The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FIFTH CIRCUIT HOLDS INSURER'S TIMELY PAYMENT OF A BINDING AND ENFORCEABLE APPRAISAL AWARD PRECLUDES BREACH OF CONTRACT AND BAD FAITH CLAIMS

In the midst of many disputes at the state and district court levels involving appraisal issues, the Fifth Circuit Court of Appeals recently examined an insured's pursuit of contractual and bad faith claims against an insurer following the insurer's timely payment of an appraisal award. In *Blum's Furniture Company, Inc. v. Certain Underwriters at Lloyds London*, 2012 WL 181413, No. 11–20221 (5th Cir. Jan. 24, 2012), Plaintiff-Appellant, Blum's Furniture Company filed suit against Defendant–Appellee Certain Underwriters at Lloyds London alleging extensive property damages to its property caused by Hurricane Ike.

Less than a month after the insured accepted payment for undisputed portions of damage and invoked appraisal as to the disputed portions, a lawsuit was filed. The appraisal process continued during the duration of the lawsuit and the appraisal umpire ultimately issued an award for damage to the property exceeding $1,000,000. Lloyds promptly issued payment to Blum's for the appraisal amount, less amounts already paid and other deductions provided for by the policy. Blum's accepted Lloyds' payment of the appraisal amount, but continued to pursue the breach of contract and extra-contractual claims. Thereafter, Lloyds filed for summary judgment which the district court granted, finding that Blum was estopped from pursuing its breach of contract claim by Lloyds' timely payment of the appraisal award. The district court further held that Blum could not maintain its bad faith claims absent a showing that Lloyds committed an act so extreme that it would cause injury independent of the policy claim or that Lloyds failed to timely investigate the insured's claim. Finding no evidence of either, the district court granted summary judgment as to Blum's contractual and bad faith claims against Lloyds.

On appeal, the Fifth Circuit agreed with the district court, finding that Lloyds promptly commenced investigation of Blum's claims and timely issued payment based on its adjustment of the claim. Citing *In re Universal Underwriters of Tex. Ins. Co*., 345 S.W.3d 404, 407 (Tex. May 6, 2011), the Court went on to state that the appraisal process can only determine the value of damages, while liability is left for the courts to decide. Since Lloyds never disputed the issue of coverage and made payment to Blum for its contractual damages, the court held that Blum failed to establish a genuine issue of material fact regarding its bad faith claims against Lloyds and therefore affirmed the district court's judgment.

FEDERAL DISTRICT COURT REFUSES TO SET ASIDE APPRAISAL AWARD WHERE UMPIRE MADE DETERMINATIONS CONTAINING ELEMENTS OF CAUSATION AND FAILED TO ITEMIZE EACH ELEMENT OF DAMAGE

Magistrate Judge Stephen Smith of the Federal District Court for the Southern District of Texas recently denied an insurer's motion to set aside an appraisal award, concluding that the appraiser performed the type of causation analysis as contemplated in *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009). *Essex Insurance Co. v. Helton*, Civil Action 4:10-cv-2229 (S.D.Tex., Jan. 24, 2012). Essex Insurance Co. filed a declaratory judgment action to set aside an appraisal award of $417,000 and motion for summary judgment declaring the appraisal award void and abating the insureds' claims for payment. The insureds, Jeffrey Helton and Deborah Helton, filed a counterclaim for breach of contract and bad faith and summary judgment affirming the appraisal award.

Essex argued that the umpire, March Stelly, should not have made determinations regarding causation and should have itemized each element of damages instead of making a lump sum award. Relying on *Johnson,* the Court found that Stelly's review of an engineering report to confirm that the damage claimed by Plaintiff's appraiser was actually caused by the storm was permissible. The Court also found that Essex had presented no authority requiring a detailed itemization of the elements of damage and that it was not called for by the appraisal provision in the policy. Accordingly, the Court denied Essex's motion for summary judgment and dismissed its claim for declaratory judgment. The Court further granted Heltons' motion for summary judgment affirming the appraisal award. Heltons' counterclaims are set for trial on February 21, 2012.

TEXAS SUPREME COURT HOLDS THAT TEXAS WORKERS' COMPENSATION ACT PROVIDES EXCLUSIVE REMEDY FOR TEMPORARY WORKERS

On Friday, January 27, 2012, the Texas Supreme Court held that the only remedy available to the parents of temporary worker for his work-related fatality is the Texas Workers' Compensation Act (TWCA). *Port Elevator–Brownsville, L.L.C. v. Rogelio Casados and Rafaela Casados, Individually and as Representatives of the Estate of their Son Rafael Casados,* Respondents, ___S.W.3d ___, 2012 WL 247985, No. 10–0523 (Tex. Jan. 27, 2012).

