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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, 20th Floor Houston, Texas 77002 713.632.1700 FAX 713.222.0101
900 S Capital of Texas Hwy, Suite 425 Austin, Texas 78746 512.610.4400 FAX 512.610.4401
16000 N Dallas Parkway, Suite 800 Dallas, Texas 75248 214.420.5500 FAX 214.420.5501

November 5, 2012

INSURER SATISFIED HOSPITAL LIEN BY ISSUING CHECKS CO-PAYABLE TO INJURED PARTIES AND HOSPITAL

Recently, the Corpus Christi Court of Appeals held that an insurer that issued checks co-payable to the hospital and injured parties satisfied its statutory duty to protect the hospital lien even though the injured party cashed them without the hospital's endorsement. In *McAllen Hospitals, L.P. v. State Farm County Mutual Insurance Company of Texas,* 2012 WL 52929026 (Tex. App.-Corpus Christi, October 25, 2012), State Farm settled claims on behalf of its insured and recognizing that there was a hospital lien, State Farm included the hospital on the settlement checks. The injured parties, however, cashed the checks without the hospital's endorsement and failed to pay off the lien. The hospital then sued several defendants including State Farm alleging in part that State Farm violated the Texas Hospital and Emergency Medical Services Lien statutes. State Farm moved for summary judgment and the trial court found that State Farm fully discharged its duty to protect the liens. The hospital appealed.

On appeal, the court reviewed the hospital lien statute and noted that it was undisputed that the hospital had perfected its lien. The court observed that the key issue was "whether State Farm's action of naming MMC as co-payee on the…settlement drafts sufficiently complied with the pertinent statutes." After considering the arguments of both parties and related case law from sister courts, the court found that State Farm's inclusion of the hospital on the settlement checks delivered to the injured parties discharged State Farm's statutory duty, which then shifted to the injured parties. And it was their duty to get the hospital's endorsement and satisfy the lien amounts. Accordingly, summary judgment in favor of State Farm was upheld.

U.S. DISTRICT COURT FINDS POLLUTION EXCLUSION PRECLUDES EMPLOYEE INJURY CLAIMS BASED ON INHALATION OF TOXIC HARD-METAL SUBSTANCES

The U.S. District Court for the Southern District of Texas recently examined an insurer's duty to defend its insured, an employer, for an employee's injury claims alleging physical injury and death resulting from the inhalation or ingestion of toxic hard-metal substances. In *Century Surety Co. v. Oates Metal Deck & Building¸* CA No. H-11-3349 (S.D.Tex. October 3, 2012)(No. 4:11-CV-03349 Document 20), Century denied a request from its insured seeking a defense to the injury claims against it under two commercial general liability policies and then filed a declaratory judgment action against its insured. Century asserted two exclusions, the pollution exclusion and a silica exclusion as precluding coverage under the policy.

After reviewing the rules of insurance policy interpretation, the court noted that Texas courts have found pollution exclusions similar to the one at issue here, to be clear and unambiguous. The insured claimed, however that "pollutants" is defined so broadly as to preclude injuries or illnesses stemming from anything a person might come in contact with. But after reviewing Texas law addressing the definition, the court concluded that "pollution" was not defined so broadly so as to create an ambiguity. And observing that

while the complaint lacked specificity, it mentioned several times that the injured employee "inhaled or ingested" hard-metal substances that found their way into his respiratory system. Accordingly, the court held that Century met its burden that the pollution exclusion was applicable and coverage was precluded. Accordingly, summary judgment was granted in favor of Colony.

CO-DEFENDANT'S CONSENT TO REMOVAL MUST BE GIVEN AND FILED WITHIN 30 DAY PERIOD

Last Tuesday, the U.S. District Court for the Northern District of Texas examined a motion to remand based on a failure of two co-defendants to join or consent to the removal within thirty days of service. In *Grand Texas Homes v. American Safety Indemnity Company,* 2012 WL 5355958 (N.D.Tex. October 30, 2012), American Indemnity responded to the motion to remand and attached two e-mails showing that the other defendants had consented. The court observed that the consent was to be *filed* within thirty days of removal and the mere representation in the insurer's removal documents that the codefendants had consented, without filing the consent or acting on behalf of the codefendants with their permission, failed to satisfy the requirement that the consent be *filed* within thirty days. As a result, the consent was untimely and the case was remanded to state court.

STOWERS DEMANDS - MDJW FIRST FRIDAY – REPEAT BROADCAST - NOVEMBER 7, 2012

Registration is open for a repeat broadcast of our November First Friday webinar. The broadcast will be held on Wednesday, November 7, 2012 at noon Central Time. George Lankford, a partner in the Dallas office will present "Stowers Demands." This course is designed to acquaint adjusters with the legal concept known as the Stowers Doctrine. The course will provide methodology for evaluating Stowers demands and determining the appropriate response. The course includes real world examples and samples.

Mr. Lankford has represented clients in insurance coverage and bad faith disputes from the trial courts of Texas to the Supreme Court of Texas for 25 years. His experience has included a wide range of coverage disputes, including first party personal and commercial property, liability, business interruption, environmental, and copyright infringement. The matters have included coverage (duty to defend and/or duty to indemnify), agent errors and omissions, adjuster mistakes, loss control issues, proper cancellation and reinstatement of coverage under state codes, surplus lines regulations, Stowers, and coverage under multiple coverages.

One hour of free CE credit will be available to all insurance professionals for the program. Please have your TDI adjuster number available during the training.

Please register at https://student.gototraining.com/r/2913268554035442176. There is a limit of 200 participants.

If you are unable to register, please send an e-mail to ce@mdjwlaw.com so we can schedule future sessions of this webinar. Thank you for your interest in the webinar and this important topic.

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

We still have some seats available for the 2012 MDJW Central Texas Insurance Seminar which will be held in San Antonio this Friday, November 9th, at the Pearl Stable on the campus of the Culinary Institute of America, 307 Pearl Parkway in San

Antonio. This program is directed to topics of value to adjusters, claims managers, litigation managers, and in-house counsel. 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, 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, phone number, 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!

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