

# TEXAS INSURANCE LAW NEWSBRIEF

MARCH 21, 2016

## FIFTH CIRCUIT REVERSES DISTRICT'S DENIAL OF ACQUIRED SUBROGATION RIGHTS

Last week, the Fifth Circuit Court of Appeals reversed a federal district court's granting of summary judgment holding that a settlement agreement precluded an insurance company from enforcing subrogation rights that had been assigned to it. In *Cont'l Ins. Co. v. Dawson*, 2016 WL 1055371, at \*1 (5th Cir. Mar. 15, 2016), a Hill International employee was severely burned from dangerously hot water while taking a shower in his assigned living quarters in Baghdad, Iraq. Continental Insurance was Hill's workers' compensation carrier and was required to pay for the injured employee's medical expenses. The employee was transported and treated in Germany, and the expenses for his injuries were billed to Aetna, rather than Continental. Aetna paid \$282,774.51 to overseas medical providers on behalf of the employee. Continental paid for the employee's subsequent treatment.

Later, the employee filed a lawsuit in Texas state court against Fluor International which managed the employee's living quarters in Iraq. Both Continental and Aetna intervened asserting liens on any settlement or judgment. Continental and the employee executed a settlement agreement that was approved by the Department of Labor that provided: 1) Continental would pay the employee a lump sum of \$260,759.68 in exchange for a complete discharge of liability; 2) Continental would continue to assist in payment of future treatment; and 3) Continental asserted a lien upon any settlement or judgment in favor of the employee in the lawsuit against Fluor. Pursuant to the Settlement Agreement, Continental's lien amounted to \$388,457, and after the employee entered into a confidential settlement with Fluor, the employee paid Continental the full amount of the lien under the agreement.

Afterward, Aetna filed a claim with the Department of Labor against Continental for reimbursement of the medical benefits paid on the employee's behalf in Germany. Aetna and Continental settled the claim in exchange for \$219,000 from Continental to Aetna. Importantly, Aetna assigned to Continental its subrogation and reimbursement rights connected with the employees' treatment.

Continental sought a stipulation regarding its newly acquired subrogation rights in the amount of \$282,774.51 and the employee refused. Continental filed suit, and the district Court granted summary judgment in favor of the employee holding that that settlement agreement Continental entered with the employee precluded Continental from enforcing the subrogation rights that Aetna had assigned to it.

On appeal, the Fifth Circuit carefully analyzed the settlement agreement entered between Continental and the employee and concluded that the Settlement Agreement did not require Continental to repay Aetna for employee's past medical treatment and, in turn, it did not preclude Continental's recovery of the subrogation and reimbursement rights that Aetna had assigned to it. Continental was entitled to subrogation for the past medical treatment Aetna paid while the employee was treated in Germany. As such, the Fifth Circuit reversed the district court's judgment.

## "TEXAS LAWYER" REPORTS MOSTYN LAW FIRM NON-SUITED IN HURRICANE IKE SUIT, THEN HIT WITH ANOTHER

Today's on-line edition of Texas Lawyer magazine contains an article written by reporter Brenda Sapino Jeffreys reporting on the resolution of a highly-publicized legal malpractice suit against Steve Mostyn and The Mostyn Law Firm. Her article reported:

The day after an ex-client of Mostyn Law Firm non-suited a negligence and breach of fiduciary duty suit related to Hurricane Ike against the firm, two other former clients filed a malpractice suit against the Houston-based firm and two of its lawyers alleging they mishandled a Hurricane Ike flood damage suit.

Plaintiffs Irvin A. and Nancy Carol Harrison seek between \$5 million and \$6 million in damages in the newly filed suit.

In the non-suit on March 17, Rankin Road, a Harris County company, filed a notice that it was non-suiting with prejudice all claims asserted against third-party defendants Mostyn Law Firm and five lawyers in Rankin Road v. Underwriters at Lloyds of London. In an amended third-party petition filed in December 2015, Rankin Road had alleged the firm and lawyers Mitchell Templeton, Sean Russell, Michael Ramsey and Amber Anderson Mostyn, among several things, withdrew from

representation in 2014 after non-suiting its Hurricane Ike insurance coverage claims against insurance defendants but without obtaining a dismissal of counterclaims or resolving a motion for sanctions. The defendants filed answers denying the allegations. (J. Steve Mostyn, founder of Mostyn Law Firm, was included in the March 17 non-suit motion even though he was earlier non-suited.)

