The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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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

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JUDGMENT THAT ALLOWED INSURED TO POCKET SANCTIONS AWARD WHEN INSURER PAID DEFENSE COSTS VACATED ON APPEAL

The Dallas Court of Appeals on Tuesday negated a trial court judgment in favor of an insured in a dispute over whether a sanctions award of "attorney's fees and costs in defending the action" belongs to the insured or to the insurer which paid for the insured's defense. *MGA Insurance Co. v. Charles R. Chesnutt, P.C.*, 2012 WL 50615, No. 05-10-00410-CV (Tex. App.—Dallas Jan. 10, 2012) concerned the proceeds of an attorneys' fees award in a separate professional malpractice suit in which MGA had provided a defense to Charles Chesnutt, an attorney and principal of Chesnutt, P.C. The court held that Chesnutt, P.C. had failed to establish its entitlement to judgment as a matter of law.

In the resolution of the separate lawsuit, Chesnutt obtained a "death penalty" sanction dismissing the case and awarding attorney's fees and costs in the amount of $114,770.50. MGA notified Mr. Chesnutt that it asserted a contractual right to the sanctions award because it paid his attorneys' fees and defense costs. A year later, Chesnutt withdrew the money from the registry of the court for himself. MGA sued Chesnutt and Chesnutt PC for "money had and received" (also known by the legal term "assumpsit") and for a declaration that MGA was entitled to the proceeds of the sanctions award.

The trial court granted summary judgment to Chesnutt. The Court of Appeals, however, reversed holding there was a question of fact as to whether the money belonged to Chesnutt, as expressly stated in the judgment in the separate suit, or whether the money "in equity and good conscience" belonged to MGA, which paid the attorney's fees and costs for which the money was intended as compensation. The court also held Chesnutt failed to identify any clause in the insurance policy that addressed the dispute over the sanctions award, and further ruled against Chesnutt on his various affirmative defenses contending MGA was suing over matters already addressed in the judgment in the separate litigation.

5th CIRCUIT HOLDS MOLESTATION IS INTENTIONAL & THUS NOT AN "OCCURRENCE" UNDER LIABILITY POLICY

An attorney attempting to collect from State Farm for a $4.75 million judgment against a State Farm insured in a civil child molestation case lost her appeal of the trial court's summary judgment in State Farm's favor. On Thursday, in *Wilkinson v. State Farm Lloyds*, 2012 WL 89957, No. 11-20402 (5th Cir., Jan. 12, 2012), the Fifth Circuit upheld the trial court's determination that molestation "could not be covered under the policy as it is an intentional act."

After a Texas family won a state court judgment against Wallie Reid Williamson for having molested a young girl, the family assigned their right to recover against him to their attorney. The attorney sued State Farm for its alleged failure to indemnify Williamson. Williamson's policy, however, provided defense

and indemnity only for losses caused by an "occurrence," which the policy defined as "an accident . . . which results in bodily injury." The court held the plain meaning of "accident" did not encompass Williamson's intentional actions, citing the Texas Supreme Court's definition of an accident as "a fortuitous, unexpected, and unintended event" that occurs "as the culmination of forces working without design, coordination, or plan."

FORT WORTH COURT OF APPEALS HOLDS DAMAGE TO RESIDENCE BY DRUNK DRIVER NOT COVERED BY UM/UIM POLICY

An uninsured/underinsured motorist policy does not cover damage to property other than an insured's automobile, the Texas Second Court of Appeals in Fort Worth confirmed last Thursday. In *Ibarra v. Progressive County Mut. Ins. Co.*, No. 02-010-00312-CV (Tex. App.—Fort Worth, Jan. 12, 2012), the court of appeals rejected the insured's argument that her policy covered her house after it was damaged by an underinsured driver, affirming the trial court's judgment.

The insurance claim at issue arose out of an accident where a drunk driver jumped a curb, struck the plaintiff's 1984 Cadillac, and crashed through the wall of the plaintiff's home. The Cadillac, worth $2,000, was totaled. The home required reconstruction costing approximately $50,000, as the accident detached the framing from the slab. The Plaintiff recovered policy limits from the driver in the amount of $25,000, and sought the balance from her own Progressive auto policy.

The Plaintiff conceded the house was not covered by the express terms of her UM/UIM policy. She argued, however, the policy was improperly narrow in scope, and therefore violated the Texas Insurance Code. The court disagreed and concluded that the purpose of the UM/UIM statute is to protect motorists, and the plaintiff's contention the policy should cover all types of property damage was inconsistent with the relevant statutes and with prior court decisions.

