The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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CLAIMS OF NEGLIGENT FAILURE TO PROVIDE CHAPERONE AGAINST EMPLOYER "ARISE OUT OF" EMPLOYEE'S SEXUAL MISCONDUCT – EXCLUSION APPLIES

The Fifth Circuit recently addressed whether negligence claims against the named insured, Radiology Associates, asserted after an employee inappropriately touched a patient while performing an ultrasound, were covered under a professional liability policy and determined that coverage was excluded. In *National Fire Insurance Company of Hartford v. Radiology Associates, L.L.P.*, 2011 WL 3444213 (5th Cir. (Tex.) August 8, 2011), the trial court granted summary judgment in a declaratory judgment action finding that the insurer had a duty to defend claims that Radiology Associates was negligent in failing to provide a chaperone during the examination and for failing to monitor its employee. The insurers appealed.

On appeal, the Fifth Circuit observed that the complaint alleged facts against the employee establishing that a "sexual assault" occurred and that the policy exclusions for sexual misconduct and intentional acts applied. The court also examined Texas courts' analysis of the term "arising out of" in that the alleged acts need only bear an "incidental relationship to the described conduct for the exclusion to apply." Applying this standard to the allegations that Radiology Associates negligently failed to provide a chaperone, failed to post notices that patients had a right to a chaperone and failed to monitor its employees, the court found that the claims arose out of the employee's unauthorized sexual conduct. Accordingly, the court held that the insurers had *no* duty to defend and reversed and rendered judgment in favor of the insurers.

TRIAL COURT'S PREEMPTIVE SANCTIONS IN QUESTIONING WITNESS IN UNDERINSURED MOTORIST CLAIM HELD TO BE ABUSE OF DISCRETION

The Dallas Court of Appeals recently concluded that a trial court's limitation of deposition questions to an insured seeking underinsured motorist benefits regarding the any diagnosis and treatment received after his deposition in the tort underlying case, combined with a preemptive sanction of $100 for every question asked that was covered in the prior deposition, was an abuse of discretion.

In *In re State Auto Property & Casualty Insurance Company*, 2011 WL 3528266 (Tex. App. – Dallas, August 12, 2011), the insured settled with the other party after giving his deposition but before trial. He pursued underinsured motorist benefits and State Auto sought discovery and the insured's deposition. The insured filed a motion to quash seeking to limit the deposition to developments that occurred after the first deposition. The trial court agreed, even imposing preemptive sanctions for any questions previously asked in the underlying liability case. State Auto filed a petition for writ of mandamus.

The Dallas Court of Appeals observed that State Auto was not a party to the underlying lawsuit and defense counsel for the other party was not affiliated, nor did they communicate with State Auto in any way. Accordingly, the court concluded that the trial court's order denying discovery prevented State Auto from developing or presenting viable claims. This was found to be an abuse of discretion for which an appellate remedy would be inadequate and the Dallas court conditionally granted State Auto's petition for writ of mandamus directing the trial court to vacate its order on the motion to quash and for preemptive sanctions.

MORTGAGOR LACKS STANDING TO SUE INSURER UNDER LENDER-PLACED COMMERCIAL POLICY

Last Tuesday, a U. S. District Court judge in the Houston Division of the Southern District of Texas granted summary judgment to an insurer after finding that the mortgagor lacked standing to bring a bad faith lawsuit for claims related to hurricane damage to the insured property under a lender-placed policy. In *Barrios v. Great American Assurance Company,* No. H-10-3511 (S.D.Tex., August 16, 2011), the mortgage company secured insurance coverage to protect its interests after the owner failed to maintain coverage. The lender was the only named insured under the policy and after Hurricane Ike caused damage to the property, the insured paid the mortgagee's claim. The owner claimed that that the payments were insufficient to repair the damage and ultimately filed this lawsuit against the insurer alleging breach of contract, unfair claim settlement practices and other causes of action.

The insurer filed a motion for summary judgment asserting that the mortgagor lacked standing to sue under the policy. And the owner responded by expressing that equitable concerns should allow them to force the insurer to perform under the policy. But, they admitted or conceded that they had no privity nor standing under the policy. After reviewing the elements to be proved in support of the causes of action alleged, and finding that plaintiffs would be unable to support the causes of action alleged, summary judgment in favor of the insurer was granted.

STATE FARM WINS ARSON TRIAL IN DALLAS

Last week, a jury in a Dallas federal court found State Farm Mutual Automobile Insurance Company did not breach its policy and did not commit unfair claims settlement practices under Article 542 of the Texas Insurance Code in handling an alleged theft and fire claim under its auto policy with the insured. In *Nunn v. State Farm Mutual Automobile insurance Company,* No. 3:08-CV-1486-D, the insured sued State Farm alleging a host of contractual and extra-contractual claims arising out of State Farm's refusal to pay for damages to an expensive Range Rover allegedly caused by the theft and attempted burning of the vehicle in June 2007. Prior to trial, all but one of the extra-contractual claims were dismissed through dispositive motions. The jury trial focused on the insured's claims of breach of contract and inappropriate claims handling delays by State Farm. State Farm defended the case alleging the insured made material misrepresentations in the claims investigation, the insured failed to fully cooperate in the claims investigation, and a person seeking coverage (the insured's adult daughter) was involved in the alleged theft and fire to the vehicle. After a week-long trial, the jury found State Farm did not breach the contract and did not commit any unfair claim settlement practices. After the jury rendered its verdict, Judge Sidney Fitzwater promptly entered judgment in favor of State Farm.

Chris Martin, Debbie Rank and Vasilia Wilkes of our firm had the privilege of representing State Farm in this case. We congratulate State Farm on this victory, appreciate its willingness to take the case to trial, and recognize the invaluable assistance provided by its SIU team during the claim and the trial of this matter.

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