The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, 20th Floor Houston, Texas 77002 713.632.1700 FAX 713.222.0101
900 S Capital of Texas Hwy, Suite 425 Austin, Texas 78746 512.610.4400 FAX 512.610.4401
16000 N Dallas Parkway, Suite 800 Dallas, Texas 75248 214.420.5500 FAX 214.420.5501

April 4, 2011

STOWERS DEMAND MUST SPECIFICALLY AND EXPLICITLY ADDRESS LIENS TO BE VALID

Recently, the First Court of Appeals in Houston determined that a purported *Stowers* demand was insufficient to trigger a duty to settle because it failed to address existing hospital liens. *McDonald v. Home State County Mut. Ins. Co.*, 2011 WL 1103116 (Tex.App.—Hous. [1st Dist.] March 24, 2011.) The court rejected the plaintiff's argument that the purported *Stowers* demand included an implied offer to release hospital liens. The court also rejected the plaintiff's argument that the demand did not have to address the lien because it was invalid, holding that the validity of the lien is irrelevant to the *Stowers* analysis. The court also rejected the plaintiff's argument that the insurer accepted a duty to settle because it engaged in settlement negotiations. In doing so, the court reinforced that the only settlement obligation in the third party context is *Stowers*. The court, therefore, ruled that the insurer did not violate any duty to the plaintiff.

SUMMARY JUDGMENT UPHELD FOR INSURER ON EXTRA-CONTRACTUAL CLAIMS BECAUSE PLAINTIFF FAILED TO SHOW LIABILITY WAS REASONABLY CLEAR OR THAT INSURER CONDUCTED UNREASONABLE INVESTIGATION

Last week, the Fort Worth Court of Appeals determined that a plaintiff failed to show more than a scintilla of evidence to survive a no evidence challenge to its extra-contractual claims. *Columbia Lloyds Ins. Co. v. Mao*, 2011 WL 1103814 (Tex.App.-Fort Worth, March 24, 2011). The insurer challenged the plaintiff's extra-contractual claims on no-evidence grounds. In reviewing the granting of summary judgment to the insurer, the appellate court noted that the plaintiff presented no evidence to show that liability had become reasonably clear or that the insurer had failed to conduct a reasonable investigation. In rejecting the plaintiff's arguments, the court noted that an insurer is entitled to rely on items received from third parties – including the plaintiff – as part of its investigation. The court upheld the summary judgment on the extra-contractual claims for the insurer.

INSURER WINS MANDAMUS RELIEF TO PREVENT PRODUCTION OF DOCUMENTS THAT PARTIES AGREED WOULD BE SUBJECT TO PROTECTIVE ORDER

The Beaumont Court of Appeals conditionally granted a writ of mandamus, determining that a trial court could not order an insurance company to produce documents that the parties agreed would be subject to a protective order without the protective order in place. *In re Cypress Texas Lloyds*, 2011 WL 915578 (Tex.App.—Beaumont, March 17, 2011). During a hearing on a discovery dispute in a residential Ike

case, the parties stated on the record that there would be a protective order in place to govern the production of certain documents. Despite the parties' agreement to a protective order, the trial court ordered the insurer to produce the documents without entry of the protective order. The insurer, therefore, did not have to produce the documents until the entry of the agreed upon protective order.

HOSPITAL LIEN PERFECTED UPON FILING EVEN IF NOT INDEXED IN TIME TO BE FOUND PRIOR TO SETTLEMENT

Recently, the Houston Court of Appeals determined that the filing of a hospital lien half an hour before an insurer issued a settlement check was sufficient to comply with the Texas Hospital Lien Law. *Memorial Hermann Hosp. System v. Progressive County Mut. Ins. Co.*, --- S.W.3d ----, 2011 WL 940783 (Tex.App.—Houston [1st Dist.] March 30, 2011.) The insurer argued that there was no way for it to know about the lien because the lien was not indexed by the clerk before it issued the settlement check, arguing that the lien was not effective because it was not timely indexed. In rejecting the insurer's argument, the court focused on the statute's provision placing the burden on the hospital to file its lien and noting that the clerk's burden is to index liens. It noted that there is no deadline for the indexing of liens. The court, therefore, determined that the hospital perfected its lien prior to the issuance of the settlement proceeds.

FIFTH CIRCUIT LIMITS APPLICATION OF MID-CONTINENT, HOLDS IT DOES NOT APPLY IF A CARRIER DENIES COVERAGE

Last week, the Fifth Circuit again limited the holding in *Mid-Continent v. Liberty Mutual* in which the Texas Supreme Court limited co-primary carriers' rights to seek reimbursement for indemnity from each other. *Maryland Cas. Co. v. Acceptance Indem. Ins. Co.*, --- F.3d ----, 2011 WL 1049537 (5th Cir., March 24, 2011). As stated by the three-judge panel, Mid-Continent involved a dispute over settlement payments between two primary liability carriers that admitted coverage and cooperatively provided a defense. In the case before it, the plaintiff insurer, had accepted coverage, provided a defense and settlement. The plaintiff insurer reserved its right to pursue an insurer who issued the policy after it that had denied coverage. Thus, the plaintiff insurer sought reimbursement from another primary insurer on a consecutive policy that had denied coverage. The panel held that the plaintiff insurer could recover on its subrogation claim, holding that Mid-Continent does not apply to situations where one carrier denies the claim. In reaching its decision, the court reflected upon other recent decisions by the Fifth Circuit which also limit the Mid-Century decision — *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 305-07 (5th Cir.2010) (*Mid-Continent* does not bar contractual subrogation simply because the insured has been fully indemnified); *Trinity Universal Ins. Co. v. Emp'rs Mut. Cas. Co.*, 592 F.3d 687 (5th Cir.2010) (*Mid-Continent* does not address the recovery of defense costs from a co-insurer who violates its duty to defend a common insured).