parties agreed to a bifurcated trial whereby they would first try the coverage issues, which presented pure questions of law, to the court and then set any remaining liability and damages issues for a subsequent jury trial. After a bench trial, the court rendered a final take-nothing judgment in GEICO's favor.

In reviewing the trial court's judgment, the court of appeals determined that the City is a party to a Liability/Property Interlocal Agreement (the "Agreement"), which creates the Texas Municipal League Joint Self–Insurance Fund (the "Fund") for the purpose of "providing coverages against risks which are inherent in operating a political subdivision." The court determined that this agreement is a liability policy, meaning that the vehicle was not uninsured. The court upheld the judgment for GEICO.

PAST AND FUTURE LOST EARNINGS EXCLUDED BY EPL POLICY

Last Thursday, in a case of first impression, the Dallas court of appeals determined that damages for past and future lost earnings due to wrongful termination were excluded from coverage under an employment practices liability insurance policy issued by St. Paul Mercury Insurance Company. *Pinnacle Anesthesia Consultants, P.A. v. St. Paul Mercury Ins. Co.*, --- S.W.3d ----, 2012 WL 404967 (Tex.App.—Dallas February 9, 2012). Pinnacle had an employment practices liability insurance policy with St. Paul with a $2 million limit. Dr. Neal Fisher was an employee and shareholder physician with Pinnacle pursuant to a written employment contract. In 2004, Pinnacle terminated Dr. Fisher, and Dr. Fisher sued for breach of the employment contract alleging he was terminated without cause. The jury agreed and determined that Dr. Fisher's damages from Pinnacle's terminating him without cause, included past lost earnings of $900,000 and future lost earnings of $5 million.

In the coverage litigation, St. Paul relied on a policy exclusion providing in part that: "The Insurer shall not be liable for that part of Loss that constitutes ... amounts owed under a written contract or agreement...." The damages in the underlying case were for past and future lost earnings. The jury charge in the underlying case defined "Past Lost Earnings" as "the cash value of the earnings Dr. Fisher would have received in the past had Pinnacle not terminated him without 'Cause,' less any amounts actually earned by Dr. Fisher." It defined "Future Lost Earnings" as "the cash value of the earnings Dr. Fisher would, in all reasonable probability, earn in the future, less any earnings, had Pinnacle not terminated him without 'Cause.' "The issue before the court was whether this award of damages for past and future lost earnings "constitutes ... amounts owed under a written contract or agreement."

The court rejected Pinnacle's argument that the lost earnings were not owed "under the contract" because they were consequential damages. The court also disagreed with Pinnacle's interpretation of "amounts owed under a written contract" as limited to money owed to Dr. Fisher for fees earned but not paid before the termination of the employment contract. Lastly, the court rejected Pinnacle's argument that the policy language was ambiguous. In doing so, the court upheld the summary judgment entered for St. Paul.

INTERPLEADER PRESENTS ISSUE OF "EX-SPOUSE" NOTATION ON BENEFICIARY FORM SUBJECT TO STATUTORY RE-DESIGNATION REQUIREMENT FOR FORMER SPOUSE

In an opinion issued last Thursday, the Fifth Circuit considered an interpleader action in which life insurance proceeds were in dispute. In *Provident Life and Acc. Ins. Co. v. Cleveland*, 2012 WL 407094 (C.A.5 (Tex.), Gerald and Shona married in 1993 and had one child together. The couple separated in 1998, and Gerald filed for divorce in March 2001. Gerald obtained a life insurance policy in November 2001 naming as the beneficiary "Shona Cleveland Ex–Spouse." He did not name an alternate or secondary beneficiary. The couple was not divorced until June 2002 when a final divorce decree was entered. By its terms the decree divested Shona of any interest in any life insurance policies held by Gerald. Following the divorce, Gerald married Jill and had one child with her. Gerald subsequently died intestate as a result of a motorcycle accident in March 2009.

The Fifth Circuit applied section 9.301 of the Texas Family Code that provides that a divorce negates the designation of a prior spouse as the beneficiary of a life insurance policy. The court rejected Shona's argument that Gerald intended to avoid that result by listing her as his "ex-spouse." The court upheld the decision to award the policy proceeds to Jill, the current wife at the time of his death.

INSURER HAS NO DUTY TO DEFEND OR INDEMNIFY FLSA CLAIMS

On Friday, U.S. District Judge Ellison granted summary judgment for SAFECO in a declaratory judgment action finding SAFECO owed no duty to defend or indemnity Fair Labor Standards Act (FLSA) claims under a homeowners and umbrella policy for claims brought by the insured's nanny. *SAFECO v. Kamat*, No.04:11-CV-00557 (S.D. Tex. February 10, 2012) (not designated for publication). The nanny sued because she was required to work eighteen hours per day for unfairly low wages, the Kamats threatened that if she went outside she would be arrested by the police, and Kamats also kept Prakash from seeing a doctor when she was sick. On December 7, 2010, the jury returned its verdict, which found that the Kamats willfully violated the FLSA. The Kamats were willing to enter into an agreed order on coverage, but the nanny challenged SAFECO's coverage action.

The court rejected the nanny's argument that it did not have subject matter jurisdiction. It then considered the allegations and verdict in light of the plain language of the policy. The court noted that the policies provide for coverage of "personal injury," which is defined as including "false arrest, detention or imprisonment, or malicious prosecution or humiliation." But, the court noted that the nanny did not allege any of these. The court found the nanny's intentional inflection of emotional distress claims, which the jury rejected, also did not fall within these categories. The court held SAFECO had no duty to defend or indemnify the claims.

[Editor's Note: MDJW congratulates SAFECO on its summary judgment in this unique claim. Christopher W. Martin, Barrie Beer, and Amber Dunten of MDJW represented SAFECO in this matter.]