

TEXAS INSURANCE LAW NEWSBRIEF

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ASSIGNMENT OF CLAIMS AGAINST SUBCONTRACTORS NOT VOIDED BY GENERAL CONTRACTOR'S INSURERS' SUBROGATION RIGHTS

A construction lawsuit against four subcontractors was given new life last week when the Texas First Court of Appeals in Houston overturned a summary judgment based in part on the conclusion that the general contractor's insurers' subrogation rights did not prevent a suit against the subs. In *Concierge Nursing Centers, Inc. v. Antex Roofing, Inc.*, No. 01-11-00882-CV, 2013 WL 1912342 (Tex. App.—Houston [1st Dist.] May 9, 2013), the trial court had reasoned that the general's assignment of its claims against the subs to the property owner as part of a settlement was ineffective because the general's insurers were subrogated to those claims. The subcontractors contended that because of the subrogation, the insurers, not the general, owned the claims, and therefore the general's attempt to convey the claims as part of the settlement was void.

In an opinion issued last Thursday, the court of appeals disagreed. First, the court explained that the policies' subrogation provisions transferred only the general's right to recover against a third party. The policies did not create a complete transfer of all claims, and the general retained the right to bring a lawsuit, which it could convey to the property owner. The court of appeals analyzed the express language of the subrogation provisions, and concluded that while the policies transferred *some rights*, they did not transfer *all* rights. The court also reviewed the business activity served by the policies, and noted that subrogation provisions are intended to reduce risk, not enable insurers to potentially profit from a loss. The insurer only has a right to recover an amount equal to its payment, and does not fully obtain the entire claim as though it were wholly transferred by an assignment.

The court of appeals ultimately concluded that the general's claims against its subcontractors were assignable even given the subrogation rights held by the insurers. The court also separately analyzed an indemnity dispute between the parties that did not directly implicate insurance issues, and concluded that the subcontractors had not established as a matter of law that they had not breached the indemnity provisions of the subcontracts.

MCALLEN FEDERAL JUDGE REFUSES TO REMAND RESIDENTIAL HAIL SUIT ON AMOUNT-IN-CONTROVERSY ISSUE

The plaintiffs in a hail suit may have pleaded that “[p]laintiffs seek damages, inclusive of attorney fees, in an amount not exceeding \$75,000[.]” but that was insufficient to defeat federal diversity jurisdiction based on the amount in controversy requirement, and their motion to remand was denied. In *Gqrcia v. Geovera Specialty Ins. Co.*, Civ. No. 7:13-CV-114 (S.D. Tex. May 10, 2013), Judge Micaela Alvarez of the McAllen Division of the Southern District of Texas ruled last Thursday the insurer's removal on diversity grounds. The plaintiffs argued in their motion that the amount in controversy was insufficient to confer jurisdiction on the federal court, relying on their representation in their petition that their damages were less than the diversity threshold.

Judge Alvarez ruled that the level of specificity in the pleading — “an amount not exceeding \$75,000” — was contrary to the Texas Rules of Civil Procedure in effect at the time suit was filed. (The rules have since been revised to allow greater specificity, and Judge Alvarez did not express an opinion as to whether the outcome would be different under the current rules.) The court therefore concluded that the pleading of a specific amount of damages was an illegitimate attempt to avoid federal jurisdiction. The court therefore considered both the operative policy limits and the fact that the plaintiffs' discovery implicated bad faith and other extra-contractual claims to determine that the amount in controversy likely exceeded \$75,000. The court also observed the absence of a demand letter or estimate from the plaintiffs that would establish that the amount in controversy was as alleged.

In the absence of anything valid on which to pin the plaintiffs' valuation of the case, the Court denied the plaintiffs' motion to remand.

FEDERAL DISTRICT COURT ABSTAINS FROM COVERAGE ACTION BASED ON PENDING CASE IN CALIFORNIA STATE COURT

Judge Sidney Fitzwater of the Northern District of Texas recently stayed a coverage action under the “abstention doctrine,” concluding that while the issues before him were ripe for adjudication and that he had the authority to grant the relief requested, he should nevertheless abstain from the case because of a concurrent suit in California. In *Continental Ins. Co. v. Giffort-Hill & Co.*, Civ. No. 3:12-CV-0925-D, 2013 WL 1875930 (N.D. Tex. May 6, 2013), Continental sued seeking a declaration that it did not owe defense and indemnity arising out of a number of toxic tort suites pending in California. Shortly after Continental brought its action in federal court in Texas, the insurer chosen to lead the defense — Central National Ins. Co. of Omaha — instituted separate suits in California, first against the insureds seeking to compel arbitration, and second against other insurers (including Continental) seeking a declaration that each insurer was obligated to provide a defense.

The central issue was the proper application of the *Brillhart* abstention doctrine, first outlined by the U.S. Supreme Court in 1942, and elaborated by the Fifth Circuit in 1994 by the identification of several non-exclusive factors to be considered by the courts. Judge Fitzwater observed that the federal and state actions did not need to be “exactly parallel,” and that the parties and issues in each could differ. He concluded that the duty to defend would be addressed in both the case before him and the case between the insurers in California. Further, variances between the parties of the cases were not substantial enough to weigh against abstention. Judge Fitzwater also considered that while many of Continental’s policies were issued in Texas, permitting the case to continue here would risk drawing in a large number of parties with connections only to California.

Having considered the foregoing issues, and determining that fairness considerations were either neutral or weighed slightly for abstention, Judge Fitzwater determined that the federal action should be stayed. He noted that the Supreme Court had urges stays in this context as opposed to dismissal because the federal action could continue later if the state action failed to resolve all issues, without the risk of implicating any applicable statutes of limitations.