

# TEXAS INSURANCE LAW NEWSBRIEF

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## INSURED'S CONSTRUCTIVE KNOWLEDGE OF LAW PRECLUDES MISREPRESENTATION AND FRAUD CLAIMS UNDER FEDERALLY FUNDED FLOOD POLICY

Last Tuesday, the U.S. District Court for the Southern District of Texas issued two decisions granting summary judgment in favor of an insurance agent, the agency and insurer who issued a flood policy on a property that was not eligible for coverage under the federally funded NFIP, after finding that the insured was charged with knowledge of the applicable federal statutes and regulations. In *Lobeck v. Licatino*, 2016 WL 3058300 & 3060020 (S.D. Tex. - Galveston Div. May 31, 2016), the insured purchased a rental property in Gilchrest, Texas unaware that the property was located in the Gulf Coast Barrier Resources System (CBRS) which made the property ineligible for coverage under the NFIP. The agent submitted the insured's application to the insurer and a policy was issued and, renewed through June 2009. But on September 13, 2008, the storm surge from Hurricane Ike completely destroyed the property. The insurer investigated the claim and was about to issue payment when FEMA notified the insurer that the property was located within the CBRS and instructed them to rescind the policy and return the premiums. They did and this lawsuit against the insurer, agency and agent followed.

In analyzing the motions for summary judgment, the court agreed that "state law non-contractual procurement claims were not preempted" then focused its analysis on several Supreme Court and 5th Circuit decisions observing that "all citizens are charged with the knowledge of the law regarding federal insurance programs, like the NFIP." And, in essence that an insured cannot rely on agent conduct contrary to the law or, agent representations about whether the property was insurable, having their "own duty to determine whether its location in the CBRS disqualifies it." And applying the law to the facts of this case, the court observed that the insured's "claims could never succeed. Even assuming Lobeck had no actual knowledge of any of the impediments to her procurement of a valid SFIP on her property, the law precludes her from using it to her advantage. She is presumed to know the law." The court found that while the law did not preempt the claims, any claimed ignorance of the law could not provide proof of "reasonable" reliance on any representations to the contrary. Accordingly, summary judgment was granted on all claims in favor of the insurer, insurance agency and the agent.

## FIFTH CIRCUIT MAKES ERIE GUESS ON MEANING OF "NARCOTIC" AND FINDS "DUE TO" STANDARD REQUIRES SHOWING OF PROXIMATE CAUSE

Recently, the Fifth Circuit applied Texas law in analyzing the meaning of the term "narcotic" in an insurance contract and found that its ordinary and generally-accepted meaning should be applied. And, again interpreting Texas law, the court found that an exclusion precluding coverage in part for loss "due to" being under the influence of a narcotic, required a "proximate cause" analysis. In *Crose v. Humana Insurance Company*, No. 15-50559, 2016 WL 2984434 (5<sup>th</sup> Cir. May 23, 2016), the insured had a stroke while under the influence of ecstasy and was hospitalized as a result. The insurance policy had an exclusion which precluded coverage in part for "Loss due to being...under the influence of any narcotic unless administered under the advice of a health care practitioner." The insurer investigated and denied the claim as excluded and the insured sued alleging breach of contract and, prompt payment and unfair insurance practices under the Texas Insurance Code. The district court granted summary judgment in favor of the insurer and this appeal followed.

On appeal, the Fifth Circuit observed that term "narcotic" was not defined in the policy and neither the Texas Supreme Court, nor the Fifth Circuit had defined the term as found in insurance contracts. So they were required to make an *Erie* guess as to the definition of the term. Applying Texas law, the court agreed with the district court that "the ordinary and generally-accepted meaning" should be applied. And the drug ecstasy fell within that definition. The court then focused on the causation standard to be applied to loss "due to" an excluded cause. The court found that the Texas Supreme Court had examined the term and, while not specifically assigning a standard, observed that "due to" called for "a more direct causal nexus than "but for" causation." The Fifth Circuit then examined another Fifth Circuit case interpreting an intoxication exclusion with the phrase "as a result of" as requiring a showing of "substantial" or "significant" cause, but not the only cause for the exclusion to apply. Interpreting the two cases together, the court held "that 'due to' requires a showing of proximate cause." And finding that the insurer in this case met its burden, summary judgment in favor of the insurer was affirmed.

