The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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INSURER SECURES REVERSAL OF $8 MILLION KATRINA/RITA VERDICT IN DALLAS FEDERAL DISTRICT COURT

Last Tuesday, Mid-Continent Casualty Company won a major federal court victory when U.S. District Court Judge Sidney Fitzwater overturned a multi-million dollar verdict in favor of an insured in a case involving claims for damages from Hurricanes Katrina and Rita. In *Mid-Continent Casualty Co. v. Eland Energy, Inc.*, Nos. 3:06-CV-1576-D and 3:06-CV-1578-D, 2011 WL 2417158 (N.D. Tex. June 14, 2011), in a highly detailed opinion, Judge Fitzwater found insufficient evidence to support the extra-contractual causes of action asserted by Plaintiffs Eland Energy and Sundown Energy (collectively "Sundown"), upheld the jury's finding for Mid-Continent on Sundown's contract claim, and entered a judgment that Sundown take nothing.

In 2005, Hurricane Katrina caused an oil leak from Sundown's oil and gas facility in Louisiana. Following Hurricane Rita, the oil escaped a containment system built during the Katrina cleanup. Sundown was the target of a number of lawsuits, one of which Sundown settled for $2 million. Last summer, a jury returned a verdict awarding in excess of $8 million to Sundown based on its claims against Mid-Continent under the Texas Insurance Code and for alleged breaches of the duty of good faith and fair dealing. (Sundown asserted a number of other claims, some of which were defeated before trial, and some of which the jury rejected.)

Judge Fitzwater determined that the jury's bad-faith finding could not stand because there is no cause of action in Texas for breach of the duty of good faith in the third-party insurance context. The judge then turned to Sundown's statutory claims, and found that Sundown had presented insufficient evidence to support the jury's verdict. At length, the opinion examines and firmly rejects each of Sundown's grounds of recovery. The judge found insufficient evidence of the claimed Insurance Code violations, and also found insufficient evidence that the violations, if they existed, caused Sundown's damages. The court therefore reversed every portion of the jury's verdict in favor of Sundown, sustained every portion in favor of Mid-Continent, and entered a new judgment entirely in Mid-Continent's favor.

Martin, Disiere, Jefferson & Wisdom was proud to represent Mid-Continent in this case, with a team led by Chris Martin, Robert Dees, and Ethan Carlyle, along with many other MDJW lawyers and staff. The firm wishes to congratulate Mid-Continent and its personnel involved in this case for having the courage to try the case and for taking a strong stand for what it believed to be right.

JUDGMENT UPHELD IN FAVOR INSURER & AGENT WHERE INSURED SOUGHT FIRST-PARTY COVERAGE UNDER THIRD-PARTY POLICY

The Dallas Court of Appeals affirmed a trial court's summary judgment against an insured who asserted a number of different claims related to his garage liability insurance policy. In *Marshall Howard d/b/a Four Seasons Automotive v. Burlington Insurance Co.*, No. 05-09-01324-CV, 2011 WL 2279067 (Tex. App.—Dallas June 10, 2011), the court of appeals rejected the insured's argument that a quote and binder issued by McClelland & Hine, Inc. (MHI) conferred coverage for personal property and equipment though the Burlington policy did not contain any such coverage. The court also rejected the insured's alternative theory that if his policy did not provide first-party coverage, that Burlington and MHI should be held liable under a variety of misrepresentation theories.

The insured owned an auto repair business that was damaged by fire. Burlington paid the insured's third-party claims, but denied coverage for the insured's equipment and personal property. The insured sued Burlington and MHI, asserting that the quote and binder issued by MHI modified the policy to provide first-party coverage, or, if the policy was not modified, then the quote and binder were material misrepresentations in support of a number of statutory and common-law claims.

The court held, first, that the quote and binder did not state or even suggest that the insured had obtained coverage for his personal and business personal property. The court further held that even if the quote and binder contained such representations, they could not modify the policy language. Finally, the court held that the numerous misrepresentation-based claims failed because the quote and binder contain no misrepresentation or actionable omission, and because statements by the independent insurance broker who dealt with MHI on the insured's behalf could not be attributed to MHI or Burlington.

PRESENCE OF COCAINE IN DECEASED'S SYSTEM NOT ENOUGH TO SUPPORT DENIAL OF WORKER'S COMP ON INTOXICATION GROUNDS

The Texas First Court of Appeals in Houston held last Thursday that non-expert testimony was sufficient to support a trial court's finding that an insured was not intoxicated at the time of the accident that killed him, even though post-mortem testing found cocaine in the deceased's system. In *Dallas National Insurance Co. v. Lewis*, No. 01-10-00528-CV (Tex. App.—Houston [1st Dist.] June 16, 2011) (Westlaw citation not yet available), a shuttle bus driver who died when his vehicle caught fire was found to have cocaine in his blood stream. The worker's compensation carrier rejected the claim based on the statutory provision that a carrier is not liable for compensation if the employee's injury occurred while the employee was intoxicated.

The court found that the lay witness testimony of the deceased's supervisor was sufficient evidence for a finding that the deceased was not intoxicated at the time of his death. An expert who testified at trial that the deceased had a "small amount" of cocaine in his system also testified that the amount was consistent with the behavior described by the supervisor. This evidence was held to be sufficient to uphold the trial court's finding that the deceased "had the normal use of his mental and physical faculties" and was not intoxicated when he died.

JURY FINDS NO LIABILITY IN HAILSTORM CASE INVOLVING 250 TOWNHOMES

Virginia-based Colony Insurance Company last week won a take-nothing judgment in a lawsuit brought by a homeowners association seeking coverage for roof damage to 250 townhomes. In *Summer Hill Village Community Association, Inc. v. Colony Insurance Co.*, No. 2008-50184, in the 133rd District of Harris County, Texas, the HOA contended that damage to the townhomes' composition shingle roofs

suffered major damage in a May 2007 hailstorm, and sued for $22 million. The jury sided with the insurer, whose investigation found no recent wind or hail damage to the roofs.

Our firm had the privilege of consulting with and assisting the carrier and lead defense counsel Bill Eggleston of Eggleston & Briscoe in Houston in certain aspects of this case before trial. We wish to congratulate Mr. Eggleston and his trial team on this very impressive trial victory. Congratulations on a job well done!

LEGISLATIVE UPDATE: TWIA DAMAGE-LIMITATION BILL CLEARS HOUSE; SENATOR OFFERS BILL TO ELIMINATE THE AGENCY

Last week, the Texas House of Representatives approved a bill that would limit TWIA's vulnerability in a lawsuit to actual damages, court costs, and some attorney's fees, and eliminate treble damages in TWIA cases. The legislation also contains a provision whereby a committee of Texas judges would assign the judges to hear TWIA lawsuits, a response to concerns that homeowners might enjoy home-court advantage with locally-elected judges. Having passed the House on Thursday, the bill now awaits the consideration of the state Senate.

In the Senate, meanwhile, a bill was filed on Thursday that would eliminate TWIA entirely. SB44, offered by Senator Troy Fraser of Horseshoe Bay, Texas, would require the TWIA commissioner to adopt a plan for the Association to cease all operations. Nineteen other senators co-signed the legislation. However, the Bill has only just been introduced, and has yet to be referred to committee, so its likelihood of success is uncertain at this point.

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