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The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF

**AUGUST 19, 2013**

## INSURER NOT REQUIRED TO ACCEPT INSURED'S ATTORNEY OF CHOICE AFTER MERE SUGGESTION OF CONFLICT OF INTEREST

An unspecified conflict of interest between multiple insured defendants was not enough to require a liability insurer to retain separate counsel or relinquish control over an unqualified defense to the preferred attorney of the insured, the Dallas Court of Appeals held Wednesday. In Marquis Acquisitions, Inc. v. Steadfast Insurance Co., No. 05-11-01663-CV, 2013 WL 4083614 (Tex. App.—Dallas Aug. 14, 2013), the Court affirmed summary judgment in favor of Steadfast on the breach of contract and common law and statutory bad faith claims asserted by Marquis Acquisitions, the insured, which had tendered the defense of an underlying lawsuit involving a fire at an apartment complex. Steadfast tendered an unqualified defense to Marquis and a number of other insureds, and assigned counsel to the defense.

An attorney with an ongoing business relationship with the insured defendants sent multiple letters to Steadfast claiming a conflict of interest between the set of defendants with ownership interests in the apartment complex and the set with management interests. Steadfast asked for additional information — or indeed any information beyond the bare claim that a conflict existed or could exist — but none was forthcoming. However, a few weeks after Steadfast tendered its defense, retained counsel submitted a detailed report that explained that while there was no present conflict, a potential conflict existed. Steadfast then assigned a second attorney to the defense so that the parties with the potential conflict had independent representation.

The Court of Appeals first addressed Marquis' contract claim, which the Court summarized as a complaint that Steadfast did not timely secure the second attorney after first being notified of the potential conflict. The Court observed that there is no Texas law requiring an insurance company to independently evaluate potential conflicts among multiple insureds. Moreover, the Court concluded that once Steadfast had the well-developed opinion of assigned counsel that a potential conflict existed — as opposed to the self-interested statements of an attorney who sought to handle the defense himself at an increased billing rate — Steadfast immediately retained a second attorney to handle the defense of the parties implicated by the possible conflict of interest. The Court finally determined that even if Marquis' contract liability theory had any merit, Marquis could not base its damages solely on attorneys' fees incurred in an effort to force Steadfast to provide separate counsel; because Marquis had no independent contract damages, attorneys' fees alone were not recoverable.

The Court concluded that Marquis' common law bad faith claims failed because a bona fide dispute existed between Marquis and Steadfast as to the possibility that a conflict of evidence existed between the defendants in the underlying lawsuit. Indeed, the summary judgment evidence showed that Steadfast never denied Marquis' request for separate counsel, but instead determined that the request was premature, and that early evaluations did not indicate that a conflict existed. There also were no damages suffered by Marquis because of any delay. The Court resolved Marquis' statutory bad faith claims by holding that Marquis' appellate arguments for statutory liability were waived, and that even if they had not been waived, Marquis could not show damages. Having concluded that there was no merit to Marquis' claims, the Court of Appeals affirmed the summary judgment in Steadfast's favor.

## OKLAHOMA FEDERAL COURT APPLIES TEXAS LAW, GRANTS SUMMARY JUDGMENT TO INSURER IN UNINSURED MOTORIST CASE

The U.S. District Court for the Northern District of Oklahoma recently held that Oklahoma law did not apply to render void an exclusion to uninsured/underinsured motorist coverage included in a Texas auto policy. In *O'Farrell v. State Farm Mut. Auto. Ins. Co.*, No. 12-CV-0633-CVE-TLW, 2013 WL 3820082 (N.D. Okla. July 24, 2013), the court was called upon to construe a policy purchased in Texas, billed to a Texas address, concerning an SUV that was titled in Texas and that State Farm believed to be kept in Texas, as it related to a claim arising out of a single-car rollover accident that occurred while the car was in fact being kept in Oklahoma. State Farm denied the claim, relying on a policy exclusion that the insured's vehicle was excluded from the definition of "uninsured motor vehicle." The parties agreed that the question of whether Texas or Oklahoma law applied would be dispositive, because Oklahoma law declared the exclusion to be void as against public policy and Texas law stated that the exclusion was permissible.

The court, in considering the parties' cross-motions for summary judgment, observed that a 2009 Oklahoma state supreme court opinion held that the Oklahoma legislature had already made the applicable determination by enacting a statute that restricted the reach of the Oklahoma UIM statute to policies "issued, delivered, renewed, or extended" in Oklahoma. Thus, the policy in *O'Farrell*, which was issued, renewed, or extended in Texas, was not governed by Oklahoma law. While the parties spent a significant portion of the summary judgment briefing discussing where the SUV was in fact garaged, that fact issue did not affect the choice of law issue. The insured never told State Farm that the vehicle was no longer garaged in Texas, and had for the life of the policy continued to accept and pay bills at a Texas address. Texas law therefore applied, resulting in summary judgment in State Farm's favor.

## FORT WORTH COURT OF APPEALS UPHOLDS ORDER CONVEYING INSURED'S CAUSES OF ACTION AGAINST INSURER TO INSURED'S JUDGMENT CREDITOR

The Second Court of Appeals in Fort Worth last Thursday affirmed a turnover order of all of a defunct construction company's causes of action against its insurance company to a judgment creditor, permitting the judgment creditor to pursue claims against the insurer in a companion action in federal court. In *D & M Marine, Inc. v. Turner*, No. 02-12-00399-CV, 2013 WL 4106365 (Tex. App.—Fort Worth Aug. 15, 2013), the court of appeals considered a challenge by the construction company, which argued that the unasserted legal claims were not properly subject to turnover, and that the specific turnover mechanism was improper and void. The outcome would affect the creditor's right to participate in a pending action in federal court that had been brought by Mid-Continent Casualty Company, the construction company's liability carrier, which had defended the underlying state court suit but was seeking a judicial declaration that it had no duty to defend or indemnify the construction company.

The primary issue substantively addressed in the court of appeals' opinion was whether the insured's causes of action against its insurer could be turned over to the judgment debtor. The court agreed that they could. Specifically, the insured's causes of action did not fall under an exception to the broad applicability of the turnover statute, because there was no evidence that the insured was satisfied with the insurer's representation. Other courts had held that where there is specific evidence that a turnover order would "drive a wedge between a satisfied client and his insurance company," public policy would prohibit such an order. Here, the construction company failed to demonstrate that it did not want to be indemnified by Mid-Continent.

The remaining substantive appellate issue — whether the turnover order could directly convey the causes of action, or if a designated constable, sheriff, or receiver was required to be involved — was waived. The construction company did not present this argument to the trial court, so the appellate court was without authority to void the turnover order based on this alleged procedural flaw.

## 2013 MDJW North Texas Insurance Seminar

## October 18, 2013

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