Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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STATE FARM WINS FIRST HURRICANE IKE BAD FAITH TRIAL

In the first Hurricane Ike trial to go to verdict against State Farm Lloyds, last Friday a Harris County jury rendered a unanimous defense verdict on all issues in favor of State Farm in Judge Elizabeth Ray's court after a two week trial. In *Yanez v. State Farm Lloyds*, Plaintiffs argued State Farm did not explain the terms and benefits of the policy to the insureds who were Spanish-speaking and further alleged State Farm failed to pay all the hurricane damages that were owed. Mr. and Mrs. Yanez did not report their claim for 9 months. After the initial claim investigation, State Farm paid for a total roof replacement. Plaintiffs hired the Mostyn Law Firm who filed suit two year later and the case proceeded to trial last week.

At trial, plaintiff's experts engineer Greg Becker and estimator James Wesselski testify the 67 mile per hour winds at the insureds' residence were sufficient to rack the house and cause rafter separation and cracks to interior walls and floor tiles. State Farm's engineering experts, Dr. Jon Peterka (a nationally recognized wind engineer from Colorado) and Mark Kubena (a structural engineer from Houston) strongly disagreed and testified the winds of Hurricane Ike did not damage any part of the residence other than was initially found and paid for by State Farm. The Mostyn Firm's attorney fee expert, Randy Cashiola, asked for $154,000 in attorney's fees through trial. That amount included a $25,000 "Premier Law Firm" fee which Cashiola argued was also owed solely because of the alleged success of the Mostyn firm in obtaining larger settlements from insurance companies than other plaintiffs' firms, among other things.

The jury found no breach of contract, no bad faith, and no violations of the insurance code. The jury also found Plaintiffs failed to comply with their obligations under the policy. The jury charge did contain a question on the amount of fees as of the date of State Farm's Rule 167 offer, but since the jury found no breach of contract or bad faith, and thus awarded no fees, the secondary fee question was not answered. Greg Cox tried the case for the Mostyn Firm. Brian Chandler of Ramey, Chandler, Quinn & Zito and Joe Nistico of Nistico, Crouch and Kessler tried the case for State Farm Lloyds. Congratulations to Brian Chandler, Joe Nistico, and the entire State Farm trial team for this trial victory.

Editor's Note: State Farm had three Hurricane Ike trials set for trial in Harris County this month, all against the Mostyn Law Firm. The first case set for trial, *Rivera vs. State Farm Lloyds* was non-suited by the Mostyn Law Firm two weeks ago on the first day trial. That case was handled by Chris Martin and Marilyn Cayce of MDJW. The *Yanez* case was the second trial and it successfully concluded last Friday. The third trial, *Fuentes vs. State Farm Lloyds*, started this morning in the 151st District Court in Houston and is expected to last two weeks. David Jones of Jones, Kurth and Andrews in San Antonio is lead counsel in that case.

HOUSTON COVERAGE TEAM WINS SUMMARY JUDGMENT ON "IMPAIRED PROPERTY" EXCLUSION

MDJ&W's Houston coverage team won summary judgment last Tuesday in favor of a major carrier in a commercial lawsuit involving a liability carrier's duty to defend and indemnify its insured. In this case, *U.S. Metals, Inc. v. Liberty Mutual Group, Inc.*, No. 4:12-CV-00379 (S. D. Texas, July 2, 2013), the policyholder, U.S. Metals, sued Liberty Mutual after Liberty Mutual refused to defend and indemnify the policyholder against a suit brought by Exxon.

Exxon's suit against U.S. Metals alleged that a number of flanges it purchased from U.S. Metals were defective, and Exxon incurred extensive costs to remove the flanges from two of its refineries and replace them with new flanges, including lost income due to shutting down the two refineries. Liberty Mutual contended Exxon's petition did not allege "property damage," the claimed damages were excluded by the policy's "Your Product" exclusion, and the claimed damages were excluded by the policy's "Impaired Property" exclusion.

Last week, the court agreed with Liberty Mutual holding the "Impaired Property" exclusion barred coverage for the shutdown of the entire undamaged refinery necessary to remove and replace the defective flanges. The court also held because the defects in the flanges were discovered during testing before the refinery was brought online, they were not a "sudden and accidental failure" occurring after the product had been put to its intended use, and did not bring the claim within any exception to the "Impaired

Property" exclusion. Finally, the court held although some damage was done to parts of the surrounding refinery equipment in order to remove and replace the flanges, this did not take the scenario outside the scope of the "Impaired Property" exclusion because the flanges themselves did not cause any damage. Instead, the damage was caused entirely by the process of removing and replacing them.