An attorney for Rankin Road, Tamara Madden, a partner in Johnson, Trent, West & Taylor of Houston, declined to discuss reasons for the non-suit except to say "the parties resolved the claim."

In response to the non-suit, Joe Madden, a spokesman for the Mostyn Law Firm defendants, said, "We would let the public documents speak for themselves. We are non-suited and are happy with the results."

#### New Suit

On March 18, a day after the notice of non-suit in Rankin Road, the Harrisons filed a suit against Mostyn Law Firm, Steve Mostyn and former firm lawyer Ramsey, alleging that because the defendants mishandled their flood damage claims, they could not rebuild their Crystal Beach home. They allege they lost the house to foreclosure.

The plaintiffs bring legal malpractice (negligence), gross negligence and breach of fiduciary duty causes of action against the defendants, and allege they violated the Texas Deceptive Trade Practices and Consumer Protection Act (DTPA).

The plaintiffs seek between \$700,000 and \$1 million in compensatory damages jointly and severally from the defendants plus treble damages under the DTPA, \$1 million in punitive damages from Steve Mostyn, \$1 million in punitive damages from the firm, \$1 million in punitive damages from Ramsey, and attorney fees, costs and interest. Plaintiff's lawyer Steven Engelhardt, of Englehardt Law of Houston, confirmed his clients seek between \$5 million and \$6 million in damages from the defendants.

The Harrisons allege they filed the petition to seek damages for the defendants' "negligent and malicious intent to cover up their actions" involving their property flood damage claims.

As to Harrison v. Mostyn Law Firm, Madden said, "We believe that the case is meritless and frivolous and is not supported by the law and the facts."

Ramsey, who is no longer with Mostyn Law Firm but offices at the firm's Beaumont office, did not immediately return a call seeking comment.

In the petition in Harrison, the Harrisons allege their home in Crystal Beach, located on the Bolivar Peninsula in Galveston County, suffered wind and flood damage from Hurricane Ike in September 2008, and they hired the firm to help them pursue their windstorm damage claims with Texas Windstorm Insurance Association (TWIA) and flood damage claims with Fidelity National Property and Casualty Insurance Co.

The plaintiffs allege they signed a power-of-attorney contract with the defendants on June 21, 2010 and a month later the firm sent a letter to Fidelity demanding full payment under their flood insurance policy.

On July 27, 2010, according to the petition, Fidelity denied the plaintiffs' flood loss claim, so the defendants filed a lawsuit Aug. 22, 2013 on their behalf. The Harrisons allege the defendants failed to appeal within 60 days of the demand letter or no later than July 27, 2011, as required, or file a lawsuit on or before July 27, 2011.

The plaintiffs allege that in April 2014, they met with Ramsey, who "acknowledged" that their flood damage claims had been mishandled.

The plaintiffs allege they were "lied to, misled and put off about the status, facts and progress in connection with the flood damage claims."

However, Madden said, the Harrisons approached the firm almost 10 months after a Federal Emergency Management Agency deadline for filing proof of loss, and that applied to their flood insurance policy.

A similar story ran on March 21<sup>st</sup> in the [Southeast Texas Record](http://setexasrecord.com/stories/510702802-another-mostyn-client-sues-him-for-legal-malpractice-seeks-millions-in-damages) written by reporter David Yates. It can be found at:  
<http://setexasrecord.com/stories/510702802-another-mostyn-client-sues-him-for-legal-malpractice-seeks-millions-in-damages>

## ATTENDING PLRB ANNUAL CLAIMS CONFERENCE IN SAN ANTONIO?

If you are attending the PLRB Annual Claims Conference in San Antonio on April 17-20, please make plans to join the lawyers of our firm and many of our industry friends and clients at a reception on Monday, April 18th from 5:00 to 7:00 p.m. The event will start as soon as the afternoon classes end and will be held in the Atrium of the Marriott RiverCenter (one of the two conference hotels). Light food and beverages will be provided. More details will be announced in the weeks to come, but we hope to see many of our friends and clients there on Monday, April 18th!