

TEXAS INSURANCE LAW NEWSBRIEF

JUNE 4, 2013

COURT REMANDS LAWSUIT AFTER PLAINTIFF STIPULATES THE AMOUNT IN CONTROVERSY DOES NOT EXCEED \$75,000

In a peculiar ruling, Federal District Court Judge Lee Rosenthal (Houston Division of the Southern District) remanded the second of two lawsuits regarding an insurance dispute back to state court in *Williams v. Companion Prop. & Cas. Ins. Co.*, CIV.A. H-13-733, 2013 WL 2338227 (S.D. Tex. May 27, 2013). In March of 2012 Plaintiff sued her insurance company, the adjuster, and the driver who allegedly damaged her property. Plaintiff's petition alleged violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code. The Defendants removed the case to federal court and, shortly thereafter, Plaintiff settled with the driver. Afterward, Plaintiff filed a motion for non-suit with regard to the claims against her insurance company and the adjuster. The motion for non-suit was granted.

In early 2013, Plaintiff filed a second state court suit asserting the same claims against the insurance company and adjuster which she previously non-suited. Importantly, the second petition included a stipulation that the damages in the second suit were less than \$75,000. The insurance company and adjuster removed the lawsuit on the basis of diversity of citizenship and they argued that Plaintiff's stipulation was ineffective because it was not filed until after the first lawsuit and is therefore a post-removal stipulation. The Court disregarded Defendants' argument and held: "the fact this court had jurisdiction over the first lawsuit, which was dismissed, does not determine whether the court has jurisdiction over the pending second lawsuit. Federal jurisdiction must be present in each suit." The court proceeded to find the amount in controversy did not exceed the jurisdictional requirements necessary to maintain federal jurisdiction and remanded the case to state court.

DALLAS FEDERAL COURT DENIES INSURED'S MOTION TO REMAND FOR FAILURE TO ASSERT VIABLE CLAIM AGAINST ADJUSTER

Recently, in *Weber Paradise Apartments, LP v. Lexington Ins. Co.*, 3:12-CV-5222-L, 2013 WL 2255256 (N.D. Tex. May 23, 2013), the District Court for the Northern District of Texas denied an insured's Motion to Remand because the Plaintiff's petition failed to set forth a reasonable basis for the court to predict that the insured might recover against an insurance adjuster on the theories asserted.

In this case, Plaintiff originally filed suit in County Court in Dallas County. Plaintiff asserted claims for negligence, negligent misrepresentation, and fraud against the insurer; claims for negligence and negligent misrepresentation against the adjusting company; and claims for negligence, negligent representation, breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code, and violations of the Texas Deceptive Trade Practices Act against the adjuster. Defendants removed the lawsuit on the basis of the improper joinder of the insurance adjuster and argued the claims against the adjuster did not meet the Texas court's low threshold for pleading.

The District Court analyzed Plaintiff's petition and determined that there was no factual fit between the unclear and conclusory allegations in Plaintiff's pleading and its theories of recovery. Even with a liberal reading of the operative allegations of the petition, the court said it would have to "guess, speculate, and strain" to determine whether a reasonable basis existed to predict that the adjuster *might* be liable to Plaintiff on the claims asserted. As such, the Court determined there was no reasonable basis to predict that Plaintiff might recover against the adjuster and denied Plaintiff's Motion to Remand.

DALLAS TRIAL TEAM WINS DEFENSE VERDICT ON BEHALF OF ELECTRICIAN IN WRONGFUL DEATH CASE

MDJ&W's Dallas trial team recently won an important defense verdict on behalf of an electrical service company in an electrocution wrongful death case that occurred at the home of Exxon/Mobil CEO Rex Tillerson. Congratulations to Dallas Managing Partner Mark Dyer and trial team members Alan Moore and Karen Meek. See *Ramirez v. Complete Landsculpture of Texas, L.P. and Denton Electric, Inc.*; No 11-12834, in the 193rd District Court of Dallas County, Texas.

The property had a large pond on it with an underwater electric pump. The pump malfunctioned and Mrs. Tillerson contacted Complete Landsculpture, who provided lawn care for the estate. Complete hired MDJ&W's client Denton Electric to confirm whether electricity was flowing properly through the system. Denton Electric sent a journeyman electrician out to confirm the pump was receiving power, which he determined it was. Before leaving, he asked Plaintiff if he wanted the system completely de-energized. Plaintiff asked that the system not be completely de-energized because they wanted to test the system after it was removed from the pond. The electrician turned off the pump in two different locations and verbally warned the plaintiff not to be in the water with the pump if it was energized.

After Denton Electric left, the plaintiff attempted to remove the pump with the help of two workers. His attempts failed so he called for a Bobcat with chains to pull out the pump. It is believed during that process, electrical wires to the pump became exposed. After the pump was partially removed from the water the plaintiff asked a worker to turn the pump on. That worker told Plaintiff that he should get out of the water before he energized the pump and then went to the house to turn on the pump. Plaintiff did not heed those warnings and was electrocuted. After the incident, it was learned that the original installer of the pump (not Denton Electric) failed to properly ground the pump and that a wire that provided electricity to the pump had been compromised and was exposed, allowing electricity to flow into the pond.

Plaintiff's demand was never less than \$1,000,000. The jury deliberated for 10 hours and found Complete Landsculpture 80% at fault, Plaintiff 20% at fault, and Denton Electric not negligent. Of note, the worker who flipped the switch that electrocuted the deceased married the deceased's wife six months later.

