The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
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

December 12, 2011

HURRICANE IKE UPDATE: FIRST HURRICANE IKE JURY TRIAL STARTED LAST WEEK IN HARRIS COUNTY

A jury trial in the case of *Malcolm and Mary Battle v. Cypress Texas Lloyds*l began last week in Judge Steven Kirkland's courtroom in the 215th District Court in Harris County. This is the first Hurricane Ike case to start trial in Harris County. Plaintiffs are represented by Amber Mostyn of the Mostyn Law Firm and Randy Cashiola from Beaumont. Defendant Cypress Texas Lloyds is represented by attorney Thomas Fountain and Defendants Crawford & Company and Sean Haley are represented by attorneys John Ramirez and Jason Bath.

Plaintiffs generally allege that winds during Hurricane Ike created multiple openings in the roof of their home allowing rain intrusion and resulting water damage in the attic and interior of the house. Plaintiffs also allege damages to windows, fencing, and attic rafters. Plaintiffs assert causes of action for breach of the insurance contract, unfair insurance practices, violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, fraud by nondisclosure and conspiracy to commit fraud.

Jury selection occurred on Monday December 5, 2011 and opening arguments began on Tuesday, December 6, 2011. Plaintiffs have called three witnesses to the stand thus far including adjuster Sean Haley, a corporate representative of Crawford and Company, and Plaintiffs' engineering expert, Gregory Becker. Cross-examination of Becker is scheduled to begin today. Defendants are expected to begin presentation of their case by mid-week.

Editor's Note: Although our firm is not involved in this trial, we are monitoring the daily testimony and arguments from the courtroom. If any carrier wishes to receive either a daily summary of the trial developments or a daily transcript from the court reporter, please call or email Chris Martin of our office.

HURRICANE IKE UPDATE: MONTGOMERY COUNTY PRESIDING IKE JUDGE ORDERS MASS MEDIATIONS TO COMMENCE IN ALL HURRICANE IKE CASES PENDING IN MONTGOMERY COUNTY

Montgomery County District Court Judge Fred Edwards held a status conference last Friday December 9th for all counsel handing Hurricane Ike cases pending in Montgomery County. Judge Edwards announced that all remaining Ike cases in Montgomery County must be mediated starting in January. The court-appointed mediator has the discretion to schedule mediations based around individual firms and the mediator commented that he wants to group them to do 3 to 5 mediation per day per carrier with common counsel. In other words, if carrier A has 15 Ike cases with one plaintiff's firm, the mediator wants to mediate all 15 of those with the same plaintiff lawyer across three days. The chief mediator has appointed co-mediators so that multiple mediations can occur simultaneously in January. Judge Edwards ruled on

Friday that even cases which have been previously mediated still have to be mediated again in January. All cases not settling during January's mediations will allegedly be set for trial on a 90-day "rocket docket" commencing in April.

U.S. SENATE APPROVES AN EXTENSION OF THE NATIONAL FLOOD INSURANCE PROGRAM THROUGH NEXT MAY; HOUSE OF REPRESENTATIVES TO CONSIDER THE EXTENSION

On December 7th, the U.S. Senate approved an extension of the government flood insurance program through May 2012. The House of Representatives still must act to ensure a program extension before the December 16th expiration date and introduced an identical bill for consideration last Thursday. The National Flood Insurance Program, which is virtually the only source of residential coverage for flooding, has survived for years on a series of extensions, the most recent of which was due to expire on December 16th. The program is currently running a large deficit and Congress has struggled to reform its finances. Debates over reforming the program have led Congress to issue a number of temporary extensions of the program in recent years that have allowed for the multiple lapses. It currently has 5.57 million policies in force nationwide, insuring $1.25 trillion in property, and will not be able write new policies unless extended. If the program is allowed to lapse, it will not affect current policyholders, but may prevent prospective buyers from closing on new homes because banks and other mortgage lenders require owners to have flood insurance.

HOUSTON COURT OF APPEALS REVERSES JUDGMENT IN A SUBROGATION CASE AND ORDERS DAMAGES TO BE PRORATED AMONG EXCESS INSURERS

On December 8th, the Houston 14th Court of Appeals reversed judgment in a subrogation case which required USF&G to pay the limits of its primary and umbrella policies to its insured and two co-insurers. *United States Fidelity & Guaranty Co. v. Coastal Refining & Marketing, Inc., Coastal Offshore Insurance Limited, and Lexington Insurance Company*, 2011 WL 6098077 (Tex.App.—Houston [14th Dist.] Dec. 8, 2011). The appellate court held that a portion of the loss should have been prorated among the excess insurers and remanded the case to the trial court in Houston with instructions to reduce the damage award and to reevaluate the award of attorney's fees and costs in light of the reduced damages awarded.

