The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT TO RECONSIDER LANDMARK *RUTTIGER* DECISION ON WORKER'S COMPENSATION / BAD FAITH CLAIMS

On Friday, the Texas Supreme Court agreed to review its own decision from last August in the landmark *Ruttiger* decision in which the Court decided that worker's compensation insurers are not subject to statutory "bad faith" claims for unfair claims settlement practices under the Texas Insurance Code. The Court granted motions for rehearing filed by *both* sides of the suit, and will revisit a number of legal issues vital to worker's compensation litigation in this state.

In *Texas Mut. Ins. Co. v. Ruttiger*, No. 08-751, — S.W.3d — (Tex. August 26, 2011), the Court held worker's comp litigants could not bring claims for unfair settlement practices under the Insurance Code, but that suits could be brought against worker's comp insurers "for misrepresenting provisions of their policies" (although there was no evidence of misrepresentation in this particular case). However, a divided Court did *not* reach an even more far-reaching question regarding whether common law bad faith claims were still viable in the worker's compensation context following the legislature's wholesale revision of the Texas worker's compensation scheme in 1989.

Both Texas Mutual and Ruttiger moved for rehearing. Texas Mutual urged the Court to reach the question of whether the 1988 *Aranda* case, which added the common law duty of good faith and fair dealing to the Texas worker's compensation regime, was still good law. Alternatively, Texas Mutual urged the Court to devise a method to curb lawsuit abuse and "minimize the perverse incentives" of the common law cause of action—matters that, according to Texas Mutual, the lower courts had already addressed sufficiently for the Supreme Court's review. Ruttiger, on the other hand, argued that Texas Mutual had waived the issues that the Supreme Court decided in its August opinion, that the Court's ruling on the Insurance Code was incorrect and "may confuse" worker's compensation lawyers, and that the Court incorrectly determined that there was no evidence of a misrepresentation of the policy.

The Court granted both sides' motions. We will continue to monitor this important case, since a shift in either direction from the Texas Supreme Court's previous opinion will have significant repercussions for worker's compensation practice in this state.

DEER STAND ACCIDENT RESULTS IN COVERAGE UNDER UIM POLICY; COURT FINDS CLAIM AGAINST HOMEOWNERS CARRIER "NOT RIPE"

The Dallas Court of Appeals last Thursday addressed an injured person's claims in a negligence case against his neighbor, against his own auto carrier for coverage under the uninsured/underinsured motorist provision, and for a declaration of coverage under his neighbor's homeowners policy. The court held that the auto policy covered the Plaintiff's claims, but that the suit against the homeowners carrier was

premature. In *Farmers Ins. Exch. v. Rodriguez*, No. 14-10-00995-CV, — WL — (Tex. App.—Houston [14th Dist.] Feb. 16, 2012), the Plaintiff brought suit based on an accident that occurred when he was helping his neighbor unload a deer stand from the neighbor's trailer on the neighbor's property. The undisputed facts established that the Plaintiff and his neighbor were trying to manually lift the deer stand off of the neighbor's trailer, and when the neighbor realized the 350-pound stand was too heavy, he jumped out of the way leaving the Plaintiff to hold the stand on his own. The stand fell, seriously injuring the Plaintiff.

At the summary judgment stage, Farmers, the homeowners insurer, argued that the trial court lacked jurisdiction over the Plaintiff's claims against Farmers because the claims were not yet ripe. The trial court denied Farmers' motion, but the Court of Appeals reversed, finding that because coverage was uncertain without a judgment against the Plaintiff's neighbor. The mere fact that the circumstances of the Plaintiff's injuries were undisputed, the Court of Appeals said, did not change the fact that the jury was required to decide and apportion liability before coverage under the homeowners policy could be determined.

The Court of Appeals affirmed, however, the judgment against Allstate, the Plaintiff's auto carrier. The Court held that loading and unloading a trailer was "use" of the trailer even if loading and unloading was not specifically mentioned in the policy. Applying a three-factor test to determine use, the Court concluded that (1) it was in the *inherent nature* of a trailer to haul materials, and that these functions include loading and unloading; (2) the accident was in the *natural territorial limits* of the trailer, because even though Plaintiff was not in the trailer, loading and unloading includes "moving … goods to their final physical destination"; and (3) the trailer was a *cause* of the accident in that the accident could not have occurred if the Plaintiff were not helping his neighbor unload the deer stand from the trailer.

