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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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FEDERAL COURT HOLDS HARVEY SUIT AGAINST AGENT NOT REMOVABLE ON FEDERAL QUESTION GROUNDS

Last Tuesday, Houston District Judge Lee Rosenthal remanded a Hurricane Harvey lawsuit against an insurer and an agent who allegedly failed to procure adequate insurance. In *Muratore v. Texas Farmers Ins. Co.*, No. H-18-4654, 2019 WL 2053988 (S.D. Tex May 7, 2019) (slip op.), homeowners sued their insurer and their insurance agent, alleging the agent failed to procure the requested amount of flood insurance. Farmers removed the suit to federal court on federal question grounds, arguing that the plaintiffs' clams, alleged in part as breach of a flood insurance policy, arose under the National Flood Insurance Program. The homeowners argued that because the suit was a failure-to-procure suit and not a claim handling suit, state law controlled and there was no federal question.

The court agreed with the homeowners, drawing a distinction based on existing Fifth Circuit law between alleged harm to a policyholder under a flood policy, which would be pre-empted by federal law, and alleged harm to a prospective customer in the sale of the policy, which is not pre-empted and is controlled by state law.

Editor's note: This ruling, issued by the Southern District's Chief Judge, could have significant effects on the large number of Hurricane Harvey lawsuits expected to be filed this year, and might make it more difficult for insurers to successfully remove lawsuits which name non-diverse agents and allege failure to procure adequate flood insurance. However, to the extent insurers are willing to accept liability for the acts of their agents, Insurance Code Chapter 542A still provides a route to federal court and dismissal of the non-diverse defendant.

LEGISLATE UPDATE: HB 1739 PASSES TEXAS HOUSE, MAY ABROGATE BRAINARD

Many in Texas insurance law have been following House Bill 1739, which was passed late last week by the Texas House of Representatives, and is on its way to a vote in the Texas Senate. Currently, Texas auto insurance law requires a claimant seeking uninsured/underinsured motorist (UIM) benefits to demonstrate the tortfeasor's liability and uninsured or underinsured status by obtaining a judgment before being legally able to pursue benefits from her own UIM coverage. This rule was exemplified in *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006), in which the Supreme Court of Texas held, "…the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist."

HB 1739, if passed, will abrogate *Brainard* and allow a UIM claimant to present a claim to the UIM insurer, and to sue the UIM insurer under Texas Insurance Code Chapter 541, without first obtaining a judgment against the tortfeasor that establishes legal entitlement to recover damages from the tortfeasor in excess of the tortfeasor's own liability insurance limits.

Editor's Note: It remains unclear how this law will affect a UIM insurer's ultimate liability for a claim, considering the typical UIM coverage requires the insured to be "legally entitled to recover" the claimed damages, and that private contractual requirement is not altered by this legislation. It likely means that in questionable cases, the issue of the insured's legal entitlement to recover the claimed damages will be determined by a "trial within a trial" in the lawsuit against the insurance company. It also leaves lingering questions as to what it means for liability to become "reasonably clear" within the meaning of Chapter 541. If the contract requires the insured to demonstrate legal entitlement to recover damages from the tortfeasor, and the insured does not establish that entitlement until after suing the UIM insurer, it begs the question of how and when liability for the UIM claim could have become reasonably clear at any time before suit.