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TEXAS INSURANCE LAW NEWSBRIEF

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POLICYHOLDER DOES NOT HAVE THE RIGHT TO ASSUME A POLICY RENEWAL IS BASED ON THE SAME TERMS AS THE ORIGINAL POLICY

The Fifth Circuit recently affirmed a federal District Court's grant of an insurer's summary judgment regarding an insurer's duty to defend under a commercial general liability policy. In Materials Evaluation and Technology v. Mid-Continent Casualty Company, No 12-40186, (5th Cir., March 18, 2013) the insured annually renewed its coverage through at least 2004. The 2002 policy, which was effective from July 2002 to July 2003 provided for an Employer's Liability Exclusion. Through the Exclusion, the 2002 policy provided coverage for employee injuries arising from third-party contractual relationships.

The following year, the insured renewed its policy for the period of July 2003 to July 2004. The coverage for the 2003 policy also contained the same Exclusion as the 2002 policy. However, the 2003 policy differed from the 2002 policy because the renewed 2003 policy also contained an endorsement excluding liability arising out of third-party relationships.

In 2003, the insured executed an agreement to provide various testing services at a DuPont facility in Beaumont, Texas. The agreement included an indemnity clause which required the insured and DuPont to indemnify each other. In 2004, two of the insured's employees sustained bodily injuries while working at the DuPont facility. DuPont settled with the insured's injured employees and sought indemnity from the insured. The insured refused and was subsequently sued for breach of contract. Afterward, the insured tendered defense to Mid-Continent Casualty Company. Mid-Continent determined that the Endorsement in the 2003 policy precluded coverage and the District Court agreed.

The Fifth Circuit rejected the insured's argument that the 2003 policy was on the same terms as the 2002 policy because Texas law generally provides that a policy renewal is on the same terms as the original. The Court carefully distinguished the case law the insured relied upon and then stressed that the cases were limited to their particular circumstances and did not "stand for the blanket proposition that a policyholder has a right to assume that a renewal policy is on the same terms as the original."

Because the 2003 Policy language with the endorsement specifically excluded liability arising from third party contracts, the Court determined the 2003 Policy specifically negated Mid-Continent's duty to defend the insured.

COURT DISMISSES PLAINTIFF'S CAUSES OF ACTION AFTER AFFORDING PLAINTIFF MULTIPLE OPPORTUNITIES TO AMEND ITS PLEADINGS

In *Springcrest Partners LLC v. Admiral Insurance Company, et al.* No. 4:12-CV-457-A, 2013 WL 1197780, (N.D. Tex. March 25, 2013), a federal District Court judge in the Northern District of Texas recently granted a 12(b)(6) Motion to Dismiss after permitting the commercial property insured multiple opportunities to amend its pleadings. The plaintiff sought damages for an apartment complex that allegedly sustained damages during a February 12, 2010 snowstorm. The parties agreed to appraisal after which the plaintiff maintained the appraisal award was inconsistent, ambiguous, and exceeded the scope of its authority. The parties acknowledged the appraisal did not address all of the damages, but the insurer offered to settle the outstanding claims it believed still existed in exchange for a release of claims. The insurer, through the claims adjusting company ("Engle Martin"), later informed the insured it had overpaid its claims by approximately $29,800, but would forego seeking reimbursement in exchange for a release of all claims. Based on these facts, the plaintiff alleged multiple violations of the Texas Insurance Code.

Early on, Engle Martin moved to dismiss the plaintiff's claims against it. However, instead of dismissing the plaintiff's claims, the Court ordered the plaintiff to file an amended complaint, twice. After a number of delays, the plaintiff finally filed its Second Amended Complaint. Engle Martin, joined by the insurer, filed another Motion to Dismiss, and the Court agreed the plaintiff failed to plead sufficient facts against the adjusting company and also failed to support its claims against the insurer under the Texas Insurance Code.

The Court carefully analyzed Plaintiff's Second Amended Complaint and determined it failed to give the defendants fair notice of the plaintiff's claims pursuant Federal Rules of Civil Procedure 8 and 9. The Court noted that Plaintiff's Second Amended Complaint was comprised of nothing more than lengthy recitations of various provisions of the Texas Insurance Code and conclusory statements that defendants acted unlawfully in violation of the Texas Insurance Code. The Court dismissed Engle Martin from the lawsuit and all of the claims asserted against the insurer, except for the breach of contract claim.

COURT DISMISSES CLAIMS AGAINST INSURERS ON GROUNDS THAT THEY PREVIOUSLY EXHAUSTED THE COVERAGE LIMITS OF THEIR RESPECTIVE POLICIES

In *S.R. Residence, LLC v. Lexington Insurance Company, et al.*, Civil Action No.-10-4178, 2013 WL 1204709, (S.D. Tex., March 25, 2013), a federal District Court judge in the Southern District of Texas granted multiple motions for summary judgment filed by multiple insurers. The lawsuit involved an insurance dispute arising out of damage allegedly caused by Hurricane Ike to four Houston area apartment complexes. The plaintiff, along with a sizable number of other commercial property owners, purchased a "tower of insurance coverage." For unknown reasons, several tiers of coverage in the "tower of insurance" were not in place when Hurricane Ike made landfall and only the primary coverage and first tier of excess insurance were available for the numerous commercial property insureds and their respective claims in the aftermath of Hurricane Ike.

Lexington provided the primary coverage, which had a $25 million limit of liability on any one occurrence. Alterra issued the first tier of excess coverage, which triggered upon the exhaustion of the policy issued by Lexington. The Alterra policy had a $10 million limit of liability.

The plaintiff filed a claim and Lexington paid approximately $1.2 million for its losses. The plaintiff later sued Lexington for breach of contract, several violations under the Texas Insurance Code, and common law duty of good faith and fair dealing. Lexington informed the plaintiff that the $25 million in coverage had been exhausted by the other insureds and the plaintiff then joined Alterra as the excess insurer. By that time, Alterra's excess coverage was exhausted too.

Both Lexington and Alterra moved for summary judgment and the Court determined that Lexington and Alterra paid their full policy limits and were entitled to summary judgment for plaintiff's breach of contract claims. Next, the Court noted that an insured party generally does not have a bad faith claim when the insurer has not breach the contract. The plaintiff alleged the insurers participated in unfair settlement practices and failure to promptly pay claims, in violation of Chapter 541 and 542 of the Texas Insurance Code, and common law bad faith. The Court evaluated the summary judgment evidence and concluded that neither insurer acted in bad faith. The Court found that Alterra repeatedly requested pertinent documentation regarding the plaintiff's claim, and because the plaintiff failed to respond to Alterra's request, its obligation to accept or reject the plaintiff's claim was never triggered. The Court also noted the plaintiff produced no facts establishing that Lexington did not promptly initiate the adjustment of Plaintiff's claims. As such, the Court dismissed all of the claims against the insurers.