The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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HARRIS COUNTY JURY REJECTS "BAD FAITH APPRAISAL" CLAIMS

Last Thursday, a Harris County jury rejected an insured's claims asserting bad faith appraisal and other extra-contractual allegations in a first party homeowners' property damage claim. In *Hurt v. Liberty Mutual Fire Insurance Company*, No. 2009-33086, (127th Dist., filed May 27, 2009), the representative of the insured's estate disagreed with the insurer's $565,000 estimate to repair fire damage to the dwelling, and initially insisted (without documented support) that the dwelling was a total loss and demanded the $1,000,000 policy limit. The undisputed actual cash value amount was timely paid and Liberty Mutual promptly invoked appraisal. But instead of naming an appraiser, the estate filed a bad faith lawsuit. Liberty Mutual sought abatement of the lawsuit for failure of to comply with the insured's duties after loss, inadequate notice and moved to compel appraisal.

The trial court ordered appraisal and the process was completed while the lawsuit was abated. The umpire's actual cash value award was $322,000 higher than the amount initially paid but included both covered and non-covered repairs. In an effort to resolve the matter, Liberty Mutual reserved its policy and legal defenses in the event that the lawsuit proceeded, but it paid the full amount of the appraisal award. Following a two week trial, the jury took less than three hours to recognize Liberty Mutual's good faith efforts to resolve the dispute and rejected all of plaintiff's claims seeking damages in excess of $17,000,000.

Editor's Note: Founding partners Christopher Martin and David Disiere, along with associate Lisa Pittman, had the privilege of defending Liberty Mutual and its adjuster in this lawsuit and we both appreciate its courage to take this case to trial and congratulate Liberty Mutual on this significant win.

TEXAS SUPREME COURT ALLOWS INSURERS TO CHECK CREDIT SCORES IN BIAS SUIT

The Texas Supreme Court recently ruled that Texas state law allowed insurers to use credit scores to set rates even if doing so disparately impacted minorities, striking a blow to a putative class action accusing Farmers Group Inc. of discrimination. *Ojo v. Farmers Group, Inc.*, __ S.W.3d __ (Tex. 2011). In answer to a certified question from the Ninth Circuit, the Texas Supreme Court ruled that the insurance code provision which prohibited insurers from pricing insurance by utilizing credit scoring factors based

wholly or partly on race did not provide cause of action against insurer for premium increases based on credit scoring that had racially disparate impact. And, the Texas Fair Housing Act did not provide cause of action against an insurer for an insurer's use of credit-scoring factors to set insurance prices that have racially disparate impact.

As the court described the facts, "Patrick Ojo, an African–American resident of Texas, carries a homeowner's property-and-casualty insurance policy issued by Farmers Group, Inc. Although Ojo has never made a claim on his homeowner's policy, Farmers raised Ojo's insurance premium by nine percent. Ojo alleges that Farmers increased the premium as a result of unfavorable credit information acquired though its automated credit-scoring system." Ojo sued Farmers on behalf of himself and all other similarly situated racial minorities whose premiums increased as a result of Farmers use of credit-scoring system.

Farmers moved to dismiss all claims against it arguing that the Texas Insurance Code preempts Ojo's FHA claims when the McCarran-Ferguson Act's reverse-preemption standard is applied. In ruling for Farmers, the court rejected Ojo's argument that "the Texas Insurance Code should also be interpreted to provide for disparate impact protection because it uses the same "because of race" language as those federal acts [FHA and Title VII]."

HOUSTON COURT OF APPEALS RECOGNIZES EXCEPTION TO THE EIGHT-CORNERS RULE ON PURE COVERAGE QUESTION

Recently, in *Weingarten Realty Management Co. v. Liberty Mut. Fire Ins. Co.*, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2011, the Houston 14th Court of Appeals recognized an exception to the eight-corners rule for the first time. In the underlying case, Connie Johnson sued her employer Norstan Apparel Shops, Inc., d/b/a Fashion Cents, and the entity she alleged leased the space, Weingarten Realty Management Company, after she was assaulted by an unknown person while working as a manager for Fashion Cents. Johnson misnamed the Weingarten defendant, which should have been named as Weingarten Realty Investors, which the court noted was a "separate and distinct" entity from the named defendant. Weingarten Management never challenged the error and Johnson never fixed it.

Weingarten Management's carrier defended. Shortly before trial, Weingarten Management made a demand upon Norstan's carrier, Liberty Mutual, for a defense as an additional insured under its policy. But, Weingarten Investors was the proper entity, through its lease contract with Nostan, due additional insured status under the Liberty Mutual policy. Liberty Mutual rejected the claim for a defense. Weingarten Management and its insurer sued Liberty Mutual for coverage.

In recognizing an exception to the eight-corners rule, the court noted that Liberty Mutual was asking the court to assume that the alleged facts were true. In doing so, Liberty Mutual argued that a complete stranger to the policy – as evidenced by the pleadings and the policy's reference to the lease – was asking for a defense to which it was not entitled. Here, the extrinsic evidence at issue was the policy's reference to parties to lease agreements, requiring the court to consider lease agreements to determine insured status under the policy.

The court distinguished other eight-corners cases by noting that Liberty Mutual was not challenging the merits of the underlying claim. The court noted that "[i]n light of the facts of this case, we are persuaded of the need for a very narrow exception to the eight-corners rule. The exception applies only when an insurer establishes by extrinsic evidence that a party seeking a defense is a stranger to the policy and could not be entitled to a defense under any set of facts. Under this exception, the extrinsic evidence must

go strictly to an issue of coverage without contradicting any allegation in the third-party claimant's pleadings material to the merits of that underlying claim." Summary judgment in favor of Liberty Mutual was affirmed.