The Court first analyzed whether the Texas Supreme Court's holding in *Mid–Continent Insurance Co. v. Liberty Mutual Insurance Co*., 236 S.W.3d 765 (Tex. 2007), barred Coastal Offshore Insurance Limited (COIL) and Lexington's claims for subrogation. Finding that the facts of *Mid–Continent* were significantly unlike those presented in the instant case, the Court concluded that *Mid–Continent* was inapplicable so COIL and Lexington's subrogation claims were not barred. Next, the Court found that the other-insurance clauses of the excess insurance policies at issue were mutually repugnant, therefore the insurers must contribute to the settlement on a pro rata basis in accordance with the precedent established in *Hardware Dealers Mutual Fire Insurance Co. v. Farmers Insurance Exchange*, 444 S.W.2d 583 (1969) (holding that when faced with conflicting other-insurance clauses, "the only reasonable result to be reached is a proration between the two insurance companies in proportion to the amount of insurance provided by their respective policies.").

Thus, finding that the trial court erred in failing to prorate a portion of the covered loss among COIL, Lexington, and USF&G, the appellate court reverse the judgment and remand the case with instructions to the trial court to (a) reduce the damage award from $6 million to $2.8 million; (b) reduce the interest award in accordance with the reduced damages; and (c) determine the extent to which the Coastal parties are entitled to attorney's fees in light of the reduced damage award.

FIFTH CIRCUIT AFFIRMS SUMMARY JUDGMENT ON BAD FAITH CLAIMS ASSERTED AGAINST WORKERS' COMPENSATION CARRIER

A week ago, in *Thompson v. Zurich American Insurance Company*, No. 10-51013 (5th Cir. Dec. 2, 2011), the Fifth Circuit affirmed a district court's grant of summary judgment in favor of Zurich American Insurance Company, Specialty Risk Services, and insurance adjuster Janet Watson on the claim of Dennis Thompson for wrongful denial and delay of workers' compensation benefits under Texas common law, the Texas Insurance Code, and the Texas Deceptive Trade Practices Act ("DTPA").

The appeal arose from the denial of workers' compensation benefits to Thompson after he suffered a torn meniscus while working as a welder. Thompson slipped on a grading stake while attempting to investigate a possible fire. Thompson was initially diagnosed with a sprained knee and ankle. After his resignation, Thompson continued to have pain in his right knee and his primary care physician recommended that Thompson obtain an MRI. The resulting MRI revealed a torn meniscus, so he was referred to an orthopedic surgeon. In response, the workers' compensation insurance carrier, Zurich, hired an independent third party service, SRS, to handle Thompson's claim. SRS then selected an orthopedic specialist, Dr. Alan Strizak, to perform a records review and peer review. Dr. Strizak concluded that the meniscus tear was not work related, but was more likely an injury that predated Thompson's work accident. Subsequently, Zurich disputed both Thompson's disability and that the injuries identified in the MRI were related to his compensable injury.

Thompson filed an administrative claim with the Texas Department of Insurance, Workers' Compensation Division ("WCD") regarding resolution of the questions of disability and compensability. As part of those proceedings, Thompson was examined by Dr. Derry Crosby, who was neutrally appointed by the WCD. On June 30, 2008, Dr. Crosby provided his written evaluation, generally disputing Dr. Strizak's conclusion that the meniscus tear was preexisting and suggesting that Thompson should not return to full work duties. Dr. Crosby did note, however, that there was evidence of a pre-existing degenerative condition in Thompson's knee. Following Dr. Crosby's report, Zurich continued to dispute liability for the tear. In the Contested Case Hearing that followed, the WCD ruled that Thompson's compensable injury did extend to the meniscus tear and that he was disabled as a result. Zurich promptly instituted Thompson's benefits, and Thompson began orthopedic treatment. Zurich declined to pursue further administrative appeal. On February 20, 2009, Thompson had surgery on his right knee.

Several months later, Thompson filed suit against Zurich, SRS, and Watson in which he alleged common law claims for breach of the duty of good faith and fair dealing for failure to conduct a reasonable investigation and that Zurich had no reasonable basis for denying or delaying benefits. During the course of this case, both Dr. Waldrop and Dr. Drury gave deposition testimony to the effect that Dr. Strizak's opinion was unreasonable. The defendants moved for summary judgment on the bad faith claims and the trial court granted summary judgment in favor of the defendants against Thompson.

Thompson then appealed and alleged that Dr. Strizak's opinion was biased and reliance upon it in the face the contrary expert opinions of three other doctors was not reasonable. Thompson argued that reliance on

Dr. Strizak's opinion was unreasonable because it was not supported by Thompson's medical records. Thompson also argued that Dr. Strizak was biased because Zurich pays him well, he works extensively for insurance companies, and SRS's adjuster could not name any other doctors that SRS used.

The 5th Circuit found the opinions of the other doctors may support the inference that Dr. Strizak was incorrect in his conclusion, but that does not establish bad faith. The court stated that, although Dr. Strizak did not physically treat Thompson – he relied exclusively on medical reports - Thompson did not raise a fact issue that Dr. Strizak acted contrary to what a doctor is required to, or should, do in the process of completing a peer review investigation. The court found nothing in the record that showed Dr. Strizak gave opinions predominantly in favor of insurers or that Zurich had knowledge of such a predisposition.

