

TEXAS INSURANCE LAW NEWSBRIEF

JUNE 9, 2015

FIFTH CIRCUIT PROVIDES GUIDANCE ON PREEMPTION OF CLAIMS AGAINST PRIVATE INSURERS UNDER THE NATIONAL FLOOD INSURANCE PROGRAM

In a ruling issued just days before last month's historic flooding in Texas, the Fifth Circuit Court of Appeals discussed when policyholders can sue private insurers under policies issued under the National Flood Insurance Program (NFIP). The claim in *Spong v. Fidelity Nat. Prop. and Cas. Ins. Co.*, No. 13-41317, 2015 WL 3372293 (5th Cir. May 22, 2015), began when Hurricane Ike destroyed all improvements to the beachside property of Robert and Kerry Spong. After the Spongs submitted a proof of claim for \$208,300 to their flood insurer Fidelity National Property and Casualty Insurance, Fidelity denied the claim when it determined that the policy was void from its inception because the property was ineligible for flood insurance under the NFIP. The Spongs filed suit against Fidelity in state court, and Fidelity removed the action to the United States District Court for the Southern District of Texas.

The Spongs purchased an elevated home in a flood zone located on the Bolivar Peninsula in Galveston County. In order to secure a mortgage loan, the Spongs were required to obtain flood insurance, and attempted to do so through Fidelity. From the start of this process, however, there was confusion as to whether the property was located within the John H. Chafee Coastal Barrier Resources Center (CBRS), a protected area under federal law. Federal law prohibited the NFIP from issuing flood insurance for properties located within the CBRS. When the Spongs purchased the property and procured flood insurance from Fidelity, both they and Fidelity had incorrectly determined that the property was not located within the CBRS because of conflicting information from the previous property owners, the Spongs' insurance agent, the United States Fish and Wildlife Service, and the Federal Emergency Management Agency (FEMA). The Court found that one of the primary reasons for this incorrect determination was inaccurate information provided by the previous property owners' insurance agent to the Fish and Wildlife Services.

On summary judgment, Fidelity argued that the National Flood Insurance Act (NFIA) preempted state-law claims by policyholders against insurers that issued flood insurance policies governed by the Act. The Fifth Circuit in *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 754 (5th Cir. 2009), previously held that the NFIA did not preempt state-law claims related to the procurement of insurance policies. After rejecting Fidelity's attempt to overrule *Campo*, the Fifth Circuit clarified that while the NFIA does not preempt state-law procurement claims, it *does* preempt causes of action related to a private insurer's claims handling. The Court cited *Campo* to explain that "[t]he key factor to determine if an interaction with an insurer is 'claims handling' is the status of the insured at the time of the interaction between the parties. If the individual is already covered...the interactions between the insurer and insured...are 'claims handling' subject to preemption." Because the Spongs were in the position of "potential future policyholder[s]" at the time that Fidelity issued the invalid policy, they were not "already covered."

Turning to the procurement claims, the Court agreed with Fidelity that "certain aspects of the Spongs' claims cannot succeed." Specifically, the Court expressed doubts as to whether the Spongs could establish that they determinately relied on Fidelity's representations that the property was not located within the CBRS when they purchased the policy. The Court noted that the incorrect property information did not come from Fidelity, but rather from the previous property owners' insurance agent. The Court also looked to related cases involving the Federal Crop Insurance Act and Medicare for the proposition that that the Spongs had constructive knowledge that the Code of Federal Regulations prohibited the issuance of flood insurance in the CBRS. The Court concluded that the lower court's denial of Fidelity's motion for summary judgment was erroneous in part and remanded the case for reconsideration of the motion.

[Editor's Note: *Spong* will likely affect many claims arising out of recent catastrophic flooding in Texas. MDJW welcomes the opportunity to help insurers navigate through these potentially complex disputes].

AMARILLO COURT OF APPEALS RULES THAT APPRAISERS NEED ONLY BE DISINTERESTED IF REQUIRED BY THE POLICY

Last month, the Amarillo Court of Appeals held that an appraiser in an automobile-damage dispute was not required to be disinterested if the policy did not expressly require it. *Texas Farm Bureau Cas. Ins. Co. v. Sampley*, No. 07-13-00151-CV, 2015 WL 3463028, arose when the insured's personal vehicle suffered property damage and the parties disagreed about the scope of loss. The insured invoked the policy's appraisal provision and selected as her appraiser the same body-shop employee who had repaired her vehicle. After the insured rejected Texas Farm Bureau's demand for her to select a disinterested appraiser, Texas Farm requested a trial court to remove the appraiser.