BEAUMONT COURT OF APPEALS FINDS PLAINTIFF'S ATTORNEY FEE REQUEST IN HURRICANE CASE EXCESSIVE

In *Ware v. United Fire Lloyds*, 09-12-00061-CV, 2013 WL 1932812 (Tex. App.—Beaumont May 9, 2013, no. pet. h.), the Beaumont Court of Appeals recently upheld an Orange County trial judge's ruling on attorney fees in a Hurricane Ike case.

The case was tried to a jury in 2011, and the jury awarded the plaintiff approximately \$8,000 in damages instead of the \$245,000 the plaintiff had demanded before trial. The issue of attorney fees was tried to the Court. The judge denied the plaintiff's request for approximately \$133,000 in attorney fees, concluding the plaintiff had made an excessive demand. The court found in particular that the plaintiff had acted in bad faith by claiming Ike damage when much of the damage was either excluded flood damage, or was caused by Hurricane Rita three years earlier. Instead, the court awarded the plaintiff 40% of the actual award, or approximately \$3,000, which the plaintiff appealed.

The Court of Appeals agreed with the trial court, relying on existing case law holding that the most critical factor in determining the reasonableness of a fee award is the "degree of success obtained." The court observed that the trial judge heard evidence that some of the damages claimed by plaintiff were caused by Rita (for which plaintiff had already collected a \$146,000 settlement from his prior carrier), by excluded flooding, or by pre-existing leaks. Thus, the trial court did not abuse its discretion by holding that a fee demand far greater than the plaintiff's actual recovery was unreasonable and excessive.

FIFTH CIRCUIT REJECTS GLOBAL WARMING CLAIMS BY KATRINA VICTIMS

In an intriguing political saga, the Fifth Circuit for the second time denied relief to Mississippi property owners who alleged that emissions from over 80 energy companies had contributed to global warming, which had made Hurricane Katrina more powerful and destructive, thereby damaging the plaintiffs. See *Comer v. Murphy Oil USA, Inc.*, 12-60291, --- F.3d ---, 2013 WL 1975849 (5th Cir. May 14, 2013) (slip opinion).

The plaintiffs first filed suit in 2005, and the district court dismissed their suit, holding they lacked standing and their claims were non-justiciable political questions. On appeal to the Fifth Circuit, seven of the court's 16 active judges were recused, presumably due to personal Katrina claims or financial connections to one or more of the many corporate defendants. Initially, a panel of the Court partially reversed the district court's dismissal of the plaintiffs' claims, holding the plaintiffs did in fact have standing to proceed with their claims for nuisance, trespass, and negligence. Before the mandate could issue, a majority of the remaining unrecused justices voted for *en banc* rehearing, which vacated the panel opinion and halted the mandate. After the *en banc* vote, but before the rehearing, an additional judge was recused, leaving only seven of the 16 judges available to rehear the case. At that point, the Court concluded it lacked the quorum necessary to proceed, and the appeal was dismissed. The plaintiffs sought mandamus relief from the United States Supreme Court, which was denied.

Plaintiffs tried again in 2011, and the same Mississippi district court once again dismissed their claims adding res judicata to the list of reasons for dismissal. The plaintiffs once again appealed to the Fifth Circuit and in last month's opinion, were once again denied the right to appellate review of the district court's original 2005 decision. The Court noted that the district court's 2005 order of dismissal was a final judgment that had never been altered or disturbed during the course of the first appeal. Relying on existing case law holding that a pending appeal does not deprive a final judgment in the trial court of its res judicata effect, the Fifth Circuit upheld the second dismissal on res judicata grounds. Plaintiffs argued for an equitable exception on the basis that they were denied meaningful appellate review in their first case. Although the court openly acknowledged the plaintiffs had never received a true adjudication on the merits, the court observed that res judicata is not subject to equitable exceptions. Thus, the plaintiffs' plea for equitable relief fell on deaf ears.

MDJW First Friday Webinar - Lessons Learned from Hurricane Ike

WAYNE PICKERING. PRESENTER
JUNE 7, 2013



Wayne Pickering, a partner in the Houston office, will present "Lessons Learned From Hurricane Ike." Mr. Pickering will share his experiences in dealing with hurricane litigation for the past four years with a focus on the potential minefield of litigation and the experiences of others who have gone before who have successfully navigated the minefield (or stepped on a mine in some cases!) in order to prepare attendees for what could happen the next time a tropical storm or hurricane impacts the Texas Gulf Coast.

Mr. Pickering's legal experience includes many years of experience at both the trial and appellate level in numerous facets of insurance litigation, including coverage issues, bad faith and extra-contractual claims, as well as litigating professional liability claims against insurance agents, brokers and claims adjusters. Mr. Pickering's experience also includes the representation of automobile manufacturers and manufacturers of commercial equipment and consumer products in products liability actions and warranty claims. Mr. Pickering also has authored or co-authored numerous articles and edited treatises in the field of insurance law.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit. Insurance professionals accredited by the Texas Department of Insurance should have their license number available during the training in order to request credit for the course.

Register for this webinar at:

<https://student.gototraining.com/r/6090459139765627904>

After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar.

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http://support.citrixonline.com/en_US/gotomeeting/all_files/GTM140010

