

# TEXAS INSURANCE LAW NEWSBRIEF

JUNE 17, 2014

## HOUSTON COURT OF APPEALS ORDERS SEVERANCE AND ABATEMENT OF EXTRA-CONTRACTUAL CLAIMS

The Houston First Court of Appeals conditionally granted a carrier's writ of mandamus and ordered the carrier's motion to sever extra-contractual claims from the breach of contract suit be granted, and the extra-contractual claims abated in *In Re Progressive County Mutual Insurance Company*, No. 01-14-00199-CV (Tex.App.-Houston [1<sup>st</sup> Dist.] June 12, 2014.)

Following an automobile accident with an uninsured motorist and while investigation into the claim was ongoing, Guia sued her insurer, Progressive, for both breach of the uninsured motorist provisions in her policy and various extra-contractual claims. Guia served numerous discovery request on Progressive, some of which were not relevant to the breach of contract claim. Progressive filed a motion to sever the breach of contract claims from the extra-contractual claims. The court ordered the motion to sever abated and allowing discovery to move forward on all claims until the pretrial hearing. Progressive filed a writ to compel the severance and abatement of the extra-contractual claims.

The Houston Court of Appeals recognized that severance has been required in cases where a carrier makes a settlement offer. The severance was required in order to avoid prejudice in the breach of contract case. In the instant case, there had not been any settlement offers.

The Houston Court of Appeals recognized that severance may be required in "other compelling circumstances." In the instant case, "other compelling circumstances" was found in avoiding discovery that was irrelevant to the breach of contract case.

## TRIAL COURT ABUSES DISCRETION IN SUBMITTING JURY QUESTION ON LOSS OF USE DAMAGES IN A TOTAL LOSS CASE

In *American Alternative Insurance Corporation v. Robert Davis and J & D Towing, LLC*, No. 10-13-00275-CV (Tex.App.- Waco June 12, 2014), the crux of the case concerned whether a chattel owner should be compensated for loss of use damages suffered when a wrecker is rendered a total loss in a motor vehicle accident. The owner of the wrecker was unable to continue operations for about four months. He claimed he could not replace the wrecker because the at fault driver's insurance carrier had "low balled" him on the value of the wrecker. After finally settling with that carrier, the owner made a loss of use claim under his under-insured motorist policy. The claim was denied and suit followed.

The Waco Court of Appeals recognized the long standing rule in Texas that in a suit for damages for personal property that has been totally destroyed, the proper measure of damages is the fair market value of the property at the time it was destroyed. However, an owner can recover both the repair cost and loss of use damages if the vehicle is repairable. In this case, it was undisputed that the wrecker was unrepairable.

The Waco Court of Appeals declined to follow precedent from another Texas court holding loss of use damages were recoverable in total loss cases when an insurance company unreasonably delays in paying a claim. However, the Waco Court of Appeals recognized, 1) the owner did not submit a jury question on whether any insurance carrier unreasonably delayed paying a claim, and 2) such a change in long standing Texas law is best handled by the Texas Legislature or the Texas Supreme Court. Thus, it was held that the trial court abused its discretion in submitting a jury question authorizing loss of use damages in a total loss case.

## FIFTH CIRCUIT COURT OF APPEALS CERTIFIES QUESTION TO THE TEXAS SUPREME COURT

In *McGinnes Industrial Maintenance Corp. v. Phoenix Insurance Company*, 2014 WL 2599926 (5<sup>th</sup> Cir. June 11, 2014), the United States Fifth Circuit Court of Appeals certified the following question of Texas law to the Texas Supreme Court;

Whether the EPA's PRP letters and unilateral administrative order, issued pursuant to CERCLA, constitute a "suit" within the meaning of the Plaintiff's CGL policies, triggering a duty to defend.

MDJW will continue to monitor this case as it proceeds to the Texas Supreme Court for additional briefing and oral argument on this important environmental coverage question.