Because aggravation of pre-existing injuries is compensable, Thompson also argued that Zurich must completely rule out aggravation by showing that a pre-existing condition is the "sole cause" of the present incapacity for an insurer to reasonably deny coverage on that basis. The court noted that Dr. Strizak's report found the injury "not causally related to, aggravated by, or accelerated by" the incident, which is the rationale relied on in denying the claim initially. Without any evidence that Zurich had knowledge to the contrary at the time of the initial denial, the court found Thompson could not establish bad faith as a matter of law.

FEDERAL DISTRICT COURT HOLDS LIABILITY INSURER HAS RIGHT TO SELECT DEFENSE COUNSEL FOR ITS INSURED

Recently, in *Coats, Rose, Yale, Ryman & Lee, P.C. v. Navigators Specialty Ins. Co*., C.A. No. 3:11–CV–0642–D, 2011 WL 5870066 (N.D. Tex. Nov. 21, 2011) (Fitzwater, J.), U.S. District Court Judge Sid Fitzwater was presented the question of whether there was a conflict of interest between an insurance company and its insured that superseded the insurance company's contractual right to select counsel to defend the insured in a state-court legal malpractice suit. Coats, Rose, Yale, Ryman & Lee, a law firm insured under a professional liability insurance policy issued by defendant Navigators Specialty Insurance Company, sued Navigators seeking a declaratory judgment that Navigators was required to pay for attorney's fees and expenses incurred in the defense of a state-court legal malpractice action.

The law firm tendered the suit to Navigators, who agreed to provide a defense under a reservation of rights. The relevant policy provided that Navigators had the right to defend the firm, which included the right to select defense counsel. The law firm asserted that any attorney whom Navigators selected would have a conflict of interest, and the firm hired counsel of its choice to defend it in the underlying lawsuit. Navigators maintained that there was no conflict of interest, and it refused the firm's requests to pay attorney's fees incurred by its independently-retained attorney.

The parties filed cross-motions for summary judgment. The firm argued: (1) although Navigators has yet to reserve its rights for claims arising from any dishonest, intentionally wrongful, fraudulent, criminal, or malicious actions, Navigators' ability to do so in the future creates a conflict of interest; (2) a conflict of interest existed because the policy covers compensatory damages but not the return of fees, and an attorney chosen by Navigators would be able to steer any damage award toward the return of fees so that the award is not covered by the policy; and (3) the declaratory judgment claim in the underlying lawsuit created a conflict of interest because the policy does not cover, and Navigators reserved its rights with regard to, "costs arising from declaratory relief."

Navigators responded to these arguments as follows: (1) Navigators represented that it has not and will not ever reserve its right to deny coverage for any claim in the underlying lawsuit based on the policy's dishonesty exclusion; (2) any concession of facts that would tend to establish liability for either a claim for compensatory damages or a return of fees would increase the likelihood of compensatory damages that Navigators would be obligated as insurer to pay on Coats's behalf; and (3) there is no incentive for an attorney whom it selects to do anything but vigorously defend the declaratory judgment claim because any declaratory relief granted would lead to liability under the malpractice or breach of fiduciary duty claim, both of which are at least partially covered under the policy.

The court agreed with Navigators and concluded there was no conflict of interest that superseded Navigators' right to select defense counsel for the law firm.

USAA WINS SUMMARY JUDGMENT IN HURRICANE IKE CASE BASED ON POLICY NOT BEING IN FORCE

On Monday, November 28th, Judge Mike Miller in Houston granted summary judgment in favor of USAA as to all claims brought by plaintiff as a result of damage she alleged was caused by Hurricane Ike and for which she claimed USAA failed to timely pay.

On August 20, 2008 USAA sent a notice of cancellation to the plaintiff advising the insured's policy would cancel at 12:01 am on September 12, 2008 should the premium not be paid in full. The notice of cancellation provided the payment must be received or postmarked prior to 12:01 am on September 12, 2008. On September 5, 2008, plaintiff made a partial payment of the past due amount and during the day on September 12, 2008 (after the previously-established deadline had passed), plaintiff authorized an electronic payment for the remaining balance. Hurricane Ike made landfall the next day and plaintiff filed a claim for property damage due to Ike. USAA investigated the claim and issued payment for plaintiff's food spoilage on the spot. After this initial inspection, however, USAA discovered plaintiff's policy had automatically cancelled for failure to pay the premiums due. USAA then denied plaintiff's claim and, several months later, the insured sued.

Plaintiff responded to USAA's summary judgment arguing that she had substantially complied with the provisions of the policy and had allegedly made a payment on the due date. Plaintiff further argued that had the payment been mailed and postmarked prior to September 12, 2008, it would likely have been received at some date later than September 12, 2008 when the electronic payment was received. Judge Miller agreed with the defense that the notice of cancellation was clear and plaintiff's failure to pay the premiums in full *prior to* September 12, 2008 effectively cancelled the policy. As there was no policy in force at the time of the loss and as such, there was no basis for Plaintiff's claims of breach of contract, misrepresentations as to coverage or violations of the Texas Insurance Code and Judge Miller granted summary judgment dismissing plaintiff's suit in its entirety.

Editor's note: MDJW had the privilege of representing USAA in this case before the trial court. It is unclear at this time if the insured's will appeal.