Rafael Casados suffered a fatal, work-related injury while working for two employers that both had workers' compensation coverage. Casados's parents sued one of the employers. The court of appeals held that the policy at issue did not cover Casados because he was a temporary worker and affirmed the judgment Casados' parents obtained against Port Elevator.

The Texas Supreme Court reversed the appellate court holding that workers' compensation was the exclusive remedy to Casados' parents, which barred their suit against Port Elevator. The Court rejected Casados' argument that their son was not covered by Port Elevator's workers' compensation policy and instead found that because Port Elevator had a workers' compensation policy, Casados was an employee (albeit temporary), he suffered a work-related injury, and the jury failed to find Port Elevator grossly negligent, the exclusive remedy under the TWCA was against the Port Elevator's insurer—not Port Elevator. Accordingly, the Court reversed the judgment of the court of appeals and rendered judgment for Port Elevator.

PROPERTY OWNER FOUND NOT LIABLE FOR INJURIES TO INDEPENDENT CONTRACTOR'S EMPLOYEE

On January 4, 2012, San Antonio Court of Appeals affirmed the trial court's judgment holding that an injured employee of an independent contractor failed to meet his burden to produce more than a scintilla of evidence that the property owner exerted contractual or actual control over his work. *Covarrubias v.*

Diamond Shamrock Refining Company, LP, 2012 WL 12116, No. 04-11-00289-CV (Tex.App.—San Antonio, Jan. 4, 2012).

Plaintiff-Appellant Pedro Covarrubias sued Defendant-Appellee Diamond Shamrock for premises liability and negligence after Covarrubias sustained second-degree burns while accessing the welds on a carbon steel line in one of Diamond Shamrock's refineries. Covarrubias was injured when the lift handrail of a scissor lift struck a nearby nipple (the fitting, consisting of a short piece of pipe, used for connecting two other fittings) causing it to break and hydrocarbons to be released.

In the first issue, the appellate court held that Covarrubias's claims were subject to Chapter 95 of the CPRC even though he was injured while accessing his work space using a scissor lift and not by the welds he was hired to repair. See TEX. CIV. PRAC. & REM.CODE ANN. § 95.002. The court held that since Covarrubias needed to use the scissor lift to access his work space, and although the nipple was not the object of Covarrubias's work, it was an unsafe part of his workplace. Accordingly, the Court held as a matter of law that Chapter 95 applied to Covarrubias's claims.

In the second issue, the appellate court held that Covarrubias did not meet his burden in producing more than a scintilla of evidence that Diamond Shamrock exerted contractual or actual control over his work. Under Chapter 95, Diamond Shamrock, as the property owner, is not liable for Covarrubias's injuries unless Diamond Shamrock exercised or retained some control over the manner in which Covarrubias's work was performed, and Diamond Shamrock had actual knowledge of the faulty nipple which caused Covarrubias's injuries. See TEX. CIV. PRAC. & REM.CODE ANN. § 95.003. The court found that Diamond Shamrock did not retain control over the manner in which Covarrubias's work was performed (i.e. using the lift to access the welds), which is one of the elements of a claim under chapter 95 of the CPRC, and that Covarrubias did not produce any evidence to counter this contention. Because Covarrubias failed in his burden regarding the first prong of chapter 95.003, the court did not address whether Diamond Shamrock had actual knowledge of the dangerous condition.

COURT FINDS PROPERTY OWNER WAS NOT INTENDED OR IMPLIED THIRD PARTY BENEFICIARY OF INSURANCE CONTRACT ISSUED TO LESSEE - INSURER'S SUMMARY JUDGMENT GRANTED

Recently, Judge Keith Ellison of the Federal District Court for the Southern District of Texas, granted an insurer's motion for summary judgment holding the Plaintiff was not an insured or an additional insured under the insurance Policy and thus had no contractual basis to bring a claim for coverage. *Bender Square Partners v. Factory Mutual Insurance Company, d/b/a FM Global, and PNS Stores, Inc.*, 2012 WL 208347; Civ. No. 4:10–cv–4295 (S.D.Tex., Jan. 24, 2012). The Court further held that Plaintiff was not entitled to proceeds from the Policy as a holder of the Policy's certificate of insurance since the certificate did not confer policy rights under Texas law. Additionally, the Court held that Plaintiff was never an intended third party beneficiary of the insurance policy as a matter of law.

Plaintiff, Bender Square Partners, sought to recover for losses it suffered as a result of Hurricane Ike in September 2008 to property it had leased to PNS Stores, Inc. According to Bender, the amounts it sought to recover were covered under a Commercial Property Insurance Policy that Factory Mutual Insurance Company, doing business as FM Global issued to Big Lots, Inc. and its subsidiaries, one of which is PNS Stores. Benders alleged that FM Global wrongfully refused to timely and fully pay and indemnify Bender for all losses covered under the Policy.

