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FEDERAL JUDGE IN HOUSTON DISMISSES EC CLAIMS IN HURRICANE CASE BASED ON INADEQUATE PLEADINGS BY MOSTYN FIRM

Recently, in *Luna v. Nationwide Property and Casualty Insurance Company*, 2011 WL 2565354, a federal District Court judge in the Southern District of Texas, Judge Melinda Harmon, granted Nationwide's renewed motion for partial dismissal of Plaintiff's extra-contractual claims for violations of the Texas Insurance Code, common law fraud, and breach of the duty of good faith and fair dealing due to inadequate pleadings. In this case, Plaintiff filed suit against Nationwide arising out of alleged underpayment of his insurance claims for damages to his home caused by Hurricane Ike. Judge Harmon agreed with Nationwide noting: "Plaintiff merely tracks the statutory language and insists he states claims against Nationwide and provides no particular factual support to illustrate how his claims meet those elements." And in response to Plaintiff's argument that "this is exactly the type of information that was intended to be developed through discovery," Judge Harmon explained: "Rule 8 does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Ultimately, the Court found the Plaintiffs' complaint was "composed of vague, general conclusions without the kind of factual support that would state a plausible complaint under Rules 8 and 12(b)(6), no less a fraud claim under Rule 9(b)." The Court then granted Nationwide's motion to dismiss Plaintiff's extra-contractual claims under the Texas Insurance Code, common law fraud claim, and—*on its own initiative*—Plaintiff's claim for breach of the duty of good faith and fair dealing.

NEW APPRAISAL ORDERS IN HURRICANE CASE FROM HOUSTON FEDERAL JUDGE

Recently, in *EDM Office Services, Inc. v. Hartford Lloyds Insurance Company,* 2011 WL 2619069, a federal District Court judge in the Southern District of Texas, Judge Lee Rosenthal, granted Hartford's motion to compel appraisal in an Ike insurance case. This suit sought contractual and bad faith damages arising out of alleged nonpayment of an insurance claim for damages supposedly caused to Plaintiff's business by Hurricane Ike. The suit is being prosecuted by the Mostyn firm. After an unsuccessful mediation, Hartford invoked the appraisal provision in the insurance policy. Plaintiff argued Hartford could not demand appraisal because it failed to comply with the "Claims Handling" provisions of the policy and provisions of the Texas Insurance Code, which Plaintiff asserted were conditions precedent to appraisal. Disagreeing, the Court noted that compliance with such provisions were <u>not</u> conditions precedent to appraisal. In addition, Plaintiff argued Hartford's delay in paying the clam waived appraisal because such delay prejudiced Plaintiff. Again, the Court disagreed noting Plaintiff was not prejudiced by any such delay. As such, the Court granted Hartford's motion to compel appraisal. The Court further determined that the portion of the case involving coverage issues should continue forward pending appraisal, while it stayed the portion of the case involving all damage valuations.

FEDERAL JUDGE FINDS "LEGALLY INTOXICATED" EXCLUSION IS NOT AMBIGIOUS

Recently, in *Likens v. Hartford Life and Accident Insurance Company,* 2011 WL 2584803, a federal District Court judge in the Southern District of Texas denied Plaintiff's motion for summary judgment and granted Hartford's motion for summary judgment regarding the alleged ambiguity of the "legally intoxicated" exclusion of a life insurance policy. In this case, Plaintiff sought life insurance benefits as the beneficiary of a life insurance policy on Wesley Vincent. The policy provided benefits for "accidental" death. Hartford denied the claim due to Vincent's intoxication at the time of the injury which lead to his death. More specifically, Hartford relied on provisions of the policy that required that the injury arise from an accident "independent of all other causes." In addition, the policy excluded injuries "sustained as a result of being legally intoxicated from the use of alcohol." Plaintiff argued the term "legally intoxicated" was ambiguous, but the Court rejected this argument explaining "[n]ot every difference in interpretation of an insurance policy amounts to an ambiguity." Based on the facts surrounding Vincent's injury, the Court concluded no reasonable jury could find facts that would avoid the intoxication exclusion of the policy.

