The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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HOUSTON COURT OF APPEALS HOLDS APPRAISAL AWARD, BY ITSELF, DOES NOT PROVE BREACH OF CONTRACT IN HURRICANE IKE CASE

In a commercial Hurricane Ike lawsuit, the Texas Fourteenth Court of Appeals held last Tuesday that because an appraisal award determined only the amount of damages and not coverage, it could not, standing alone, support judgment against an insurer on an insured's breach of contract claim. In *Security National Insurance Co. v. Waloon Investment, Inc.*, No. 14-11-00130-CV, 2012 WL 4788114 (Tex. App.—Houston [14th Dist.] Oct. 9, 2012), the owner of a Houston hotel sued over its claim for storm damages, invoked appraisal, and once the appraisal was complete, moved the trial court to order the insurer to pay the appraisal award. The only exhibit to the motion was the appraisal award itself. The court granted the motion, and later converted the order into an appealable judgment.

The appellate court reversed. First, the court observed that the court could not have rendered judgment at all "without a summary-judgment proceeding, trial, or agreed judgment." The court stated that the insured's motion, and the court's ruling, essentially converted an appraisal award into an arbitration award, and that such a move would be contrary to 120 years of Texas law distinguishing the two. Arbitration, the court said, "may encompass the entire controversy between the parties," but an appraisal only determines the amount of the loss. An appraisal award does not on its own entitle an insured to judgment. To turn an appraisal award into a judgment, the insured would be required to pursue a summary judgment motion, and not simply a motion to enforce the appraisal award.

The appellate court next considered whether, assuming that the insured was correct that its motions were *effectively* summary judgment motions, summary judgment was appropriate given the substance of the motions. The court held that the motions were insufficient. The appraisal award by itself did not determine the merits of the insured's breach of contract claim. Moreover, the insured did not even provide the trial court with a copy of the insurance policy to prove the contract existed in the first place. Neither the grounds nor the evidence presented in the insured's motions supported summary judgment. The court of appeals therefore reversed and remanded to the trial court for further proceedings.

FEDERAL DISTRICT COURT RULES FOR INSURER THAT REFUSED DEFENSE AND INDEMNITY FOR SUIT OVER ALLEGED "STOCK KICKBACK SCHEME"

Judge Hittner of the Southern District of Texas granted summary judgment earlier this month in favor of an insurer whose insured had tendered defense in a Massachusetts case over a deal gone bad. *D'Amato v. Endurance American Specialty Insurance Co.*, Civ. No. H-12-84 (S.D. Tex. Oct. 5, 2012), involved a claim for benefits under a professional liability policy. The insured was a defendant in a suit over a securities transaction, in which the plaintiff, a software company, claimed that the defendants had participated in an "illegal stock kickback scheme" — a stock transfer without legitimate consideration, intended to induce the plaintiff into a deal that eventually devalued the plaintiff's intellectual property. The insured tendered the defense, but Endurance denied the claim, and the insured entered into a settlement of the underlying case.

Judge Hittner applied the eight-corners rule to evaluate the insurer's duty to defend, considering only the petition in the underlying lawsuit and the Endurance insurance policy. The duty to defend turned on whether the allegedly fraudulent securities transfer constituted "professional services." Endurance argued that there were no facts alleged in the underlying petition that the insured provided the plaintiffs with professional services. Judge Hittner agreed. While the petition alleged that the insured participated in the securities transaction, it was not alleged that she engaged in what the policy defined as "professional" services. Judge Hittner refused to consider, for duty-to-defend purposes, the insured's arguments based on extrinsic evidence. He also determined that even if the insured had provided "professional services," her actions were not for "clients" as the term is used in the policy.

Judge Hittner also ruled for the insurer on the duty to indemnify. While the duty to indemnify and the duty to defend are not co-extensive, the insured did not present any evidence in response to summary judgment other than the underlying complaint and the policy. Thus, there was no extrinsic evidence that would support a finding of a duty to indemnify where there was no duty to defend. Finally, Judge Hittner dismissed the insured's extra-contractual claims, finding that (1) there is no cause of action for negligent claims handling, defeating the insured's assertions of negligence, gross negligence, and negligence per se; and (2) the failure of the insured's contract claims defeated her statutory and common-law bad faith claim.

STATE BAR OF TEXAS 17TH ANNUAL INSURANCE LAW INSTITUTE OCTOBER 18-19TH IN AUSTIN

This October 18-19, 2012, the Insurance Law Section of the State Bar of Texas and the University of Texas School of Law will present the 17th Annual Insurance Law Institute at the Courtyard Marriott in Austin. During this two-day event, some of the Texas' leading insurance lawyers, representing both policyholders and carriers, will be speaking on issues such as the insured's duty to cooperate, determining the number of occurrences, documenting business interruption claims, the boundaries of the duty to defend under liability policies, policy limit demands, and more.

Early registration for this event is $555 through Wednesday, October 10, and $605 after October 10. Up to 12.75 hours (with 1.75 hours ethics) of CLE credit are available, and the course also qualifies for TDI CE credit. For more information on this CLE and CE opportunity, visit **www.utcle.org/conferences/IN12** or call the UT School of Law at 512-475-6700.

REMINDER: MDJW CENTRAL TEXAS INSURANCE SEMINAR NOVEMBER 9TH IN SAN ANTONIO

Adjusters, claims managers, litigation managers, and in-house counsel should mark your calendars for the 2012 MDJW Central Texas Insurance Seminar which will be held in San Antonio on Friday, November 9th, at the Pearl Stable on the campus of the Culinary Institute of America, 307 Pearl Parkway in San Antonio. The program will run from 9:00 a.m. to 4:00 p.m. and will cover cutting edge insurance issues for anyone involved in P&C claims or lawsuits in Texas. This FREE program will feature some of the state's leading insurance lawyers from our firm who will be providing updates on the latest decisions and latest legal trends across multiple liability and property topics including the latest Stowers problems, inadequate limits issues, punitive damage exposures, Texas bad faith update, new appraisal issues, homeowners and auto insurance updates, and much more. Chris Martin, David Disiere, Barrie Beer, Kenni Lucas, Andrew Schulz, Jeff Farrell, Tanya Dugas, Mark Dyer and several others from the firm will teach on cutting edge issues impacting those who handle claims or manage insurance litigation in Texas. Lunch will be provided as well.

To register, please send an email with your name, employer, and work address to: ce@mdjwlaw.com OR call 713-632-1737 with the same information. Following receipt of a registration request, we will reply with more detailed information regarding the location of program in San Antonio. Seating is limited, so register as early as you can. We hope to see many of our friends from the insurance industry on November 9th in San Antonio!