The court reversed the trial court's judgment in part because Progressive's motion for summary judgment did not reference damage to the Plaintiff's Cadillac. The trial court, therefore, should not have granted final judgment on all claims.

BANKRUPTCY COURT OFFERS GUIDANCE FOR HURRICANE IKE CLAIMS INVOLVING BANKRUPTCIES

In a case of first impression, a United States Bankruptcy Court recently decided a debtor had the right to exempt settlement proceeds from his Hurricane Ike claim under Texas Homestead Law even though the debtor did not ask for authority to file the suit, did not ask for permission to hire the Mostyn Law Firm to pursue the claim, did not list the lawsuit in the schedules, and did not seek consent to enter into the settlement agreement. *In re Hill*, 2011 WL 6936357 (Bkrtcy.S.D.Tex. Dec. 30, 2011), the Court found the debtor was an unsophisticated person who did not intentionally fail to disclose information to the court. The Court determined the contingency fee agreement for 40% by the Mostyn Law Firm was also approved, but used its discretion to reduce the fee by $1,000 for the firm's failure to timely file an application for approval of its employment. The Court noted this was a serious offense and noted: "Candidly, the Mostyn Firm is fortunate that this Court did not reduce its fees by more than $1,000.00, as this delay in obtaining Court approval to represent the Debtor is entirely unacceptable." The Court awarded the $1,000 to the Trustee to distribute among the unsecured creditors. The Court also ordered the lienholder on the homestead had the right to hold the proceeds, determine that the repairs had been made, and to apply any leftover amounts to arrearages on the mortgage.

DATE OF INJURY NEED NOT BE PLED IN UNDERLYING PETITION TO TRIGGER DUTY TO DEFEND ACCORDING TO HOUSTON COURT OF APPEALS

Two weeks ago, Houston's Fourteenth Court of Appeals determined that GEICO owed a duty to defend to Austin Power, Inc. for an underlying asbestos-exposure tort suit. *Geico General Ins. Co. v. Austin Power Inc*., 2012 WL 27697 (Tex.App.—Houston [14th Dist.], Jan. 5, 2012), Austin Power had successfully defended the underlying suit, winning a summary judgment. GEICO, however, had refused to defend it. In the coverage suit, the parties stipulated that Austin Power incurred $54,706.67 in attorney's fees and costs in defending the underlying case. The only issue for the court was whether the underlying petition triggered GEICO's duty to defend under a CGL policy issued from December 1, 1969 to December 1, 1970. The underlying petition was silent as to the date of any injury.

The court rejected GEICO's argument that the underlying petition's silence did not trigger the duty to defend. Instead, the court applied a strict version of the eight-corners rule, comparing only the pleadings to the policy. In doing so, the court found that it was *possible* the underlying claim arose during the policy period. The court thus rejected GEICO's arguments that construing the petition in such a way was "inferring" a claim in the petition that had not been made. The court determined that GEICO owed Austin Power a defense.

EVIDENCE OF SPECIFIC DATE OF CONSTRUCTION DEFECT INJURY NOT NECESSARY TO TRIGGER DUTY TO DEFEND AND INDEMNIFY UNDER CGL POLICY

In a construction-defect coverage dispute that was decided by a trial court before the Texas Supreme Court's decision rejecting the manifestation rule and adopting an "actual injury" approach in *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co*., 267 S.W.3d 20, 24–25 (2008), the Austin Court of Appeals recently reversed the trial court's ruling that the policy did not cover the claim – an analysis which had initially applied a manifestation rule. *Vines-Herrin Custom Homes, LLC v. Great American Lloyds Ins. Co*., 2011 WL 6396473, Tex.App.-Dallas, Dec. 21, 2011). The court determined the actual-injury analysis did not require specific evidence, expert or otherwise, of the date the damages to the house manifested. The court, reviewing the evidence before the trial court, determined there was sufficient evidence to find the damage occurred while the home was under construction. It reasoned the policy covered the period of construction, which means the policy was triggered by the lawsuit for both defense and indemnity.

