The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FIFTH CIRCUIT FINDS INSURANCE CARRIER HAS NO DUTY TO RETROACTIVELY DEFEND AN ADDITIONAL INSURED

Last Friday, the Fifth Circuit affirmed a district court's decision that an insurer had no duty under the policy to defend an additional insured. In *Ace American Insurance Co. v. Freeport Welding & Fabricating*, No. 12-20002, 2012 WL 5077688, (5th Cir. October 19, 2012), Freeport Welding & Fabricating ("Freeport") sued Ace American Insurance Company ("Ace") for defense and indemnity arising from an underlying personal injury law suit filed in Texas state court.

In 2008, Freeport issued a purchase order to Brand Industrial, L.L.C. ("Brand Industrial") for the installation of lining inside of a quench chamber. Brand Industrial's work was subsequently taken over by its parent company, Brand Energy Solutions, LLC ("Brand Energy") in January 2009. Afterward, Freeport and Brand Energy entered into a purchase agreement. The purchase agreement started on January 1, 2009 and was indefinitely valid until cancelled in writing by the parties. Importantly, the 2009 purchase agreement served as a contract wherein Brand Energy agreed to provide insurance coverage to Freeport for all purchase orders entered into by Brand Energy and Freeport.

In May 2009, the workers started the installation of the lining and completely fulfilled the 2008 purchase order by August 2009. Several workers were injured during the installation and sued Freeport. Afterward, pursuant to the 2009 purchase agreement, counsel for Freeport tendered defense to Brand Energy's insurance carrier, Ace. Ace denied the tender of defense and filed for declaratory judgment in the District Court for the Southern District of Texas. The parties filed cross motions seeking summary judgment, and the district court rendered judgment in favor of the insurance carrier holding that it had no duty to defend Freeport as an additional insured under the policy.

On Appeal, the Fifth Circuit determined the May 2009 purchase agreement served as a contract granting Freeport additional insured status under the policy; however, the May 2009 purchase agreement did not apply retroactively to work negotiated under the 2008 purchase order. The Fifth Circuit affirmed the district court's holding that Ace had no duty to defend Freeport and remanded the case for determination of whether or not Ace had a duty to indemnify.

NATIONWIDE OBTAINS FAVORABLE OPINION REGARDING THE IMPROPER JOINDER OF AN INSURANCE ADJUSTER

Last week in *George Green v. Nationwide Mutual Insurance Company and Yolanda Alvarez*, No. A-12-CV-600LY, (W.D. Tex. October 17, 2012), the District Court for the Western District of Texas issued an opinion wherein the court refused to remand a case back to state court on the basis that an insurance adjuster was improperly joined to defeat federal diversity jurisdiction. Plaintiff filed an action against Nationwide Insurance Company ("Nationwide") and Nationwide's claims adjuster in Texas state court for claims arising out of a December 5, 2008 motor vehicle accident. Plaintiff's causes of action against Nationwide and the

insurance adjuster included breach of contract, breach of duty of good faith and fair dealing, and DTPA violations. Counsel for Nationwide removed the lawsuit to federal court, and Plaintiff filed a motion to remand the lawsuit back to state court.

The Court determined the Plaintiff failed to present any reasonable basis that he could recover against the insurance adjuster. The court went on to explain that the insurance adjuster cannot be held liable for breach of contract since she was not a party to the contract, and the common law duty of good faith and fair dealing does not extend to an insurance company's adjusters. Last, the court evaluated Plaintiff's Original Petition and effectively determined that Plaintiff's boilerplate language was not sufficient to sustain a DTPA cause of action against the insurance adjuster.

Editor's Note: Patrick Kemp and Robert Russell from the firm's Austin office handled the briefing, and MDJW is pleased to have had the opportunity to obtain such a favorable opinion out of the Western District of Texas.

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

Martin, Disiere, Jefferson & Wisdom UNIVERSITY

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!

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.
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