On appeal, Texas Farm cited a Texas Supreme Court case from 1919 that discussed the importance of disinterestedness on the part of the appraisers. The Court rejected Texas Farm's position, noting that the cases it cited involved appraisal clauses that expressly required appraisers to be both competent *and* disinterested. Because the appraisal provision in the present case only required appraisers to be competent, the Court declined to impose a disinterestedness requirement independent of the contract language.

FEDERAL COURT IN AUSTIN GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER IN NARCOTICS EXCLUSION DISPUTE

Last week, federal District Judge Sam Sparks ruled in favor of Humana Insurance Company in a lawsuit brought after Humana's denial of healthcare benefits in *Crosey v. Humana Ins. Co.*, No. A-14-CA-205-SS, 2015 WL 3467160 (W.D. Tex. May 28, 2015). The claim arose when Ron Crosey, a policyholder of Humana, suffered a stroke after ingesting MDMA, commonly known as "ecstasy." Humana denied his claim for health benefits after determining that his injuries were excluded by the policy because they were "due to being intoxicated or under the influence of any narcotic unless administered on the advice of a health care practitioner."

In analyzing whether the exclusion applied, the Court first addressed the plaintiff's argument that MDMA was not a "narcotic" within the meaning of the policy. The plaintiff argued that narcotics referred only opium, opiates, cocaine, and related substances, that the term "narcotics" was therefore ambiguous that required construction in favor of the insured. The Court acknowledged that this was a legitimate argument, looking to the Texas Controlled Substances Act and its federal counterpart that classified MDMA as a "hallucinogen," with a separate definition of "narcotic" that did not include MDMA. However, the Court rejected these technical definitions and instead followed general rules of contract interpretation that look to a term's "ordinary and generally-accepted meaning." The Court concluded that the common meaning of "narcotic" is "illegal drug" and held that MDMA was therefore a "narcotic" within the meaning of the policy exclusion.

The Court next considered whether Mr. Crosey's stroke was "due to...being under the influence of [MDMA]." The plaintiff argued that this causation analysis required Humana to "prove, to a reasonable degree of medical certainty, based on a reasonable medical probability and scientifically reliable evidence," that the MDMA caused the stroke. Humana countered that it needed only to demonstrate that the MDMA was *a* cause, not the *sole* cause, of the stroke. The Court considered a variety of cases discussing similar causation issues, including a Fifth Circuit case observing that "Texas cases generally interpret alcohol exclusions to apply even where alcohol is not the sole cause of death." *Likens v. Hartford Life & Accident Ins. Co.*, 668 F.3d 197, 202 (5th Cir. 2012). Finding that these cases did not provide a definitive answer and that the phrase "due to" was ambiguous, the Court settled on requiring proximate causation, which requires "a substantial factor in bringing about injury or death, and without which the injury or death would not have occurred."

The Court then looked to the summary-judgment evidence and found that Humana had met its burden of proving that Mr. Crosey's MDMA ingestion proximately caused his stroke. First, his treating physician believed that the MDMA ingestion led to uncontrolled hypertension, which in turn caused the stroke. Second, the connections between MDMA, hypertension, and stroke were well documented in the evidence submitted by both parties. Third, Mr. Crosey's treating physicians provided no alternative explanations for the stroke. Finding no genuine issue of material fact regarding whether the stroke was "due to" narcotics ingestion, the Court granted summary judgment in favor of Humana and dismissed plaintiff's Insurance Code claims.

DRI NATIONAL BAD FAITH LITIGATION CONFERENCE – JUNE 17th-19th IN CHICAGO

Please join some of the nation's best in-house counsel and outside counsel who handle and manage bad faith cases across the country at the Insurance Bad Faith and Extra-Contractual Conference presented by the Defense Research Institute in Chicago on June 17th to 19th. Chris Martin of our firm is the Chair of this year's national bad faith litigation conference, which is presented every other year by DRI. The conference will address many of the cutting edge claims and litigation issues impacting carriers who are sued for bad faith and other extra-contractual claims across the nation. States with unique exposures, cutting edge discovery strategies, winning trial techniques, and legal updates will be provided by prominent in-house counsel and outside counsel who have a history of winning bad faith cases across the country. We hope to see many of our friends and clients at this great event in Chicago in three weeks.

Speakers, topics and registration information can be found on line at: www.dri.org