The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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TEXAS SUPREME COURT PERMITS POST-SUIT APPRAISAL DEMAND: WAIVER REQUIRES SHOWING OF IMPASSE AND PREJUDICE

Last Friday, the Texas Supreme Court addressed how courts are to determine whether an insurer has waived its right to appraisal under the insurance contract, concluding that an insured must show both (1) conduct indicating waiver and (2) prejudice before waiver can be found. In *In re Universal Underwriters of Tex. Ins. Co.*, No. 10-0238, — S.W.3d —, 2011 WL 1713278 (Tex. May 6, 2011), an auto dealership that suffered hail damage filed a claim with Universal, its insurance carrier. Universal paid a total of $7,081.95 on the claim following two inspections (the latter with an engineer), and heard nothing further from the dealership until four months later when the lawsuit was filed. Universal moved to abate the case and compel appraisal, but the dealership argued that Universal had waived its right to appraisal by failing to invoke it sooner. Both the trial court and the court of appeals agreed with the dealership.

The supreme court, however, rejected the dealership's argument for finding of waiver based solely on Universal's purported delay in seeking appraisal. First, the court held that delay should be measured from the point of impasse—defined as "an apparent breakdown of good-faith negotiations"—and not from the first instance of a disagreement between the parties. In this case, the point of impasse was the date of suit, and Universal's assertion of its appraisal rights approximately one month later. The court concluded that this was not an unreasonable delay.

The court further observed that the dealership had neither shown nor made any attempt to show that it suffered prejudice from the carrier's delay in seeking appraisal. The court held that a party attempting to establish waiver must show both that an impasse was reached and that failure to demand appraisal within a reasonable time following impasse resulted in prejudice to the opposing party. The court further opined that "it is difficult to see how prejudice could *ever* be shown when the policy . . . gives both sides the same opportunity to demand appraisal." (Emphasis added.) Since prejudice is a requirement of a waiver finding, the court here suggests that an insured might never be able to establish a waiver of a policy appraisal clause, so long as the clause applies equally to both parties.

BUY-BACK AGREEMENT NOT VOID AS AGAINST PUBLIC POLICY

On May 3, the 14th Court of Appeals in Houston reversed a summary judgment entered in favor of an insured's judgment creditor, holding that the trial court erred when it determined that a buy-back agreement between Traxel, the insured, and Gainsco, the carrier was void as against public policy. In *Gen. Agents Ins. Co. of Am., Inc. v. El Naggar*, No. 14-09-00641-CV, — S.W.3d —, 2011 WL 1643575 (Tex. App.—Houston [14th Dist.] May 3, 2011), following a mistrial of El Naggar's claims against the Traxel and others, Gainsco and Traxel entered into a "buy-back agreement" in which Gainsco repurchased Traxel's policy for $50,000 and Traxel released Gainsco from any and all claims or demands

arising out of the policy. After a second trial, a judgment was entered in favor of El Naggar against Traxel. El Naggar then sued Gainsco (as well as Traxel's other insurers) to collect the judgment, and the trial court entered summary judgment declaring the buy-back agreement void.

After first determining on procedural grounds that it was capable of adjudicating the issue, the Court of Appeals found that El Naggar presented no relevant authority in support of its various public-policy theories. Particularly, the Court observed that El Naggar's primary precedent, *Ranger Ins. Co. v. Ward*, could be distinguished because in that case, insurance was required by statute, whereas Naggar only argued that insurance was a prerequisite to the private contract between the parties. The 14th Court held that the statute was the controlling factor in *Ranger*, and absent that factor, El Naggar's public-policy challenge to the buy-back agreement failed. The Court did *not*, however, enter a judgment that the buy-back agreement was valid, because Gainsco did not raise that issue in its cross-motion for summary judgment, but sought only a judgment that the agreement was not void as against public policy.

WORKER'S COMPENSATION CASE REMANDED BASED ON TEXAS SUPREME COURT'S *CRUMP* OPINION

The First Court of Appeals, relying on the supreme court's opinion in *Transcontinental Ins. Co. v. Crump*, last week remanded a worker's compensation case based on jury charge error. In *Continental Casualty Co. v. Baker*, the Court of Appeals reviewed the carrier's assertion of charge error based on the trial court's instruction on producing cause. While the case was on appeal, the supreme court issued *Crump*, holding that "producing cause in workers' compensation cases is defined as a substantial factor in bringing about an injury or death, and without which the injury or death would not have occurred." The court of appeals held that the inclusion of a charge that did not reflect this new definition was error, and probably caused the rendition of an improper judgment. The court, reversing on this ground, did not address remaining substantive challenges to certain of the trial court's evidentiary rulings and to the sufficiency of the evidence to support the jury's verdict. (The First Court did address a separate issue relating to attorneys' fees, and held that Baker was not entitled under the relevant statute to fees incurred "in pursuit of attorney's fees.")

SUMMARY JUDGMENT IN INSURER'S FAVOR ON BAD FAITH CLAIMS UPHELD BY EL PASO COURT OF APPEALS

The El Paso Court of Appeals last week rejected an insured's argument that summary judgment is never appropriate with respect to whether an insurer's liability is reasonably clear, and upheld judgment rendered by the trial court in favor of a worker's compensation insurer. In *Aleman v. Zenith Ins. Co.*, No. 08-09-00168, — S.W.3d —, 2011 WL 1663152 (Tex. App.—El Paso May 4, 2011), the court considered evidence that "conclusively established that Zenith did not know nor should it have known it was reasonably clear that the claim was covered." The insured relied on the Supreme Court's *Giles* opinion and argued that the question of whether an insurer's liability had become reasonably clear is a fact issue for the jury. The Court of Appeals held that this rule is not absolute, and does not preclude traditional summary judgment on such grounds. The court also held that Zenith was not required to identify specific medical literature on which it relied in rejecting the insured's claim, even though the denial notice stated that "[t]he medical literature does not support a casual relationship between the work activities and the diagnosed carpal tunnel syndrome."