COURT OF APPEALS CONCLUDES INSURER HAS NO LIABILITY TO INSURED FOR UIM COVERAGE WHEN SETTLEMENT AMOUNTS EXCEED DAMAGES

In *Melancon v. State Farm Mut. Auto. Ins. Co.,* --- S.W.3d ----, 2011 WL 2448375 (Tex.App. – Houston [14th Dist.] June 21, 2011), the Fourteenth Court of Appeals in Houston recently affirmed a take-nothing judgment entered in favor of State Farm, concluding State Farm had no liability under the uninsured/underinsured motorists ("UIM") coverage of an automobile insurance policy when the amount of the insured's personal-injury damages were less than the total amount paid in settlements to the insured.

In this case, Chezaray Melancon was injured in an automobile accident involving multiple vehicles. He brought suit against two other drivers involved in the accident, Noel Sholes and Miguel Garcia, and Garcia's employer, Lane Freight, Inc. Melancon also joined State Farm as a defendant, asserting a breach of contract claim on the basis that State Farm was liable to Melancon under the UIM Coverage of his policy. Melancon and State Farm stipulated that (1) Melancon settled his claims against Garcia and Lane Freight for $170,000; (2) Melancon settled his claims against Sholes for $20,012; and (3) State Farm paid Melancon $5,000 in personal injury protection benefits under the policy. The total of these three settlement amounts was $195,012. Following a trial on the merits, the jury found Sholes's negligence to be the sole proximate cause of the accident and that Melancon sustained various damages resulting from the accident which totaled $168,800.

The UIM coverage part in the State Farm policy provided that State Farm's liability was limited to the lesser of the $100,000 limit or "[t]he difference between the amount of [Melancon's] damages for bodily injury or property damage and the amount paid or payable to [Melancon] for such damages, by or on behalf of persons or organizations who may be legally responsible." Melancon sought judgment from State Farm awarding him $100,000 in UIM Coverage under the policy. The trial court rendered a take-nothing judgment in favor of State Farm. Relying on the unambiguous language of the policy, the court of appeals concluded State Farm had no liability and affirmed the trial court's judgment.

COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT IN FAVOR OF INSURER ON GROUNDS THAT INSURED BREACHED DUTY TO COOPERATE

In *Martinez v. ACCC Ins. Co.*, --- S.W.3d ----, 2011 WL 2449509 (Tex.App. – Dallas June 21, 2011), the Dallas Court of Appeals recently affirmed a summary judgment in favor of Best Texas General Agency, State and County Mutual Fire Insurance Company, and ACCC Claims Service, finding they owed no duty to defend or indemnify the insured, Carmensa Romero, with respect to claims in an underlying lawsuit brought by Ann Martinez, individually and as next friend of Michael Munoz and Patricia Davilla.

Martinez and Davilla were involved in an automobile accident with Carmensa Romero. Martinez and Davilla alleged they were traveling through a controlled intersection on Buckner Boulevard when Romero ran a red light and slammed into their vehicle. At the time, Romero was insured under a personal automobile liability insurance policy issued by Best Texas General Agency acting as the authorized managing general agent for State and County Mutual Fire Insurance Company. Best Texas provided claims servicing for this policy through ACCC Claims Services. Martinez and Davilla filed a lawsuit against Romero and their attorney forwarded a copy of the original petition to ACCC Claims. ACCC Claims forwarded a copy of the original petition to its attorney, Trey Harlin, and requested that he confirm whether service had been effected on Romero. Over the next several months, Harlin and Tkach had several communications in which Harlin asked whether Romero had been served and asked that he be provided with the executed citation when Romero was served. When Romero was finally served, Tkach did not send a copy of the executed citation to Harlin or ACCC Claims and the trial court ultimately signed a default judgment against Romero in the underlying suit, awarding damages in excess of $150,000. Tkach did not forward the default judgment to ACCC Claims until June 26, 2006, almost five months later after it had become a final, non-appealable order.

