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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

NOVEMBER 27, 2013

FIREMAN'S FUND WINS HUGE BAD FAITH CASE IN COMMERCIAL HURRICANE IKE CASE IN HOUSTON

This past Monday, November 25th, a take nothing final judgment was entered in favor of Fireman' Fund Insurance Company in a Hurricane Ike bad faith case involving more than 3 million square feet of retail shopping mall space at Greenspoint Mall and San Jacinto Mall in Houston. Plaintiffs sued for and asked the jury for more than $100 million in damages for allegedly underpaid property damage at both malls purportedly caused by Hurricane Ike, plus treble damages under the Insurance Code for alleged bad faith. The case is believed to involve the largest amount of actual damages sought from a jury at trial in an insurance bad faith case in Texas in more than 20 years.

Trial lasted for 8 weeks over July, August and September. The case was brought by a Hollywood movie producer, Bob Yari, who held an ownership interest in multiple partnerships which managed and allegedly owned both malls. The case – styled *Triyar Companies LLC et al vs Fireman's Fund Insurance Company*, Cause No. 2010-47654, in the 55th Judicial District Court of Harris County, Texas – arose out of Fireman's Fund's investigation and payment of property damage at both malls due to high winds from Hurricane Ike, which hit Houston on September 12th and 13th, 2008. After a lengthy claims investigation, Fireman's Fund estimated the Ike damage to both malls at $11.5 million and, after applying both the $4 million deductible applicable to both malls and substantial depreciation to both of the 30-year-old malls, it paid Triyar $4.2 million. Triyar then sued for more than $100 million which it claimed was the replacement cost to repair and/or replace the property damage at both malls caused by Hurricane Ike as well as its alleged business income losses and other damages not previously paid for by Fireman's Fund.

Fireman's Fund asserted multiple defenses including standing, the failure to make repairs, and fraud, among others. Fireman's Fund alleged the partnerships who owned both malls were not insureds on its commercial property policy. Fireman's Fund also defended on the basis the mall owners failed to timely repair and replace the damaged property and were thus limited to the ACV amounts which FFIC previously paid. Fireman's Fund also asserted a fraud defense because of testimony from one of the estimators hired by the insured's public adjuster who testified under oath that the initial repair estimate from the PA included more than $24 million in damages which either did not exist or were, in his words, "fluff." Fireman's Fund also attacked the scope of alleged damages and alleged costs to repair and replace as excessive and unreasonable.

Following an 8 week trial earlier this fall, the jury determined after 5 days of deliberations that FFIC did not breach its contract with Triyar, the insured. Last Monday, State District Court Judge Jeff Shadwick entered a take nothing final judgment in favor of Fireman's Fund ruling that the Plaintiffs take nothing on any of their claims against the carrier.

The marathon 8-week trial was tried by Chris Martin and Molly Pela of MDJW along with co-counsel Rob Hoffman of Gardere Wynne Sewell. We wish to congratulate Fireman's Fund and our co-counsel, Rob Hoffman, on this great win and thank FFIC for the opportunity to represent it in this significant lawsuit.

FIFTH CIRCUIT DETERMINES WHICH INSURER IS THE PRIMARY AND EXCESS CARRIERS DESPITE CONFLICTING "OTHER INSURANCE" CLAUSES

This past week in *Am. States Ins. Co. v. ACE Am. Ins. Co.*, 12-20783, 2013 WL 6069431 (5th Cir. Nov. 19, 2013) the Fifth Circuit reversed and vacated in part a district court's determination that two insurers were required to split the defense costs in a commercial automobile accident lawsuit. The district court previously granted summary judgment in favor of ACE Insurance Company (ACE) on American States' Insurance Companies claims that its obligation to provide coverage to an insured under a commercial auto policy is excess of ACE's coverage in the underlying suit. Instead, the district court ordered the insurers to split the cost of defense.

American States provided coverage to Hook & Anchor under a commercial auto policy, and ACE provided coverage to Chemical Weed Control under a business auto policy. Both policies contained identical "other insurance" clauses providing for primary coverage for "covered autos" owned by the policyholder and excess coverage for "covered autos" not owned by the policyholder.

In 2008, an employee of Hook & Anchor was involved in a collision while driving a truck owned by Chemical Weed. Hook & Anchor was sued and its insurer American States tendered defense to ACE because the truck was owned by Chemical Weed Control. ACE rejected coverage and offered to share defense costs with American States. American States, again tendered defense to ACE, and ACE refused. American States eventually undertook the defense of Hook & Anchor in full and commenced an action seeking defense costs and attorneys' fees and a declaration that ACE had the sold duty to defend Hook & Anchor in the underlying suit.

Both insurers moved for summary judgment, and the district court determined that ACE had a duty to defend Hook & Anchor, but that American States' coverage obligation was not excess to that of ACE and liability should be prorated amongst the insurers. The district court concluded that ACE's offer to share defense costs was in line with its obligation, and that ACE did not breach its contract with Hook & Anchor, and American Steel was not entitled to attorney's fees and ACE was ordered to pay its prorated share of American States' defense of Hook & Anchor.

On appeal, the Fifth Circuit relied on the rule announced by the Supreme Court of Texas in *Snyder v. Allstate Insurance Co.* where the court declined impose a pro rata share to the non-vehicle owner's insurer despite the conflicting "other insurance clauses". The Fifth Circuit noted that if the vehicle involved in the accident was an "owned vehicle" within the meaning of one insurer's policy, then that insurer's coverage is primary and the other insurer's 'non-owned' coverage is excess within the meaning of both policies.

Because the "other insurance" clauses did not limit liability or coverage based on the existence of the other available insurance, coverage was based on vehicle ownership, the court held the policies do not conflict. As such, ACE was obligated to provide primary coverage to Hook & Anchor and was liable for the entirety of Hook & Anchor's defense. As such, the court reversed the district court's decision that the insurers should pay pro rata portions for the defense of Hook & Anchor.