The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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UNION INSURANCE OBTAINS DISMISSAL OF HURRICANE COVERAGE ACTION BY BANKRUPTCY COURT & IS AWARDED ATTORNEYS' FEES

Recently, Union Insurance Company successfully defended, and recovered its attorneys' fees, in an adversary proceeding in bankruptcy court brought by the debtor in possession for building damages allegedly caused by Hurricane Ike. *Gulf Freeway Plaza, LLC v. Union Insurance Company*; Adversary Proceeding No. 10-03378; in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. Union successfully defended the adversary proceeding by obtaining a dismissal of all claims against it. Union sought dismissal on the basis that the debtor should be judicially estopped from pursing the adversary proceeding because it failed to disclose the claim to the bankruptcy court in its schedules, because it caused a related entity to bring a lawsuit outside of the bankruptcy against Union, and because the corporate representative of both entities gave conflicting testimony in the two lawsuits regarding the claim.

In the adversary proceeding, during a hearing to obtain a turnover of insurance proceeds held by the lienholder, the corporate representative testified that the building had been repaired and was ready to be placed back into service, and presented the court with supporting projected income schedules. In the non-bankruptcy proceeding, the same person (acting as corporate representative for a related entity) testified that the building required millions in repair and that it was not fit to be used for any purpose. After hearing the evidence obtained in both suits, the bankruptcy court ordered the adversary proceeding dismissed and awarded Union its costs and attorneys' fees for having to defend the action.

Editor's Note: Jamie Cooper and Jeff Tinkham of Martin, Disiere, Jefferson & Wisdom represented Union in this case. Jamie is a member of the firm's insurance team and Jeff is the firm's bankruptcy specialist. The firm wishes to thank Union for allowing us to undertake the challenges involved in a bankruptcy proceeding that contained complex insurance issues.

FIFTH CIRCUIT PANEL REJECTS ARGUMENT THAT INSURED'S CLIENT IS IMPLICITLY COVERED AS ADDITIONAL INSURED UNDER POLICY

In an appeal of a maritime-insurance dispute between the owner of a large fleet of vessels, a ship repair company, and the repair company's insurer, the Fifth Circuit held last week that the repair company had agreed to defend, indemnify, and procure insurance for the fleet owner, but that the fleet owner was not covered by the policy at issue. *One Beacon Ins. Co. v. Crowley Marine Svcs., Inc.*, — F.3d —, 2011 WL 3195292 (5th Cir. July 28, 2011), arose out of indemnity demands raised by the fleet owner, Crowley Marine Services, following a workplace injury lawsuit by the employee of a subcontractor of the repair company, Tubal-Cain Marine Services, brought against both Crowley and Tubal-Cain. The appellate court's opinion focuses primarily on the dispute between Crowley and Tubal-Cain, in which Crowley

contended that the repair service order ("RSO") that it sent to Tubal-Cain incorporated certain language maintained at Crowley's website that purportedly required Tubal-Cain to obtain certain insurance, and to name Crowley as an additional insured. Tubal-Cain's attorney did not review the on-line material, and Tubal-Cain did not obtain the necessary insurance. Crowley also claimed that Tubal-Cain's Marine Comprehensive Liability Policy with One Beacon Insurance Company implicitly covered Crowley as an additional insured, even though Tubal-Cain did not procure coverage explicitly naming Crowley. The trial court found in favor of Crowley in its claims against Tubal-Cain, but found that the One Beacon policy did not cover Crowley as an additional insured.

The Court of Appeals affirmed the trial court in all respects. In a thorough opinion, Circuit Judge Carolyn King explained that even though the RSO did not give precise instructions how to find the on-line terms and conditions, and even though the terms and conditions "were displayed in approximately four-point font," the course of dealing between Tubal-Cain and Crowley and the incorporation language in the RSO rendered the terms and conditions binding on Tubal-Cain. Thus, Tubal-Cain was required to defend and indemnify Crowley.

Crowley was not, however, entitled to coverage under Tubal-Cain's insurance policy with One Beacon. The trial court held that an oral agreement between Tubal-Cain and Crowley, the RSO, and a later invoice sent by Tubal-Cain together formed an "insurable contract" under the policy. However, the trial court further found that Crowley was not specifically named as an additional insured anywhere in the policy, and therefore that Crowley was not entitled to additional insured coverage. The Court of Appeals rejected Crowley's argument that the policy implicitly included Crowley as a named insured because Crowley was a party to an "insurable contract." The Court therefore did not reach One Beacon's alternative argument on appeal that the agreements between Crowley and Tubal-Cain did not constitute an insurable contract.

INSURED'S FAILURE TO DISCLOSE CRIMINAL RECORD RENDERS POLICY VOID & LEADS COURT OF APPEALS TO RENDER TAKE-NOTHING JUDGMENT

The San Antonio Court of Appeals last week reversed a trial court judgment on a jury verdict awarding $154,251.31, and entered a take-nothing judgment based in large part on the insured's misrepresentation of her criminal history. In *Texas Farm Bureau Mut. Ins. Co. v. Rogers*, — S.W.3d —, 2011 WL 3120645 (Tex. App.—San Antonio July 27, 2011), the jury had found that the insured made a material misrepresentation in her policy application, and that the insurer ratified the policy. The Court of Appeals held that the misrepresentation rendered the policy void but the void policy was not susceptible to ratification.

