The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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WACO COURT OF APPEALS ORDERS APPRAISAL IN IKE CASE BUT REFUSES TO OVERTURN ORAL DISCOVERY RULING

Last Wednesday the Waco Court of Appeals, applying the Texas Supreme Court's May 2011 opinion *In re Universal Underwriters*, issued an opinion directing a trial court to order appraisal in a Hurricane Ike case, but rejected the insurer's arguments relating to the plaintiff's broad discovery requests. *In re Certain Underwriters at Lloyds*, No. 10-11-00263-CV, 2011 WL 4837869 (Tex. App.—Waco Oct. 12, 2011), followed the trial court's repeated denial of the insurer's motion to compel appraisal, including one denial prior to the Supreme Court's decision in *Universal Underwriters* and a second denial afterward. In addition to challenging the appraisal rulings, the insurer contended that the trial court had improperly ordered compliance with discovery from the plaintiff that the insurer argued was grossly overbroad. The court sided with the insurer on the first issue, and against the insurer on the second.

In analyzing the appraisal issue, the court of appeals first had to determine when the parties reached a point of impasse. The Waco court cited the *Universal Underwriters* definition of impasse "as the point when *both* parties are 'aware that further negotiations would be futile, or would be of no effect if performed.'" The insureds argued that impasse occurred in December 2008 after the insurer sent a letter stating that the claim was closed; consequently, the insureds contended, the insurer had waived its right to appraisal by its allegedly unreasonable delay in requesting it. The court first held that impasse had not clearly occurred until the insureds filed suit without providing the notice required by the Texas Insurance Code and, because the insurer invoked its right to appraisal two weeks later, there was no waiver by delay. Next, the court held waiver could not be found at all because the policy by its own terms did not permit a waiver of the appraisal clause.

Regarding the discovery dispute, the court concluded the issue was not subject to appellate review at this time. The insurer had provided the entire claim file to the insureds and argued the additional discovery sought by the insureds was grossly overbroad. The court held the trial court had neither overruled the insurer's objections to discovery nor ordered production of the disputed material. Instead, the trial court had made a vague oral statement that the court of appeals declined to characterize as an appealable order; at most, the trial judge appeared to have ordered the court to provide specific objections to each discovery request rather than relying on "generic, global objections." The court of appeals had no clear and specific ruling to review, and so it rejected the insured's challenge.

Finally, in a footnote, the court of appeals considered whether the case should be abated during the appraisal process. The court noted that the insurer had not requested abatement, but stated that under *Universal Underwriters*, the insurer was not entitled to abatement even if one had been requested.

FIFTH CIRCUIT REVERSES SOUTHERN DISTRICT RULING HOLDING JURY VERDICT NOT CONCLUSIVE AS TO LIABILITY COVERAGE QUESTION

The Fifth Circuit Court of Appeals last Tuesday reversed a pro-carrier ruling from the Southern District of Texas holding the trial court had incorrectly concluded, based on a state court jury's findings, that the insured's conduct did not require the insurer to indemnify. In *Mid-Continent Casualty Co. v. Brock*, No. 10-20726, 2011 WL 4807715 (5th Cir. Oct. 11, 2011), the insurer sought the district court's declaration of no coverage based on the verdict in a Texas suit between Ms. Brock and the insured. That suit involved a number of claims arising out of the insured's restoration work at Ms. Brock's home following a fire. The insurer argued that the state court jury's answers to a number of questions established that the insured's conduct was not an "occurrence" covered by the policy.

The Fifth Circuit first observed that the jury's answers, though they established the insured's liability, did not establish that Ms. Brock's damages were a foreseeable result of the insured's actions. In addition, although the jury found that the insured intentionally engaged in the conduct giving rise to liability, the jury did not find that the insured intended Ms. Brock's damages that resulted from the conduct. Thus, the jury verdict was not conclusive as to whether Ms. Brock's damages "were expected or intended," and the Fifth Circuit remanded the case to the District Court for further proceedings.

HOUSTON APPEALS COURT CONCLUDES CITY OF BELLAIRE NOT ENTITLED TO GOVERNMENTAL IMMUNITY IN WORKERS' COMP CASE

The Texas Fourteenth Court of Appeals in Houston held Thursday that a municipality's governmental immunity did not extend to a worker's compensation case brought by an employee of a staffing services company who was injured while performing work for the city as a garbage collector. In *Johnson v. City of Bellaire*, No. 14-10-00757-CV, 2011 WL 4841037 (Tex. App.—Houston [14th Dist.] Oct. 13, 2011), Mr. Johnson, an employee of Magnum Staffing Services, sued the city after he lost his arm as the result of an accident involving the garbage truck on which he was riding. Mr. Johnson was paid by Magnum, but picked up his check from the city; the evidence did not establish whether Mr. Johnson was included in the city's worker's compensation coverage. The city argued that Johnson could not maintain his suit because the legislature had not waived governmental immunity. Johnson responded that the city's worker's compensation policy did not cover him because he was not a paid city employee, but the employee of a staffing company, and therefore the city could not invoke its immunity.

The court analyzed the appeal under the framework set out by the court's 35-year-old *Lyons* opinion. In that case, a Texas A&M employee sued the university for personal injuries suffered while on the job; the court held that the legislature "retained [governmental] immunity and provided an alternative remedy through workmen's compensation." Johnson, however, was not clearly covered by the applicable worker's compensation agreement. Thus, he may have had no alternative remedy, and under the trial court's ruling, would have had no remedy at all for the loss of his arm. The Fourteenth Court concluded that a fact issue existed as to the city's immunity, reversed the trial court's ruling, and remanded for further proceedings.

MDJW TEXAS INSURANCE SEMINAR: *NOVEMBER 15, 2011*

The lawyers of MDJW will host a free continuing education seminar in Dallas on November 15, 2011 covering the latest developments in Texas insurance law, litigation management, and trial strategy. Lawyers from the firm's tort trial group and its insurance trial team will provide updates on a host of cutting edge topics for those in the insurance industry who handle claims or manage litigation. This free

one-day program will cover the latest claims handling issues, coverage issues, and litigation strategies arising out of auto and HO claims, construction defect claims, responsible third party claims, and primary/excess issues. We will also be examining the implication of the 2011 Texas "Tort Reform" Legislation, the future of Texas bad faith litigation, continuing *Stowers* exposures, and much more. A special lunch presentation from one of the nation's best jury science researchers will examine recent discoveries from Texas jury research projects. Chris Martin, Mark Dyer, Barrie Beer, Andrew Schulz and many of the other lawyers of MDJW will be speaking at this program. CE credit from the Texas Department of Insurance (including consumer protection hours) and CLE credit from the State Bar of Texas will be available for each attendee. The program will be held from 9:00 a.m. to 3:30 p.m. on November 15, 2011 in the large auditorium at the Studio Movie Grill, 4721 W. Park Boulevard Plano, TX 75093. The venue is located in north Dallas just off the Dallas North Tollroad, one mile north of the George Bush Turnpike. The venue is easy to reach from Love Field and any location in the DFW metroplex. Although attendance is free, we do need each attendee to register in advance so we can get an accurate count for lunch. Registration can be completed by emailing **teresai@mdjwlaw.com** or calling Teresa Ivory-Jones at **214-420-5534**. We hope to see many of our friends and clients in the insurance industry on November 15th in Dallas for the **2011 MDJW Texas Insurance Seminar.**