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TEXAS INSURANCE LAW NEWSBRIEF

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NOTICE TO A BROKER IS NOT NOTICE TO THE UMBRELLA CARRIER

In *Berkley Regional Ins. Co. v. Philadelphia Indemnity Ins. Co*., 2015 WL 329421 (5th Cir. Jan. 27, 2015), the core of the dispute concerned whether or not the umbrella policy's notice requirements were satisfied by notice of the claim to the broker who placed the umbrella policy. The Court of Appeals held it was not because the broker was not an agent for the carrier regarding claim notification and prejudice existed as a matter of law.

Towers of Town Lake Condominiums was sued in state court on a premised liability claim. Towers was insured by a $1,000,000 primary policy with Nautilus Insurance Company and a $20,000,000 umbrella policy with Philadelphia Indemnity Ins. Company. Towers was defended by Nautilus. During the suit, Towers tendered the petition and notice of the suit to an alleged agent of Philadelphia, Wortham Insurance Group, the broker for the Umbrella policy. Notice never actually got to Philadelphia, and a jury delivered a verdict of $1,654,663 against Towers. With interest and cost, the Judgment was entered for $2,167,300. Nautilus tendered its limits and interest. Towers then gave direct notice to Philadelphia, and demanded they pay the excess. Philadelphia refused to pay based on late notice and prejudice. Nautilus obtained a supersedeas bond on the judgment through Berkley Regional Ins. Co. and Berkley paid the remainder to the Plaintiff in exchange for an assignment of the Plaintiff's and Tower's rights under the Umbrella Policy.

Nautilus brought the instant suit against Philadelphia as assignee and subrogee of the Plaintiff and Tower. The district court granted a summary judgment in favor of Philadelphia based on lack of notice and that notice to the broker did not constitute constructive notice to Philadelphia, and the lack of notice constituted prejudice to Philadelphia.

On appeal, the Court of Appeals noted that the Umbrella Policy required Towers to "see to it" that Philadelphia was "notified promptly." This language does not require direct notice to Philadelphia, so the Court looked to the contract between Philadelphia and the broker to see if the broker had authority to receive notice.

On this issue, the Court of Appeals held the 2002 Agency Agreement "at least arguably created an agency relationship," however, the contract expressly provided that the broker had authority to solicit and place business for Philadelphia, but was silent about accepting notice of a claim. The Court noted: "The claims process is distinct from policy brokering, and even though Wortham may have had authority to broker policies, this authority did not impliedly include authority to accept notice of claims."

The Court of Appeals also held that this notice was not just late, but "wholly lacking." Thus, Philadelphia was denied the opportunity to investigate or participate in any aspect of the suit including mediation. Whether or not Philadelphia would have participated in the trial was deemed irrelevant. The Umbrella Carrier was prejudiced as a matter of law, and the summary judgment in favor of Philadelphia was affirmed.

DECLARATORY JUDGMENT ISSUED IN COVERAGE CASE NOT FINAL DESPITE MOTHER HUBBARD CLAUSE

In *Farm Bureau County Mut. Ins. Co. v. Roger*, No. 14-0279 (Tex. Jan. 30, 2015), the Supreme Court of Texas examined a trial court's order issued after a summary judgment was granted in a coverage case, without a full trial, and which contained a Mother Hubbard clause. The question is whether or not this order constituted a final judgment for appeal purposes because it didn't address attorney fees but it did have a Mother Hubbard clause. The Court held it did not and dismissed the matter for want of jurisdiction.

The Court recognized the long standing rule that, "the language of an order or judgment *can* make it final, even though it should have been interlocutory, if the language expressly disposes of all claims and all parties." This is true, even if it erroneous. "If the trial court's intent to enter a final judgment is 'clear from the order, then the order is final and appealable, even though the record does not provide an adequate basis for rendition of judgment.'"

The Court previously held in *Lehman v. Har-Con Corp*., 39 S.W.3d 191 (Tex. 2001), that "a judgment issued without a conventional trial is final for purposes of appeal if and only if [1] it actually disposes of all claims and parties then before the court, regardless of the language, or [2] it states with unmistakable clarity that it is a final judgment as to all claims and all parties."

A Mother Hubbard clause attempts to fulfill requirement #2 by stating "all relief not granted is denied." However, the Court rejected this language as "any indicia of finality" for claims not expressly mentioned.

In this case, the Farm Bureau failed to request an award of attorneys' fees in its motion for summary judgment or to attach any evidence. Thus, the Court concluded the parties presented no evidence that suggested the trial court intended the Mother Hubbard clause to deny attorney fees. Thus, the trial court's order did not dispose of all parties and claims.

FIRST PARTY PROPERTY CASE AGAINST ENGINEERING DEFENDANT AS DEFACTO ADJUSTER DISMISSED FOR FAILING TO FILE CERTIFICATE OF MERIT

In *Craig Penfold Properties, Inc. v. The Travelers Cas. Ins. Co., et al;.*, 2015 WL 356885 (N.D. Tex. – Dallas Div. Jan. 28, 2015), the Plaintiff's state court suit was removed to federal court. Plaintiff amended its existing first party property suit to include Unified Building Sciences & Engineering ("UBSE") as the *defacto* adjuster who they claimed negligently failed to properly investigate the insurance claim and also failed to properly adjust it. BSE filed a motion to dismiss under Rule 12(b)(6) for failing to state a claim.

The Court relied on an unpublished 5th Circuit Court of Appeals decision to hold that the Texas law "fair notice" standard would be applied to the allegations to determine if a claim had been stated. The Court also applied the new Tex.R.Civ.P. 91a rule that allows for dismissal if "a cause of action has no basis in law if the allegations, taken as true, together with inferences drawn from them, do not entitle the claimant to the relief sought."

The Court concluded the claims should be dismissed because Tex.Civ.Prac.&Rem.C sec. 150.002(a) requires the filing of a certificate of merit in any action for "damages arising out of the provision of professional services." The Court reasoned that "the issue is not whether the alleged tortious acts constituted the provision of professional services, but rather whether the tort claims arise out of the provision of professional services." The Court held that the claims did arise out of the provision of professional services by the engineering company because: UBSE inspected the property and found hail damage, UBSE wrote a report that the carrier relied upon, and they were sued for failing to recommend repairs in conformity with industry standards for roofs with the same or similar damage. Accordingly, the Court dismissed the claims without prejudice for failing to file the required certificate of merit.