LLOYD'S POLICY LIMITS INDEMNIFICATION AVAILABLE TO ADDITIONAL ASSUREDS

Houston's First Court of Appeals recently brought an end to a tortured coverage dispute that had been to Maine, the UK, and then Texas. The Court of Appeals was tasked with unraveling the various lawsuits, a Lloyd's policy, and contractual indemnification provisions to determine if the insurers had breached the insurance policy. In *Offshore Recruiting Services, Inc. v. New Hampshire Ins. Co*., 2011 WL 6938531 (Tex.App.—Houston [1st Dist.], Dec. 29, 2011), the underlying claim arose during an offshore construction project from an accident that occurred injuring two people and killing a third. Petrodrill, which managed the construction and commissioning of six offshore oil drilling units, entered into an agreement with Offshore for Offshore to provide Petrodrill with personnel for a Petrodrill-managed semi-submersible drilling vessel construction project. The Personnel Agreement required Offshore to maintain with Lombard Canada Limited an "Employers Liability Insurance" policy, and it required Offshore and

Petrodrill to "indemnify, defend, and hold the other harmless from and against any and all claims, losses, costs, damages and expenses ... in respect of injury to ... or death of any person employed by itself or its other contractors or subcontractors ... arising out of or in connection with" the Personnel Agreement.

The injured workers and the estate of the deceased worker sued Petrodrill, and it requested that Offshore, pursuant to the indemnity provision in the Personnel Agreement, defend it against the workers' claims. Offshore refused, and Petrodrill, after it later settled the workers' claims for $912,000, sued Offshore in a Maine court for indemnification for the settlement amounts and its legal expenses. Offshore challenged the jurisdiction of the Maine court, contending that Petrodrill's claim was subject to arbitration, and Petrodill submitted its indemnification claim to arbitration in England. Petrodrill won the arbitration; the arbitrator issued a detailed award order, concluding that Petrodrill was entitled to indemnification for the settlement amounts pursuant to the indemnity provision in the Personnel Agreement. After the entry of the arbitration award, Offshore sent the London Insurers a letter demanding that they defend and indemnify it against the claims made by Petrodrill in the arbitration on the basis that Offshore was an "additional insured" under the London Policy. Offshore filed the Texas suit against the London Insurers alleging they had breached the London Policy by bringing, through Petrodrill, the arbitration proceeding against it for indemnification of the settlement amounts.

The court upheld a summary judgment for the insurers. The court rejected Offshore's argument that the policy language was ambiguous and it followed general rules of construction to apply the policy's limitations on the insurer's obligations to indemnify "additional assureds." The court also noted that Offshore's anti-subrogation claim, which was the basis for its breach of contract, is typically an affirmative defense under Texas law.

TWO-YEAR STATUTE OF LIMITATIONS BARS EXTRA-CONTRACTUAL CLAIMS AGAINST INSURER

Recently, a federal court in the Southern District of Texas determined the two-year statute of limitations barred an insured from bringing extra-contractual claims against the insurer. In *Painter Family Investments, LTD., L.L.P. v. Underwriters at Lloyds, Syndicate 4242*, 2011 WL 6755839 (S.D.Tex., Dec. 23, 2011), the insured's property was damaged by Hurricane Dolly. The insured had two separate policies issued by two separate insurers. Both insurers addressed the claim but only one insurer was sued when the lawsuit arose. The second insurer was not added until two years after its claim-decision letter to the insured was issued. The court rejected the insured's argument that the relation-back doctrine should apply because the suits did not involve the same series of events, transactions or occurrences. The court also noted that the amended complaint naming the second insurer had been filed without leave of court and no leave had been requested as of the date of the opinion. The court, therefore, dismissed the extra-contractual claims as barred by the statute of limitations.

BUSINESS INTERRUPTION CLAIM HINGES ON POLICY LANGUAGE

Recently, a federal court in the Southern District of Texas determined a commercial property policy required that a hotel had to cease all operations, not just some, to recover for business interruption losses under a commercial property policy. In *H & H Hospitality LLC v. Discover Specialty Ins. Co*., 2011 WL 6372825 (S.D.Tex., Dec. 20, 2011), the hotel argued the business interruption claim should apply because Hurricane Ike damaged several of its rooms and those rooms were unable to generate income. The insurer argued the hotel did not have to close in its entirety. The court looked at the plain language of the policy. Finding the plain language to be unambiguous, it applied the policy as written. It determined the policy language required that the hotel had to close in its entirety, not just a few rooms, for the business

interruption coverage to be triggered. It, therefore, granted summary judgment to the insurer on the business interruption claim.

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