Plaintiff admitted it was not a named insured under the Policy, was not named as an additional insured in the Certificate, and was not an additional insured or loss payee on the Policy. Rather, Plaintiff claimed it was a named holder of the Certificate and was an intended or implied third-party beneficiary of the Policy.

However, the Court held that the terms of the certificate of insurance were subordinate to the terms of the insurance policy and the certificate did not confer any rights to Plaintiff under the policy. The Court also held that Plaintiff failed to meet its heavy burden of showing that it was an intended third-party beneficiary to the Policy. To qualify as a third-party beneficiary of the Policy, Bender must have shown (1) that it was not privy to the Policy; (2) that the Policy was actually made for its benefit; and (3) that the PNS Stores and FM Global intended for Bender to benefit by the Policy. The Court found that Plaintiff did not proffer any evidence to support the inference that it was an intended third-party beneficiary.

Finally, as to Plaintiff's claim that it was an implied third-party beneficiary, the Court found that the insurance policy did not require PNS Stores to procure a policy issued in Bender's name. Accordingly, Bender was not an implied third-party beneficiary. Holding that Plaintiff was not an insured, additional insured, or third-party beneficiary to the Policy, the Court granted summary judgment as to all of Plaintiff's claims.

FEDERAL DISTRICT COURT FINDS NO DUTY TO DEFEND - POLICY'S FIELD OF ENTERTAINMENT EXCLUSION PRECLUDES COVERAGE

Recently, in *Rick's Cabaret International, Inc. v. Indemnity Insurance Corporation*, 2012 WL 208606, Civil Action No. H–11–3716 (S.D.Tex., Jan. 24, 2012), an insured sought coverage under a policy for two class action lawsuits filed against it in Florida for allegedly sending numerous advertising text messages to cell phones without the cellular subscribers' consent. The insurer, Indemnity Insurance Corporation (IIC), denied coverage asserting that the claims fell within the "Field of Entertainment" Exclusion and the "Legal Liability" Exclusion in the Policy. Plaintiff, Rick's Cabaret International, Inc. filed suit seeking a declaratory judgment that there was coverage under the Policy and that IIC owed Rick's a duty to defend in the two class action lawsuits.

Looking at Plaintiff's pleadings and the Policy language, the Court held that the "Field of Entertainment" exclusion applied to negate the duty to defend and therefore IIC had no duty to indemnify. The Court further held that the "Legal Liability" Exclusion excluded coverage for breach of contract claims against the insured. The Court allowed Plaintiff to recover the expenses and fees allowed by Rule 4(d)(2) of the Federal Rules of Civil Procedure for obtaining service on Defendant since Defendant declined to waive service as well as legal fees incurred in preparing the Motion for Costs and Fees for Service of Complaint.

HURRICANE IKE LITIGATION UPDATE

There have been several recent developments in the Hurricane Ike docket in Harris, Jefferson and Ft. Bend Counties. In Harris County, coordinating Ike judge Mike Miller recently indicated he may be expanding master discovery requests for production numbers 5 and 16. These requests seek written procedures or policies (including document(s) maintained in electronic form) that pertain to the handling of windstorm claims in Texas and a carrier's internal newsletters, bulletins, publications and memoranda relating to policies and procedures for handling Texas Hurricane claims. The requests are currently limited to the period from August 1, 2007 – August 31, 2009; however, Judge Miller is considering expanding this to 2010. He has been asked by the Mostyn Law Firm to expand the parameters towards

Cypress Texas Lloyds. Judge Miller has stated if he agrees to do this for one carrier, it will have to apply to all. This issue is currently under advisement.

While Judge Miller has previously and routinely refused to abate any cases during the appraisal process, on Monday, January 23rd, he stated that all proposed orders for appraisal shall include a deadline for completion. Judge Miller signed an order which stated: "If, for any reason, the appraisal process is not completed by ___[date]__, the Court hereby ORDERS that the case will be abated until the date on which the umpire's award is signed." All future appraisal orders should follow suit in Harris County according to Judge Miller.

In Fort Bend County, Judge Brady Elliot recently entered an order requiring Cypress Texas Lloyd's to produce all emails for all employees on any subject matter sent or received between September 12, 2008 and January 13, 2012. Counsel for The Mostyn Firm has indicated they intend to seek similar email discovery from all carriers in all Hurricane Ike cases. Cypress Lloyd's has indicted its intentions to seek mandamus protection from the Court of Appeals.

Finally, last Friday morning, State Farm obtained an emergency stay from the Houston 1st Court of Appeals relieving it of an obligation to produce many thousands of documents which it had been ordered to produce the prior evening by the Galveston coordinating Ike judge Susan Criss and the production deadline was 10:00 a.m. the following morning. When State Farm's request for more time to comply with the production order was denied, State Farm sought and obtained relief from the 1st Court.