SOUTHERN DISTRICT OF TEXAS JUDGE ABATES ENTIRETY OF HURRICANE IKE CASE PENDING APPRAISAL

On February 8, U.S. District Judge Melinda Harmon of the Southern District of Texas granted Hartford's motion to abate a Hurricane Ike business property damage case pending appraisal, and rejected the Plaintiffs' call to abate only the valuation portion of the case and allow the coverage portion to proceed. In *United Neurology, P.A. v. Hartford Lloyd's Insurance Co.*, Case No. 4:10-cv-04248 (S.D. Tex.), Judge Harmon entered an order compelling appraisal, and abating the entire case. The Plaintiffs did not oppose the appraisal, but argued that discovery should be allowed to go forward during the appraisal process. In the alternative, they suggested that the court should at least proceed with the coverage portion of the case.

In the opinion accompanying her order, Judge Harmon acknowledged the precedent offered by the Plaintiffs, but determined that the greater weight of judicial authority gave her the discretion to decide whether the case should be abated or not. Noting that "if Hartford satisfies the appraisal award, Plaintiff[s'] breach of contract and bad faith claim will be subject to dismissal," Judge Harmon decided that a full abatement was appropriate. Judge Harmon also was not persuaded by the Plaintiffs' argument that the appraisal clause was merely a covenant, the breach of which could be addressed by an award of damages, as opposed to a mandatory condition precedent to liability.

"FIRST FRIDAY'S" WEB-SEMINAR TO BEGIN FRIDAY, MARCH 2nd

In two weeks, the Insurance Practice Group at MDJW will begin a new monthly continuing education program for those in the insurance industry to provide a one hour web-based program of interest to those who handle property or liability claims or manage insurance litigation in Texas. Lawyers from MDJW

will host each month's one hour program on the first Friday of each month and each program will provide one hour of CE credit from the Texas Department of Insurance. (Most programs will qualify for consumer protection credit.) Each presentation will be limited to one hour and can be viewed and listened to from any desktop or laptop with audio-video capabilities. The program will be from noon to 1 p.m. Central each "First Friday" of the month.

The March 2nd program will feature one of our firm's founding partners, Chris Martin, who will be discussing "The Future of Bad Faith Litigation in Texas." The program will look at the recent changes to the bad faith standard in Texas by our state's high court, litigation trends in such cases, claims handling implications, and practical considerations for those in the industry. The program will be free each month. Registration and additional information will be provided next week in our Newsbrief.

DRI's INSURANCE COVERAGE & CLAIMS INSTITUTE SCHEDULED FOR CHICAGO ON MARCH 28-30TH

One of the nation's best insurance CLE programs is scheduled for late March in Chicago and this year's program features cutting edge coverage and insurance litigation topics presented by a nationally renowned faculty. The Defense Research Institute's Insurance Coverage and Claims Institute (affectionately called "ICCI"), will be held on March 28-30, 2012 at The Westin Michigan Avenue in Chicago. MDJW Partner Chris Martin will be speaking at this year's program on trial issues in insurance cases.

ICCI will once again offer the opportunity to hear from a distinguished faculty of lawyers, insurance industry leaders and policyholder counsel regarding recent court rulings and national claims trends, as well as practical advice for both the practitioners and claims professionals. This program will provide the perspectives of senior management in the insurance industry.

Wednesday afternoon features a program focused on bad faith, including tips on composing a bad faith trial theme, defenses to bad faith and damages in bad faith actions. The Thursday session is filled with a wide range of cutting-edge topics, including Drilling Down the Duty to Defend: Beyond the Four Corners, The Perspectives of Senior Management and Claims Professionals, Ethics: Visiting the Sins of Defense Counsel on the Insurance Carriers, and Trial Advocacy in a CSI World. The Friday program includes two outstanding breakout tracks, focusing on construction defect issue and first-party personal lines property claims.

For more information on this national insurance program, visit: http://www.dri.org/Event/20120155