Martinez and Davilla subsequently filed suit seeking coverage as third-party beneficiaries. The policy contained provisions regarding contractual duties on the part of a person seeking coverage, including: (1) the duty to provide prompt notice of how, when, and where the accident occurred; (2) the duty to cooperate in the investigation, settlement, and defense of any claim; and (3) the duty to promptly send copies of any notices or legal papers. Best Texas argued that Romero's breach of these conditions precedent prejudiced it and State & County and precluded coverage for Martinez and Davilla's claims against Romero. Martinez and Davilla addressed the conditions precedent of notice of the accident and notice of the suit, arguing that Best Texas was provided actual notice of the accident, the underlying suit, and service of citation on Romero. But Martinez and Davilla did not challenge the granting of summary judgment on the basis that Best Texas was prejudiced by Romero's failure to satisfy the condition precedent to cooperate in the investigation, defense and settlement of the claims against her. Thus, the court of appeals affirmed the summary judgment as to Best Texas and State & County on that basis.

With regard to ACCC Claims, it asserted that it was not a party to the policy made the subject of the claims alleged by Martinez and Davilla and that it could not be liable for the contractual obligations to be performed by the insurer under the policy. Because Martinez and Davilla did not claim error by the trial court in granting summary judgment in favor of ACCC Claims on that basis, the court of appeals affirmed the summary judgment in its favor.

COURT OF APPEALS FINDS WOKRERS' COMPENSATION CARRIER CAN PURSUE SUBROGATION CLAIMS AGAINST TORTFEASOR AFTER INSURED HAS SETTLED AND DISMISSED CLAIMS WITH PREJUDICE

Recently, the Amarillo Court of Appeals addressed the split of authority as to the fate of a workers' compensation insurance carrier when the lawsuit of an employee against a third party is dismissed. In *City of Lubbock v. Payne*, 2011 WL 2463125 (Tex.App. – Amarillo June 17, 2011), Jarred Pierson, a Lubbock police officer, was injured on the job while chasing a suspect at an apartment complex, when he fell over a cable that had been placed there by the Ponderosa Apartments ("Ponderosa") to prevent cars from entering into a particular area. Pierson filed suit against Ponderosa to recover for his injuries. At the same time, he received workers' compensation benefits from the City of Lubbock, which intervened in his lawsuit against Ponderosa. One day before trial, Pierson non-suited his lawsuit with prejudice. Ponderosa then also obtained a dismissal with prejudice of the City's claims.

On appeal, the City contended it was entitled to continue to pursue the lawsuit against Ponderosa to the extent it made compensation benefits to Pierson. The court of appeals recognized a split of authority on the issue. Some courts of appeals hold that when an employee's cause of action is defeated, that of the carrier is defeated as well, while others hold that once compensation benefits have been paid, the right of the insurance carrier overrides that of the employee.

In agreeing with the City, the court of appeals stated that to hold otherwise would be to ignore several long established rules of subrogation. In particular, payment from a subrogee effectuates a transfer of interest in the cause of action to the subrogee. When that occurs, the subrogee assumes the status as the "real party in interest" while the subrogor's interest becomes nominal. If the subrogor enters into a settlement with and gives a release to the wrongdoer after such payment while the tortfeasor knows of the subrogee's rights of subrogation and the subrogee is not party to the settlement, then settlement does not bar the subrogee from enforcing its subrogation right. So, it does not matter that Pierson may have compromised whatever remaining claim he had against Ponderosa and dismissed his portion of the suit with prejudice. The City had compensated Pierson to some extent before then and, therefore, owned at least a part of the cause of action. Pierson also knew of the City's status as a subrogee before the non-suit. Consequently, the actions of Pierson, did not bar the City from continuing its recovery efforts against the purported tortfeasor. Accordingly, the court of appeals reversed the trial court's order dismissing the City's claims and remanded for further proceedings.