

# TEXAS INSURANCE LAW NEWSBRIEF

JANUARY 27, 2015

## LUBBOCK FEDERAL COURT GRANTS INSURER'S MOTION TO DISMISS PREMATURE DECLARATORY JUDGMENT ACTION

The District Court for the Northern District of Texas, Lubbock Division, recently granted a motion to dismiss filed by Sentinel Insurance Company Limited ("Sentinel") and Hartford Insurance of the Midwest ("Hartford"). In *Byrd Telecom v. Sentinel Insurance Company, et. al.*, 5:13-CV-188-C (N.D. Tex)(December 2, 2014)(S. Cummings), Plaintiffs Byrd Telecom and Circle B Electric and Tower sued Sentinel and Hartford seeking a declaration that Defendants have a duty to defend them against claims arising out of an accident that occurred in Mississippi and a duty to indemnify them in the event of a judgment arising out of the same accident.

This insurance action arose out of a Mississippi workplace accident that resulted in the death of two men. Byrd Telecom and Circle B were allegedly involved in the accident. At the time of the accident, Byrd Telecom and Circle B had insurance policies with Sentinel and Hartford for general liability, worker's compensation, employer liability, and umbrella coverage. On November 27, 2013, the estate and heirs of one of the deceased men filed a wrongful death suit in Mississippi state court against Byrd Telecom, Circle B, and several other defendants. The Mississippi case has not yet been resolved. Sentinel and Hartford accepted the defense of Byrd Telecom and Circle B in that case under a reservation of rights. Plaintiffs filed this case in the 99th Judicial District Court of Lubbock County, Texas, on July 12, 2013, asserting claims for breach of contract and seeking declaratory judgment as to Defendants' duty to defend and indemnify Byrd Telecom and Circle B. Defendants removed the case based on diversity jurisdiction.

Plaintiffs sought a declaration that Defendants have a duty to defend them against claims arising out of the Mississippi accident and a duty to indemnify them in the event of a judgment arising out of the same accident. The basis of the declaratory judgment actions was the fact that Defendants are defending Plaintiffs in the underlying case under a reservation of rights. The Court noted that the purpose of a reservation of rights is to notify the insured of a potential or actual conflict of interest so that the insured may hire their own counsel, if they so choose and that defending a case under a reservation of rights will not breach the duty to defend. The Court then concluded Plaintiffs' declaratory judgment action regarding Defendants' duty to defend is not ripe because there is no actual controversy over this issue because Defendants were currently fulfilling their duty to defend the Plaintiffs in the underlying case. Further, the fact that Defendants are defending Plaintiffs pursuant to a reservation of rights merely means that they reserve the right to dispute their duty to pay a judgment, not that they are disputing their duty to defend the insured. The Court also found that Plaintiffs' declaratory judgment action regarding Defendants' duty to indemnify is also not ripe because there is no judgment against the Plaintiffs and, according to well established Texas law, the issue of Defendants' duty to defend is not justiciable until the underlying case is concluded.

Finally, the Court addressed the breach of contract claim that consisted of one paragraph in the complaint. The claim was based on Defendants' allegedly wrongful termination of an insurance policy. However, under the section titled "breach of contract" in the complaint, they failed to state which policy was terminated or when this termination occurred. Further, in respect to damages, Plaintiffs merely stated that they were left without coverage. The Court concluded that such a general pleading constitutes the type of "bare assertion and legal conclusion that is impermissible under federal law" and that the breach of contract claim should be dismissed. The Court dismissed all claims without prejudice.

*Editor's Note:* Christopher Martin and George Lankford of Martin, Disiere, Jefferson and Wisdom were privileged to represent Sentinel Insurance Company Limited and Hartford Insurance of the Midwest in this matter and we take this opportunity to congratulate our clients on this significant win.

## SOUTHERN DISTRICT OF TEXAS FINDS THAT INSURED'S FAILURE TO TIMELY FILE ADDITIONAL PROOF OF LOSS PRECLUDES COVERAGE FOR REMAINDER OF IKE FLOOD LOSS CLAIM

The District Court for the Southern District of Texas, Galveston Division, recently granted summary judgment dismissing all claims against Texas Farmers Insurance Co. In *Fennelly v. Texas Farmers Insurance Co*, 2015 WL 106061 (S.D. Tex)(January 7, 2015), Plaintiff Jason Fennelly sued Texas Farmers for flood damage to his property caused by Hurricane Ike. Fennelly submitted two timely Proof of Loss ("POL") documents to Texas Farmers, his insurer under a Standard Flood Insurance Policy ("SFIP") issued through the National Flood Insurance Program. In response, Farmers made a payment to Fennelly. On August 9, 2009, the FEMA-extended deadline for filing a POL expired. On January 11, 2011, Fennelly filed his third POL for about \$112,000.00 more in benefits. Farmers adjusted this claim and approved it in the amount of only about \$7,000.00. On January 20, 2011, the adjuster's supplemental report was sent to FEMA with a waiver request. On January 21, 2011, FEMA approved a waiver for the amount of the loss and scope of the damages outlined in the adjuster's report. On January 25, 2011, Farmers sent Fennelly a letter informing him that it had approved the \$7,000.00 supplemental amount, had rejected the remaining \$105,000.00 of his claim and was "reserving all rights and defenses under the policy"; the supplemental settlement check was enclosed. On March 15, 2011, Fennelly demanded an appraisal of the remainder of his claim, but Texas Farmers denied his request because, in its opinion, its disagreement with the scope of damages claimed by Fennelly made an appraisal inappropriate. On January 24, 2012, Fennelly sued Texas Farmers in an effort to recover the remainder of his POL under the policy.

The single dispositive issue considered by the Court was whether FEMA expressly waived any challenge to the entirety of the third POL or whether FEMA's waiver was limited to only the \$7,000.00 portion of the POL approved by the Texas Farmers adjuster. The Court began its analysis by noting that, absent a waiver by FEMA, a POL must be timely filed or else no benefits are recoverable and that only FEMA's Federal Insurance Administrator under the National Flood Insurance Program can waive any provision of the SFIP. Most importantly, Texas Farmers cannot waive any provision of the SFIP. In this case, the Administrator's waiver stated specifically: "This limited waiver is for only the amount of the loss and scope of the damages outlined in this request and otherwise does not waive the Proof of Loss or any other requirement of the Standard Flood Insurance Policy..." The Court concluded that when considered in conjunction with the adjuster's supplemental report it was clear that the waiver was

limited to the \$7,000.00 recommendation of the adjuster. The Court also disagreed with Fennelly's argument that Texas Farmers' continued adjustment of the claim waived the POL provision for timely submission, finding specifically that "the mere fact that an insurer continues

to evaluate an otherwise untimely claim will not, alone, constitute a waiver of that defect." Based on these findings, the Court granted the summary judgment and dismissed all claims against Texas Farmers.