In two applications for an insurance policy, the insured denied she had ever been convicted of a criminal offense. In fact, she had been convicted for DWI, public intoxication, theft, assault, possession of a controlled substance, burglary and forgery, along with numerous probation violations. The insured's house was destroyed by a fire, and during the insurer's investigation, she admitted to her criminal record. The insurer rescinded the policy as of the original application date and returned the insured's premium payment. The jury was asked whether the insured made a material misrepresentation in her applications, and answered "yes." The Court of Appeals therefore held that the policy was void and, as a result, the jury's second finding that the policy was ratified could not stand.

In a separate issue, the Court held that the insured's heirs could not maintain her Deceptive Trade Practices Act claim. The insured died during the pendency of the lawsuit and DTPA claims do not survive the death of the original consumer.

HURRICANE IKE PLAINTIFF'S FORM PLEADING FAILS TO OVERCOME REMOVAL TO FEDERAL COURT

Last week, Federal District Court Judge Melinda Harmon from Houston quickly dispatched a motion brought by the Mostyn Law Firm seeking a remand to state court based on the allegations against adjusters contained in the Mostyn firm's form Hurricane Ike pleadings. In *Gonzales v. Homeland Ins. Co. of N.Y.*, 2011 WL 3104104 (S.D. Tex. July 25, 2011), the court held that the Plaintiff's pleadings did not contain facts sufficient to sustain a claim against the defendant-adjusters, and therefore could not defeat federal diversity jurisdiction. Specifically, while the Plaintiff argued that the adjuster "created a wholly deficient report as a result of his substandard inspection of the claim, which was in part the cause of much of the Plaintiff's damages complained about in this suit," the pleadings did not contain any specific facts to "explain the what, where, when, and how, to support these allegations." As such, remand was denied.

HURRICANE IKE COMMERCIAL PLAINTIFF'S CLAIMS AGAINST INSURER'S PARENT COMPANY DISMISSED & COURT STAYS CASE FOR APPRAISAL

Liberty Mutual was dismissed last week from a large Hurricane Ike commercial breach of contract and bad faith case and the remainder of the case was stayed pending appraisal. In *Medistar Twelve Oaks Partners, Ltd. v. American Economy Ins. Co.*, Case No. 4:09-cv-03828 (S.D. Tex. July 27, 2011), Chip Merlin of The Merlin Group in Tampa, Florida brought suit against three carriers on behalf of the owner of a high rise building in Houston allegedly damaged by Hurricane Ike. Last week, Federal District Court Judge Melinda Harmon (from the Houston Division of the Southern District of Texas) ruled on several related motions urged by the carriers. Among other issues, the defendant-insurers — American Economy, Liberty Mutual and Safeco — moved that Liberty Mutual be dismissed because it was not a party to the insurance contract, and contended that there could be no breach of contract by the remaining insurers because they timely and properly invoked the appraisal provision of the insurance contract. The court granted the motion to dismiss as it related to Liberty Mutual and stayed the remainder of the case pending the result of the appraisal proceeding.

Specifically, Judge Harmon agreed that Liberty Mutual was not a party to the insurance contract at issue in the case, which was a Safeco policy sold to Medistar by a Safeco representative, and which listed American Economy as an insurer. Because Liberty Mutual is a separate entity and Medistar did not assert any theory for piercing the corporate veil, Liberty Mutual could not be held liable for Safeco's actions.

Judge Harmon also agreed that "because the appraisal process is ongoing, . . . there is no denial of payment to give rise to breach of contract and breach of duty of good faith and fair dealing." Thus, she concluded, these claims were not ripe and, if the parties settled via appraisal, the claims would not mature. Judge Harmon determined that if appraisal failed then the contract and bad faith claims would be more appropriately addressed by summary judgment. Thus, she ordered the case stayed pending resolution of the appraisal process, and that if appraisal did not result in a final conclusion of all issues, one or both sides should file a motion for summary judgment following appraisal's conclusion. She also noted that Medistar's Prompt Payment claim was "premature . . . because the validity of Medistar's claims is still in litigation in the appraisal process."

Also significant in this case was Judge Harmon's dismissal of the DTPA claims against all Defendants due to Medistar's failure to plead these allegations with sufficient specificity under the federal pleading

guidelines. After previously ordering Medistar to amend its pleadings to meet the guidelines, and finding the pleadings still wanting, Judge Harmon dismissed these causes of action leaving pending those claims which, according to the court, could be resolved by appraisal and, if necessary, summary judgment after appraisal.

Editor's Note: Chris Martin and Barrie Beer at MDJ&W, together with Greg Weinstein and Keith Langley at Langley Weinstein in Dallas, have the privilege of representing the Defendants in this ongoing commercial Ike case.

MDJW OPENS NEW CONFERENCE CENTER IN HOUSTON OFFICE

The renovation of Martin, Disiere, Jefferson & Wisdom's office space in downtown Houston's historic Niels Esperson Building was recently completed and, after a 6-month temporary relocation while repairs were completed, the firm recently returned to its permanent facilities. The firm has committed to another 10 years in the downtown space it has occupied since the firm's opening 12 years ago, but we've added a new floor to serve as our main reception area and conference center. Clients and visitors will enjoy the new amenities and opportunities for conferences, mediations, depositions, arbitrations, and continuing education that the wonderful new space provides. Visitors, deliveries, and mail should now be sent to MDJW at:

808 Travis Street, *20th Floor*
Houston, Texas, 77002.