STATE FARM SUCCESSFULLY DEFENDS DIRECT ACTION SUIT BY INSURED

In *Lynch v. State Farm Mutual Auto. Ins. Co.*, ___ S.W.3d ___ (Tex. App.—Austin, June 2, 2011), the Austin Court of Appeals recently ruled that State Farm was entitled to summary judgment on a direct action claim brought against it. Lynch was involved in a car accident with a State Farm insured. Lynch sued the driver and State Farm in the first suit. State Farm won a summary judgment in the first suit. Then, Lynch sued State Farm in a second suit separately from the driver. State Farm again moved for summary judgment. In a memorandum opinion, the court of appeals upheld the summary judgment for State Farm.

PLAINTIFF'S COUNSEL STOCK HURRICANE PLEADINGS HELD INSUFFICIENT

Last week, in a series of decisions involving challenges to the sufficiency of the pleadings, federal Judge Lee Rosenthal granted the insurer's motions to dismiss two lawsuits filed by The Mostyn Law Firm, and abated a third pending proper notice of the claims asserted under the Texas Insurance Code as required by that statute. In *Carter v. Nationwide Property & Casualty Insurance Company*, 2011 WL 2193385 (S.D. Tex. June 6, 2011), and, *Escobar v. Geovera Specialty Insurance Company*, 2011 WL 2193347 (S.D. Tex. June 6, 2011), the court found the plaintiff's fraud and other extra-contractual allegations were insufficient and dismissed the claims but also allowed the plaintiff until July 8, 2011 to amend the complaints. And, in *Leon v. Allstate Texas Lloyds*, 2011 WL 2193365 (S.D. Tex. June 6, 2011), even though discovery had taken place and the suit had been on file for almost a year, the court found that the notice requirement had not been waived and that plaintiff's petition did not satisfy the notice requirements. The lawsuit will be abated until 60 days after proper notice is received.

INSURED'S ATTORNEY NOT ENTITLED TO RECOVER FEES IN SUIT AGAINST CARRIER

Recently, in *Shaw v. Mid-Continent Cas. Co.*, 2011 WL 2120522 (Tex. App.—Dallas May 31, 2011), the Dallas Court of Appeals upheld a summary judgment in favor of Mid-Continent against an attorney who sought recovery of attorney's fees from Mid-Continent for representing its insured. Mid-Continent defended the insureds in the underlying suit. The attorney sued to recover fees that he alleged had not been paid, that Mid-Continent agree to pay, and that Mid-Continent did not pay. Mid-Continent argued that the attorney could not sue because Shaw was not a party or insured under the policy; Shaw did not have a direct benefit under the Policy; Shaw had no standing to assert a claim as a beneficiary under the Policy; there was no contract to pay Shaw for fees; Shaw had no right to recovery under any theory; and Shaw was not subrogated to

the insured's rights. The court rejected Shaw's arguments that the summary judgment was procedurally improper and upheld the decision that Mid-Continent did not have to pay Shaw.

LEGISLATIVE UPDATE: TEXAS ENACTS LOSER PAYS LAW

Recently, Governor Perry signed into law the bill containing the controversial "loser pays" system to slow frivolous lawsuits in Texas. Under the bill, some civil plaintiffs who sue and lose will be required to pay the court costs and attorney fees of those they are suing. The law creates expedited civil actions for cases less than $100,000 and allows judges to dismiss meritless lawsuits early in the process. The bill also contains several other measures that will impact litigation in Texas:

1. The substitute bill restores the litigation cost offset provision and a cap on the amount of litigation costs subject to cost shifting;
2. Some provisions of the House version were removed in their entirety in the substitute: no section on banning implied causes of action, no attorney's fees in tax protest cases, and it eliminates the House provision Section 5 on cost-shifting in breach of contract claims;
3. The bill retains but modifies Supreme Court of Texas rulemaking for expedited procedures in cases of $100,000 or less;
4. It directs the Supreme Court to adopt rules for a Motion to Dismiss practice and will allow cost-shifting with respect to these motions;
5. The bill does contain a provision for interlocutory appeals for controlling questions of law if the trial judge orders same and if accepted by the court of appeals;
6. Finally the bill also includes Responsible Third Party (RTP) language in modified form. Under the substitute bill, a defendant may not designate an RTP after the applicable statute of limitations has expired with respect to the RTP if the defendant has failed to meet its obligations, if any, to timely disclose that the person may be designated as an RTP under the Texas Rules of Civil Procedure.

LEGISLATIVE UPDATE: GOVERNOR ADDS TWIA TO SPECIAL SESSION TO-DO LIST

State lawmakers will make a renewed effort at reforming the Texas Windstorm Insurance Association after Gov. Rick Perry on Friday added the issue to the Legislature's current 30-day special session. Negotiations to reform TWIA, which was plagued by lawsuits and allegations of mismanagement in the aftermath of Hurricane Ike, fell apart in the final weekend of the regular session when Perry and Texas House negotiators rejected a Senate proposal that included stiff penalties for the insurance cooperative if it failed to process claims in a timely manner.

HURRICANE SEASON 2011 OFFICIALLY STARTED

The National Oceanic and Atmospheric Administration has determined that there is a 70 percent chance of between 3 to 6 major hurricanes, an above normal year. NOAA said in mid-May that there is a 70 percent chance of the following: 12-18 Named Storms, 6-10 Hurricanes, 3-6 Major Hurricanes. Part of the reason for the above normal year is that there are no El Niño or La Niña climate patterns this year. The last year without these patterns was 2005, when the Gulf Coast saw Hurricanes Katrina and Rita make landfall.