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TEXAS INSURANCE LAW NEWSBRIEF

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HOUSTON APPEALS COURT SIDES WITH AGENTS IN HURRICANE IKE FAILURE-TO-PROCURE DISPUTE

In *Houstoun, Woodard, Eason, Gentle, Tomforde & Anderson, Inc. v. Escalante's Comida Fina, Inc..*, 01-11-00746-CV (Tex. App. – Houston [1st Dist.], June 3, 2014), the Houston First Court of Appeals reviewed a jury finding against insurance agents concerning damages related to Hurricane Ike. Escalante's sued its former insurance agent, Houstoun, Woodard, Eason, Gentle, Tomforde and Anderson d/b/a Insurance Alliance for breach of contract and violations of the DTPA and the Texas Insurance Code. The breach of contract claim was based on the failure to procure an insurance policy with coverages allegedly requested and the DTPA and Insurance Code claims were for alleged misrepresentations and non-disclosure of information about the policy and the coverage afforded thereunder. In the trial court, the jury returned a verdict in favor of Escalante's and awarded actual damages and additional damages for a "knowing" violation of the DTPA and the Insurance Code, attorney's fees, costs, and pre- and post-judgment interest. Insurance Alliance appealed.

Between 2003 and 2008, Escalante's owned and operated four restaurants in the Houston area. Between 2003 and 2006, the property and casualty insurance policy on the restaurants was with Ohio Casualty Group. The Policy provided coverage against the loss of business income caused by an off-premises power or utilities outage. In 2005, Hurricane Rita struck Houston. Escalante's subsequently made a claim against the policy and Ohio Casualty paid the claim.

Patrick Torres, the president of Escalante's, testified that during this same time period, Insurance Alliance was seeking to regain Escalante's as a client. Escalante's provided Insurance Alliance with a copy of its then-current policy and agreed to purchase coverage under a new policy only if the coverage matched the current coverage. Torres emphasized that the coverage he sought had to be the same as that provided by the current Policy. Torres allegedly asked if the coverage under the new policy matched the current policy "apples to apples" and was allegedly assured that it did.

In reliance upon Insurance Alliance's assurances, Escalante's claimed later that it declined to renew its then-existing policy and, instead, purchased a new insurance policy issued by Allied Property & Casualty. In September 2008, Hurricane Ike caused a temporary loss of electrical power at all four Escalante's restaurants and Escalante's lost revenue as a result of the interruption. Apart from minor damage suffered at one location, none of the other restaurant locations suffered any physical damage, but all experienced food spoilage and some business interruption loss. Escalante's complained that it never recovered for these losses under the new policy because losses caused by an off-premises power failure were expressly excluded from coverage.

Escalante's maintained that had the new policy's coverage been identical to the prior policy, as Insurance Alliance had allegedly assured, the restaurants' losses would have been presumably covered. The parties agreed that to establish causation for its DTPA, Insurance Code, and breach of contract claims, Escalante's had the burden to show that its business interruption losses from Hurricane Ike that were not covered by the new policy would have been covered by the former one. Undertaking a sufficiency of the evidence review, the court found that because the former policy had an exclusion for "direct physical loss or damage to overheard transmission lines" and the evidence at trial conclusively established that the off-premises power failure did result from direct physical loss or damage to overhead power lines, the jury's finding otherwise (i.e., that the former policy's exclusion did not apply), was not supported by legally sufficient evidence. The court reversed the judgment and rendered a new judgment in favor of Insurance Alliance.

DALLAS FEDERAL COURT DISMISSES CLAIMS FOR EQUITABLE SUBROGATION AGAINST THREE PRIMARY INSURERS

A Federal District Court Judge in Dallas recently granted motions to dismiss claims against three primary insurers in a suit seeking equitable subrogation for amounts paid to settle a construction defect case. In *Trammell Crow Residential Co. v. St. Paul Fire Ins. Co*., No. 3:11-CV-2853-N (N.D. Tex. May 27, 2014), the court dismissed third-party subrogation claims against three primary insurers and an equitable subrogation claim against an insured.

