The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FEDERAL COURT AGREES THAT PLAINTIFFS' ALLEGATIONS IN IKE SUIT WERE IMPERMISSIBLY VAGUE

Last Monday, in *Garcia v. Nationwide Property and Casualty Insurance Company*, 2011 WL 1885248, a federal judge in Southern District of Texas granted Nationwide's partial motion to dismiss based on generic pleadings in a Hurricane Ike case filed by the Mostyn Law Firm. In this case, Plaintiffs sued Nationwide for breach of contract, fraud, violations of the Texas Insurance Code, Sections 541 (unfair settlement practices) and 542 (prompt payment act), and bad faith based on nonpayment of insurance claims for damage allegedly caused to Plaintiffs' home by Hurricane Ike.

The Court held that Plaintiffs' Original Petition failed to the meet the pleading requirements of the Federal Rules of Civil Procedure, explaining that Plaintiffs failed to specify at least some particular facts personal to their situation that showed their claims satisfied the general elements of their causes of action. The Court granted Nationwide's partial motion to dismiss and granted Plaintiffs "leave to amend their pleadings within twenty days to attempt to state their extra-contractual claims with the requisite factual support to plead plausible statutory and tort claims" under the Federal Rules. This ruling is significant given the large volume of hurricane suits filed by The Mostyn Law Firm.

FEDERAL MAGISTRATE RECOMMENDS DENIAL OF SUMMARY JUDGMENT BASED ON CONFLICTING EVIDENCE REGARDING ALLEGED VICARIOUS LIABILITY OF AN EMPLOYER

Last Monday, in a coverage shootout between two carriers in *Stallion Heavy Haulers, LP v. Lincoln General Insurance Company*, 2011 WL 1843259 (W.D.Tex), Magistrate Judge Nancy Nowak recommended denial of Lincoln's motion for partial summary judgment finding a genuine issue of material fact regarding whether Stallion maintained control over work performed by its contractor. This case involves a dispute between two insurance companies: Steadfast Insurance Company, Stallion's insurer, and Lincoln. Steadfast and Lincoln settled the underlying lawsuit and Steadfast sought indemnification from Lincoln.

In the underlying case, Stallion's contractor, Rig Runners' drivers parked trucks along the shoulder of the highway near the entrance of a worksite. A Stallion truck, leaving the worksite and entering the highway, drove from behind the Rig Runners trucks and into the path of the underlying plaintiffs' motorcycle, which struck the truck and seriously injured the underlying plaintiffs. The underlying plaintiffs sued several defendants, including Stallion's work site supervisor and Rig Runners.

Steadfast, through Stallion, maintained that Stallion was an insured under Rig Runners' insurance policy issued by Lincoln. The applicable portion of Lincoln's policy provided that a party is an insured in this

situation when the party is alleged or held to be vicariously liable for the conduct of the named insured. Under Texas law, an employer can be held vicariously liable for the actions of an independent contractor if the employer retains some control over the manner in which the contractor performs the work that causes the damage. Here, the Court determined that the work that caused the underlying plaintiffs' injuries was the parking of the trucks on the shoulder of the highway. Based on deposition testimony of the Stallion work-site supervisor, the Rig Runners drivers, and the Rig Runners regional manager, the Court held that there was a fact issue regarding who controlled the decision to park the trucks on the shoulder of the highway. Therefore, the magistrate judge recommended denying Lincoln's motion for partial summary judgment.

PRIVITY REQUIRED FOR CAUSE OF ACTION UNDER HEALTH CLAIMS PROMPT PAYMENT STATUTE

Last Tuesday, in *Christus Health Gulf Coast v. Aetna, Inc.*, 2011 WL 1843510, the Houston Court of Appeals held that liability under the Texas Insurance Code, article 20A.18B (the Prompt Payment Statute) is predicated on the existence of a contract, and without such contract, there is no liability. In this case, a group of hospitals alleged that Aetna Health, Inc., an HMO, and its parent company, Aetna, Inc. (collectively "Aetna") were liable under the Prompt Payment Statute for failing to timely pay claims for healthcare services provided to Aetna's Medicare HMO enrollees under agreements between the hospitals and an intermediary that failed to pay the hospitals. Under the agreement, the hospitals were to provide hospital serviced to the insurance plan enrollees in return for payments based on rates specified in each contract. The intermediary arranged for and/or provided healthcare services for Aetna. The intermediary eventually became insolvent and allegedly failed to pay the hospitals over $13 million invoiced for the serviced the hospitals provided to the insurance enrollees. The hospitals sued Aetna seeking damages under the Prompt Payment Statute. The Court held that the plain language of the Prompt Payment Statute requires privity between the HMO and the provider and, therefore, the hospitals could not recover under the Prompt Payment Statute.