

TEXAS INSURANCE LAW NEWSBRIEF

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YOUR WORK, EARTH MOVEMENT EXCLUSIONS DO NOT DEFEAT DUTY TO DEFEND IN ROAD CONSTRUCTION LAWSUIT

Last Thursday, the Houston First Court of Appeals held that a CGL carrier was obligated to defend its insured in a suit over the construction of a road in a subdivision, and rejected the insurer's arguments that the policy's your work exclusion and the earth movement exclusion defeated coverage. In *Mid-Continent Cas. Co. v. Krolczyk*, No. 01-12-00587-CV, 2013 WL 2445049 (Tex. App.—Houston [1st Dist.] June 6, 2013), the court considered an agreed interlocutory appeal of the trial court's denial of the parties' cross-motions for summary judgment. Krolczyk was a contractor who built a road for a subdivision in Waller County, Texas. The project lasted several years, and resulted in litigation between Krolczyk and the homeowners' association for the subdivision. Krolczyk tendered the defense to Mid-Continent, which, after defending the case for a short time subject to a reservation of rights, eventually determined that there was no coverage.

Mid-Continent relied on the your work exclusion and the earth movement exclusion to deny benefits. The court of appeals first addressed the your work exclusion. The court noted that the road construction project involved multiple distinct stages, separated by periods of many months. In addition, the relevant pleading from the homeowners' association alleged damage to only one of the phases. The First Court panel also observed that the Fifth Circuit had reviewed Mid-Continent's your work exclusion in 2009, holding that if an insured performs both defective and non-defective work, and the defective work damages the non-defective work, the your work exclusion will not defeat the duty to defend. Accordingly, since the pleadings could reasonably be construed to conclude a claim that faulty work in one stage of the road construction damaged a separate, non-defective stage, the Houston court followed the Fifth Circuit case and concluded that the your work exclusion did not apply.

Next, Mid-Continent argued that an exclusion of property damage caused by "movement of land, earth or mud." The court of appeals disagreed, concluding that the petition alleged movement of man-made materials only. Since insurance policies are construed against the insurer, the court declined to interpret "land, earth or mud" to encompass, for example, concrete. Thus, the earth movement exclusion also did not preclude coverage. The court of appeals therefore concluded that the duty to defend had arisen, and rendered judgment for the contractor.

AWARD OF REFUND FROM PROVIDER TO WORKERS' COMP CARRIER HELD TO BE OUTSIDE THE SCOPE OF DISTRICT COURT'S AUTHORITY

In a lengthy and thorough opinion last Thursday, a panel of the Austin Court of Appeals held that a district court hearing an appeal from an administrative decision of the Division of Workers' Compensation did not have the authority to order a partial refund of an award paid to a medical care provider, even though the original award had itself been invalidated. In *Vista Medical Center Hospital v. Texas Mutual Ins. Co.*, Nos. 03-11-00641-CV through 03-11-00643-CV and 03-11-00742-CV through 03-11-00785-CV, — WL — (Tex. App.—Austin June 6, 2013), the court of appeals reviewed the consolidated appeal of multiple proceedings in Travis County District Court arising out of alleged underpayment by Texas Mutual Insurance Company for emergency care under workers' compensation policies. Administrative proceedings resulted in a number of money awards to the provider, which Texas Mutual paid. The dispute in this appeal arose out of orders reversing those money awards which included directives that Vista Medical pay back the additional moneys it had received.

The court of appeals first provided a detailed review of the worker's compensation system in Texas, and described a prior dispute over the "stop-loss exception" to per-diem rates. The result of the stop-loss controversy in this case was that certain of Texas Mutual's previous payments of administrative awards to Vista Medical were deemed to have been excessive. After considering and rejecting a waiver argument advanced by the provider, the court addressed the principal matter in controversy, whether the district court had jurisdiction to award money relief in the form of a "refund" of an "overpayment" based on the administrative decision.

Texas Mutual argued that it was entitled to these refunds on an equitable basis, urging a "money had and received" theory in support of the district court's rulings. The court disagreed, and determined that the statutory scheme allowed only one remedy — a remand from the district court back to the Division of Worker's Compensation to follow the exclusive administrative process. (The appeal

addressed other issues, and still more remained before the district court; thus, the ultimate result following the 51-page opinion was an affirmance in part, a reversal and remand in part, and a reversal and render in part.)

DALLAS COURT OF APPEALS REJECTS CONSTITUTIONAL CHALLENGE TO 2003 MEDICAL MALPRACTICE REFORM

The Dallas Court of Appeals last Monday held that the heightened standard of proof for malpractice claims against emergency medical care providers was constitutional, reaching the same result as a prior opinion from the Eastland Court of Appeals. In *Gardner v. Children's Medical Center of Dallas*, No. 05-11-00758, 2013 WL 2389854 (Tex. App.—Dallas June 3, 2013), the plaintiffs appealed a take-nothing judgment in favor of an emergency care provider, arguing that the liability standard in Section 74.153 of the Texas Civil Practice and Remedies Code violates the equal protection clause of the U.S. Constitution. Specifically, the plaintiffs contended that by dividing plaintiffs between those who received emergency care in facilities such as hospital emergency departments and those who receive emergency care in non-covered facilities, the legislature acted arbitrarily, unreasonably, and without a rational relation to a legitimate state interest.

Under the rational basis review standard, the Court of Appeals needed only to determine whether “any reasonably conceivable state of facts ... could provide a rational basis for this classification.” The Court, therefore, reviewed the history of Texas’ 2003 tort reform, enacted to deal with a crisis in medical malpractice insurance identified by the legislature. The tort reform effort, the legislature found, would “have a positive effect on the rates charged by insurers for medical professional liability insurance.” The special standard of proof for emergency care providers was included “to encourage physicians and other health care providers to provide emergency medical care.”

The Dallas Court then looked to *Dill v. Fowler*, a 2008 opinion from the Eastland Court of Appeals that also considered an equal protection challenge to Section 74.153. That court found a rational basis for the statute. Similarly, the Dallas court agreed that the provider had demonstrated a rational relationship to Texas’ legitimate interests, upheld the statute, and affirmed the judgment of the trial court.