Trammell Crow initiated this lawsuit to recover amounts paid to settle a multi-million dollar construction defect suit from its insurers. The excess carrier, National Union, filed a third-party complaint against Trammell Crow's primary insurers Virginia Surety, Old Republic, and First Specialty for equitable and contractual subrogation to recover the amount National Union contributed to the settlement. National Union also brought counterclaims against Trammell Crow for breach of contract and equitable subrogation. Trammell Crow, Virginia Surety, Old Republic, and First Specialty all filed motions to dismiss National Unions counterclaims and third-party claims.

Federal District Court Judge David Godbey first addressed Trammell Crow's motion to dismiss the counterclaims National Union filed for breach of contract and equitable subrogation. He found that under Texas law an insurer cannot seek subrogation on its own behalf or against its own insured. Judge Godbey did not find any of National Union's arguments persuasive to support an exception to the general anti-subrogation rule and dismissed the subrogation counterclaims against Trammell Crow. As to the breach of contract claim, Trammell Crow argued that the Court should dismiss the contract claim based on Rule 12(f) as redundant of National Union's affirmative defenses. The Court found that Rule 12(f) is a "drastic" remedy and denied Trammell Crow's motion as to breach of contract.

Judge Godbey then turned to National Union's third-party equitable and contractual subrogation claims against Virginia Surety, Old Republic, and First Specialty. The primary insurers argued that National Union cannot subrogate against them under either theory because their primary coverage policies do not overlap temporally with National Union's excess coverage policy. The Court agreed and found that an excess insurer may *only* subrogate against the underlying primary insurer and other excess insurers; it may not subrogate against primary insurers whose policies do not overlap temporally with the excess policy. The Court further found that to hold otherwise would allow an excess insurer to "circumvent Texas's anti-stacking rule by combining multiple policies to exceed the policy limit." Based on these findings, Judge Godbey granted the three primary insurers motion to dismiss for failure to state a claim.

SNOWMOBILES IN TEXAS? HOUSTON APPELLATE COURT EXAMINES THE RECREATIONAL-VEHICLE EXCEPTION TO THE MOTOR-VEHICLE EXCLUSION IN A HOMEOWNER'S POLICY

In *Oleksy v. Farmers Ins. Exchange*, 410 S.W.3d 378, Tex.App.— Hous. [1 Dist.], Jul. 30, 2013, review denied (June 6, 2014), Houston's First Court of Appeals examined the applicability of the motor-vehicle exclusion and recreation vehicle exception in a homeowner's policy. In 2007, Lawrence S. Oleksy, a Texas resident, went snowmobiling in New York with his friend Paul Pochron. Pochron was seriously injured when his snowmobile collided with Oleksy's. Pochron and his wife later sued Oleksy in Fort Bend County, Texas. Pochron alleged that Oleksy was a resident of Texas and the snowmobile accident occurred in New York. Oleksy filed a declaratory judgment action against Farmers Insurance, his homeowner's insurance carrier, seeking a declaration that Farmers had a duty to defend and to indemnify him in the lawsuit filed by Pochron. Although his homeowner's policy included an exclusion for personal injuries arising from the use of motor vehicles, Oleksy based his claim for coverage on an exception to the exclusion that it did not apply to:

(1) motor vehicles which are not subject to motor vehicle registration and are:

....

(d) designed and used for recreational purposes; and are:

(i) not owned by an insured; or

(ii) owned by an insured while on the residence

premises.

Farmers filed an answer, counterclaim, and third-party petition for declaratory relief naming Pochron as a third-party defendant and seeking a declaratory judgment that Oleksy was not entitled to coverage because the motor-vehicle exclusion applied. Both parties asserted there was a conflict of law issue on whether or not snowmobiles were subject to motor-vehicle registration.

The parties both filed motions for summary judgment. The trial court granted summary judgment for Farmers, denied Olesky's motion, and issued a final declaratory judgment holding the insurance policy provided no coverage for the snowmobile accident and Farmers had no duty to defend or indemnify. On appeal, the Houston appellate court found the trial court erred in granting Farmer's summary judgment motion because there was no conflict of law issue and in both Texas and New York snowmobiles were *not* subject to "motor-vehicle registration." As such, it reversed and remanded to the trial court. Justice Keyes, in a detailed dissenting opinion, characterized the majority opinion as "advisory" and believed the trial court erred in granting Farmers summary judgment and in not granting Olesky's. The dissent concluded that the appellate court should reverse and render in favor of coverage for the insured.