Last but not least, the court also granted summary judgment on all of the insured's extra-contractual claims because it found there was no coverage for the claim, thus no breach of contract, and therefore Liberty Mutual's conduct in denying the claim did not violate any statutory provisions of the Texas Insurance Code. In making this holding, the court confirmed that in the third-party context, "bad faith" and its statutory equivalent under insurance Code Chapter 541 are analogous to and co-extensive with the *Stowers* duties owed by the carrier to the insured.

Editor's Note: Congratulations to Chris Martin and Todd Lonergan of MDJW as well as the litigation and coverage groups at Liberty Mutual for their collective work which led to this win.

FEDERAL COURT IN NORTHERN DISTRICT RETAINS SURPLUS LINES INSURANCE CASE ON PUBLIC POLICY GROUNDS

Last Monday, a Federal District Court in the Northern District of Texas denied a motion to transfer venue to a New York court based in part on the ground that Texas has a compelling interest in maintaining jurisdiction over out-of-state insurers who do business in Texas as surplus lines carriers. In *JetPay Merch. Services, LLC v. Chartis Specialty Ins. Co.*, 3:13-CV-0401-M, 2013 WL 3387517 (N.D. Tex. July 8, 2013), an insured sued Chartis and the procuring agent in the Dallas Division of the Northern District of Texas over a claim dispute. The dispute raised questions concerning whether the surplus lines policy was issued properly, and whether the agent was a properly licensed surplus lines broker.

Chartis sought to transfer venue to the Southern District of New York where it and the agent have their principal places of business, arguing venue was proper there and it was a "clearly more convenient" venue than Dallas. The court acknowledged that either Dallas or New York would both be proper under the federal venue statute, but denied the transfer to New York. Upon weighing the private and public factors affecting the transfer decision, the court found that some of the factors, such as access to witnesses, favored transfer. Nevertheless, the court's analysis suggests that the interest of the state of Texas in regulating and monitoring the activities of unauthorized insurers and surplus lines brokers in the state was the single decisive factor, even though the case involved complicated choice of law questions which may ultimately result in application of New York law.

FEDERAL COURT IN SOUTHERN DISTRICT, MCALLEN DIVISION FINDS IMPROPER JOINDER & DENIES MOTION TO REMAND BAD FAITH CASE

Last Monday, the Federal District Court in the McAllen Division of the Southern District of Texas showed that removal based on improper joinder is alive and well and can still succeed when policyholders sue agents in an attempt to defeat federal diversity jurisdiction. In *Garza v. State Farm Lloyds*, 7:13-CV-112, 2013 WL 3439851 (S.D. Tex. July 8, 2013), the policyholder filed a "cut-and-paste" type petition against State Farm and the procuring State Farm agent, which referred to them jointly throughout the petition, even though some of the claims, such as breach of contract, were only asserted against State Farm. The court pierced the pleadings and examined additional evidence submitted by the parties and concluded there was no reasonable basis to predict the plaintiff could recover against the agent for the various misrepresentation-based claims made against him.

Editor's Note: This case does not address the likelihood of winning an improper joinder argument when the non-diverse defendant is an adjuster who is accused of improperly handling the claim. That scenario can be significantly more difficult to beat under existing Texas precedent.

MDJW Recognized Again by Chambers USA as the Top Insurance Litigation Firm in Texas

MDJW has been recognized for the 10th consecutive year by the international research firm of Chambers USA as the top Insurance Litigation firm in Texas. Chambers USA ranks law firms from across the county in more than two dozen different practice areas based on extensive independent research. The Insurance Litigation ranking was based on the number of insurance lawsuits won at trial, on appeal, and on summary judgment by the firm over the past year, as well as interviews with insurance industry leaders, judges, and other insurance lawyers from across the state. In the individual lawyer category, Chris Martin was again recognized as the state's leading Insurance Litigation attorney. Founding Partner David Disiere was also recognized individually for the 3rd consecutive year as one of the state's best insurance attorneys.

Our firm's Insurance Practice Group would like the thank all of the carriers whom we have the privilege of counseling and representing each week in bad faith lawsuits and coverage matters across Texas and we want to specifically acknowledge the talented in-house lawyers with whom we get to partner each week to evaluate risks, develop strategies, and bring excellence to all that we collectively do together. Recognition such as this merely reflects the good results which flow from a long-term partnership of the type we have with our friends and clients who work in the Law Departments and Claim Operations of the insurance companies whom we have the privilege of representing. Thank you!