The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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OWNERS CLAIMS AGAINST SUBCONTRACTORS' INSURERS ARE BARRED BY ANTI-ASSIGNMENT PROVISIONS

Recently, a federal judge in the U. S. District Court for the Southern District of Texas examined whether anti-assignment provisions in the contractors and subcontractors' insurance policies precluded assignment of the insureds' rights against their insurers without the insurers' written consent, and granted summary judgment in favor of the insurers. In *Nautilus Insurance Company v. Concierge Nursing Care*, 2010 WL5449849 (S.D.Tex., December 28, 2010), Brae Burn Construction Company contracted to build a nursing facility for Concierge. The building developed water leaks and mold, and a lawsuit followed. Brae Burn settled the lawsuit for $3,000,000 and assigned its claims against the subcontractors and their insurers to Concierge as part of the settlement.

In this declaratory judgment action that followed, the insurers argued the anti-assignment provisions in the policies issued to the subcontractors precluded coverage absent the insurers' written consent. Concierge argued the provisions did not apply absent a showing that the insurers' interests were prejudiced by the assignment. It also asserted the insurers were estopped from asserting the provisions. The court found that because Concierge did not plead estoppel, the argument was waived. But even if it wasn't, the court cited recent Fifth Circuit decisions enforcing non-assignment provisions post-loss and rejecting a prejudice requirement. In granting summary judgment to the insurers, the court held there was no valid assignment and Concierge could not seek to enforce Brae Burns rights against the insurers.

YOUR PRODUCT, YOUR WORK AND IMPAIRED PROPERTY EXCLUSIONS PRECLUDE DUTY TO DEFEND OR INDEMNIFY - SUMMARY JUDGMENT GRANTED

Last Tuesday, a federal judge in the U.S. District Court for the Western District of Texas held a Commercial General Liability insurer had no duty to defend or indemnify a sign manufacturer who produced signs for TXDOT and the City of El Paso, based on the Your Product, Your Work and Impaired Property Exclusions. In *Admiral Insurance Company v. H&W Industrial Services*, 2011 WL 318277 (W.D. Tex., February 1, 2011), over 10,000 street signs produced by the insured began to deteriorate soon after placement on city streets and allegedly created traffic hazards requiring replacement of the signs. The court applied an eight corners analysis based on the latest amended pleading and determined that the Your Product, Your Work and Impaired Property exclusions precluded any duty to defend.

The court then examined the duty to indemnify and after finding that "the same reasons eliminating the duty to defend also eliminated the duty to indemnify" the court applied an exception to the general rule requiring a separate determination of the duty to indemnify. Finding an "impossibility" that the claims

could be "transformed by proof of any conceivable set of facts into claims covered by the insurance policy" the court held that the insurer had no duty to indemnify the insured for claims made in the underlying lawsuit and granted summary judgment for the insurer.

COURT HOLDS THAT A PARTY CANNOT TORTIOUSLY INTERFERE WITH ITS OWN INSURANCE CONTRACT

Recently, in *Bramlett v. The Medical Protective Company of Fort Wayne, Indiana*, 2011 WL 248849 (N.D. Tex., January 26, 2011), a federal judge in the U.S. District Court for the Northern District of Texas held that a party to an insurance contract cannot be liable for tortious interference with that contract. Plaintiffs alleged that Dr. Benny Phillips tortuously interfered with an insurance contract between him and Defendant The Medical Protective Company of Fort Wayne, Indiana ("Med Pro"), his malpractice insurer. In the underlying case, Plaintiffs filed a medical malpractice lawsuit against Dr. Phillips. Dr. Phillips subsequently settled all his potential claims with Med Pro and assigned to Med Pro his rights under any subsequent judgment against him, including his right to appeal the judgment. Judgment was entered in favor of plaintiffs in the underlying case and Med Pro paid the judgment.

In this case, Plaintiffs argued that they were third-party beneficiaries of the insurance contract between Dr. Phillips and Med Pro and, therefore, were entitled to recover under the insurance contract in the same manner and extent as Dr. Phillips. They alleged that, by assigning his rights to Med Pro, Dr. Phillips tortiously interfered with their rights under the insurance contract. Med Pro argued that Dr. Phillips could not tortiously interfere with the insurance contract, because he was a party to it. The Court held that a party cannot tortiously interfere with its own contract, explaining that, under Texas law, tortious interference is based on the acts of an interfering third party. Accordingly, the Court dismissed the action against Dr. Phillips with prejudice.

COURT UPHOLDS TEXAS WORKERS' COMPENSATION ACT'S EXCLUSIVE REMEDY PROVISION

Recently, in *Calhoun v. F. Hall Moving Company*, 2011 WL 167231 (Tex.App. – Fort Worth, January 13, 2011), the Fort Worth Court of Appeals held that the exclusive remedy provision of the Texas Workers' Compensation Commission (TWCC) precluded the employee from maintaining a cause of action for negligence against his employer. In this case, F. Hall Moving Company (F. Hall) was hired to dismantle a central utility building on the campus of the University of Texas at Arlington. While F. Hall's employee, Calhoun, was cutting pipes to dismantle the unit for F. Hall, a fire broke out on the roof of the building and Calhoun was allegedly injured while attempting to escape. Calhoun filed a claim for workers' compensation benefits with the TWCC. The TWCC hearing officer found that F. Hall had workers' compensation insurance but, because Calhoun did not sustain a compensable injury, he was not entitled to workers' compensation benefits.

Calhoun then brought suit in state court against F. Hall for negligence. F. Hall filed a motion for summary judgment, arguing in part that it was entitled to summary judgment based on the exclusive remedy provision of the workers' compensation statute. The Texas Workers' Compensation Act's exclusive remedy provision provides that "[r]ecovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . . . against the employer . . . for . . . a work-related injury sustained by the employee." Tex.Lab.Code § 408.001(a)(emphasis added). In response, Calhoun asserted that the exclusive remedy provision is an affirmative defense that must be asserted and proved by the employer and that F. Hall did not establish as a matter of law that it

was Calhoun's employer. Calhoun based his argument on the fact that F. Hall denied it was Calhoun's employer before the TWCC.

The Court observed that the TWCC found that F. Hall was Calhoun's employer on the date of injury, and Calhoun did not request a review of the TWCC hearing officer's decision. The Court explained that F. Hall attached to its motion for summary judgment as evidence the TWCC hearing officer's finding of facts and conclusions of law, including the findings that F. Hall had workers' compensation insurance and F. Hall was Calhoun's employer on the date of the accident. Therefore, the Court found the summary judgment evidence conclusively established that F. Hall had an approved workers' compensation insurance policy on the date of the accident, Calhoun was an employee of F. Hall on the date of the accident, and Calhoun later filed a claim for workers' compensation benefits. Accordingly, the Court affirmed the trial court's decision and held that F. Hall conclusively proved its affirmative defense—that the exclusive remedy provision of the TWCC precluded Calhoun's suit for negligence against F. Hall.