The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT RENDERS JUDGMENT IN WORKERS' COMPENSATION CASE THAT PLAINTIFF TAKE NOTHING PURSUANT TO *TEXAS MUTUAL INSURANCE CO. V. RUTTIGER*

Last Friday, the Texas Supreme Court reversed judgment by the Court of Appeals for the Fourteenth District of Texas in a workers' compensation suit and rendered judgment that Plaintiff take nothing. *Texas Mutual Ins. Co. v. Morris*, 2012 WL 5275467, No. 09–0495 (Tex. Oct. 26. 2012)

Plaintiff, Lance Morris, injured his back while working and his employer's workers' compensation insurer, Texas Mutual Insurance Company (TMIC), accepted the injury as compensable. Three years later when it was discovered that Plaintiff had herniated lumbar intervertebral discs, TMIC disputed whether they were causally related to the original injury. The Texas Department of Insurance Division of Workers' Compensation (the division) determined that the disc herniations were related to the original injury and ordered TMIC to pay medical benefits, which it did. Morris later sued TMIC for damages caused by its delay in paying benefits. The trial court rendered judgment for Morris, and the court of appeals affirmed.

On appeal, TMIC argued (1) the trial court did not have jurisdiction over Plaintiff's suit because he did not timely use administrative remedies available to him under the Workers' Compensation Act for obtaining benefits; (2) Plaintiff's causes of action for unfair claims settlement practices under Insurance Code section 541.060 and breach of the common law duty of good faith and fair dealing did not apply in the workers' compensation context; and (3) Plaintiff could not recover under Insurance Code section 541.061 for misrepresentation of an insurance policy.

As to the first issue, the Court distinguished the instant suit from that of *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804–05 (Tex.2001), in which the Court held the trial court did not have jurisdiction over a claim for delay in providing compensation benefits if the division had not yet made a determination that the benefits were due. In Morris's lawsuit, however, the division had determined that his lumbar disc herniations were compensable and that TMIC was liable for compensation. The Court concluded that Morris's delays in requesting division action were not jurisdictional in nature, but rather were matters of whether he mitigated his damages. Thus his delays in seeking relief from the division did not deprive the trial court of jurisdiction.

As to the second issue, the Court held that Morris could not recover damages for unfair claims settlement practices under Insurance Code section 541.060 nor for breach of the common law duty of good faith and fair dealing pursuant to the Court's recent decision in *Texas Mutual Insurance Co. v. Ruttiger*, —— S.W.3d ––, No. 08-0751 (Tex. 2012) (overruling *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 212–13 (Tex.1988)).

Finally, as to the third issue on appeal, the Court found that there was no evidence that TMIC misrepresented its insurance policy. Plaintiff did not point to any statements or actions by TMIC that he

believed constituted untrue statements about or failure to disclose something about the insurance policy. Therefore, the Court held that Plaintiffs' claim for misrepresentation under Insurance Code section 541.061 failed.

APPELLATE COURT HOLDS INSURER UNABLE TO SEEK SUBROGATION AND INDEMNITY FOR DAMAGES RESULTING FROM FIRE AT UNIVERSITY OF TEXAS' GOLF CLUBHOUSE ALLEGEDLY CAUSED BY SUBCONTRACTOR

In February 2009, American Zurich Insurance Company (AZIC), as Subrogee of the Varsity Golf Club, Ltd d/b/a The University of Texas Golf Club (UT), filed suit against Barker Roofing, L.P. (Barker) alleging the roofer was negligent in the performance of its work and services at the UT clubhouse resulting in a catastrophic fire that caused UT to suffer business interruption damages. *American Zurich Ins. Co. v. Barker Roofing, L.P.*, —— S.W.3d ——, 2012 WL 5231858, Cause No. 07–11–0038–CV (Tex. App.–Amarillo, Oct. 23, 2012). AZIC sought damages it paid to UT resulting from the fire allegedly caused by Barker. The trial court granted summary judgment in favor of Barker based upon the affirmative defense of waiver to which AZIC appealed.

By way of background, in February 2007, UT and Harvey–Cleary Builders (HCB) executed a general contract for the construction of clubhouse improvements at UT's Golf Club in Austin Texas. As part of the contract, UT and HCB waived all rights against each other and any of their subcontractors for damages caused by fire or other perils to the extent covered by property insurance or any other property insurance applicable to the work under the contract.

In March 2007, the HCB entered into a subcontract with Barker to complete the roof, vinyl siding and flashing at UT's clubhouse. The subcontract contained two indemnification provisions whereby Barker agreed to "indemnify, defend and save Contractor and Owner harmless from any liability for all claims, causes of action, losses, costs, expenses, damages, liabilities and judgments" due to any delay in performance or Barker's failure to properly pursue the subcontract work or comply with the terms of the subcontract. Before Barker completed performance under the subcontract, there was a catastrophic fire at UT's clubhouse that originated in the exterior roof covering, ignited by a "spark, ember or flame," with a contributing factor of high wind.

At the time of the fire, UT was insured under a commercial insurance policy issued by AZIC that insured UT against, among other things, real and personal property damage including business income loss. AZIC paid business interruption damages to UT totaling $500,000 resulting from the fire. On appeal, AZIC argued it was entitled to recovery of business interruption damages it paid to UT resulting from the fire plus any deductible paid by UT. AZIC also argued it was entitled to contractual indemnity under Barker's subcontract with HCB for UT's uninsured losses.

In reviewing the contracts and insurance policies at issue, the Court concluded the parties intended claims against HCB and its subcontractors (and resultantly any subrogation claims) be waived if UT had already purchased, or later obtained property insurance, that otherwise covered any damage to UT's clubhouse resulting from fire and/or other perils. The Court held that since AZIC's policy covered damages resulting from the destruction of UT's property, UT waived all rights against Barker for damages caused by the fire, and, because AZIC's rights were limited by UT's rights, the trial court properly held that AZIC's subrogation claim was barred as a matter of law.

As to AZIC's claim for indemnity from Barker, the Court held the indemnification clause(s) in Barker's subcontract did not modify, or conflict with, the waiver clause in the primary contract between UT and HCB. As a result, AZIC's subrogation claims against Barker were barred as a matter of law by Barker's affirmative defense of waiver of subrogation. Concluding its analysis, the Court stated that the trial court did not err by granting Barker's traditional motion for summary judgment on AZIC's claims because

Barker's affirmative defense of waiver applied to all AZIC's theories of recovery, including its breach of contract claim asserting UT's rights, if any, to indemnity under the subcontract.

DISTRICT COURT FOR SOUTHERN DISTRICT OF TEXAS, MCALLEN DIVISION, REMANDS TWO CASES TO STATE COURT BECAUSE INSURER FAILED TO ESTABLISH IMPROPER JOINDER

Last week, Judge Micaela Alvarez of the District Court for the Southern District of Texas, McAllen Division, remanded two cases to State court on the basis that the insurer failed to meet its burden to show that non-diverse, independent adjusting companies was improperly joined by Plaintiffs in both actions in an attempt to defeat federal diversity jurisdiction. *Chavez v. Companion Commercial Ins. Co*., 2012 WL 5207522, No. M–12–276 (S.D. Tex. – McAllen, Oct. 22, 2012); *Goldstein v. Companion Commercial Ins. Co.*, 2012 WL 5250568, Civil Action No. M–12–288 S.D. Tex. – McAllen, Oct. 22, 2012). In two separate suits, Plaintiffs sued Companion Commercial Insurance Company ("Companion") and independent adjusting companies (4Cast Claims, LLC in *Chavez* and Wellington Claim Service Inc. in *Goldstein*) alleging delay and underpayment of insurance benefits related to a severe hailstorm on March 29, 2012. In August 2012, Companion removed both cases to federal court on the basis of diversity of citizenship asserting that both conditions of 28 U.S.C. § 1332(a)(1) were satisfied because the non-diverse defendants in each case (4Cast Claims, LLC and Wellington Claim Service Inc.) were improperly joined.

Plaintiffs subsequently filed motions to remand arguing Defendants failed to show that the non-diverse defendants were improperly joined. After reviewing Plaintiffs' original state court petitions (and despite noting the petitions were "hardly a model of draftsmanship" and that Plaintiffs were "carelessness…in drafting the state court petition and the motion to remand"), the Court determined that Plaintiffs sufficiently alleged that both independent adjusting companies violated provisions of Section 541 of the Texas Insurance Code and therefore were not improperly joined to the actions. Therefore, the Court found that Companion had not met its burden of demonstrating that all non-diverse defendants were improperly joined in either case. The Court held that it lacked jurisdiction in both cases because the parties were not completely diverse and remanded the cases to the State court for further proceedings.

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!