The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
www.mdjwlaw.com
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

November 23, 2010

FIFTH CIRCUIT HOLDS NO DUTY TO DEFEND OR INDEMNIFY LAWSUITS ARISING AFTER ACQUISITION OF ASSETS AND LIABILITIES THROUGH COMPANY PURCHASE AGREEMENT WHICH EXCLUDED INSURANCE POLICIES

Last Friday, the Fifth Circuit concluded Wausau Underwriters Insurance Company did not have a duty to defend or indemnify a business for lawsuits filed after it acquired assets and liabilities from another company since it agreed to assume liability for the particular losses in question and explicitly excluded the Wausau policy from the asset transfer. In *Keller Foundations, Inc. v. Wausau Underwriters Ins. Co.*, 2010 WL 4673026 (5th Cir. November 19, 2010), Keller Foundations (renamed "New Suncoast") entered into a purchase agreement with Travis International (subsidiary called "Old Suncoast") to purchase certain assets and assume certain liabilities. Wausau provided Old Suncoast with general liability insurance coverage. And the policy contained a non-assignment clause providing, "Your rights and duties under this policy may not be transferred without our written consent . . ."

After the sale took place several lawsuits were filed in Texas and other states for defects and property damage allegedly arising from Old Suncoast's work prior to the asset purchase and during the term of the Wausau insurance policy. New Suncoast assumed the defense of all new suits consistent with its assumption of liabilities in the purchase agreement and, in turn, tendered to Wausau for defense. Wausau refused. And, New Suncoast filed suit against Wausau alleging breach of contract, violation of the Texas Insurance Code, and breach of the duty of good faith and fair dealing. Wausau removed the case to federal court, where the parties consented to trial by magistrate. After cross motions for summary judgment were filed, the magistrate denied Wausau's and granted New Suncoast's in part. The magistrate held Wausau's coverage transferred from Old Suncoast to New Suncoast either as a chose in action with the general transfer of all assets in the purchase agreement or by operation of law. The magistrate further held that the non-assignment clause in the policy did not prohibit post-loss assignments.

Wausau argued on appeal that the (1) insurance coverage did not constitute a "chose in action" that was transferred as part of the catch–all transfer of "all other assets" in the purchase agreement and (2) the non-assignment clause barred the transfer of the policy without prior approval from Wausau. The court analyzed Texas law on the non-assignment clause issue and concluded that Texas courts would enforce the non-assignment clause in the Wausau policy. Because Wausau never consented to the transfer, the insurance coverage was not triggered. In the same analysis, the court held New Suncoast could not circumvent the non-assignment clause by casting the transfer of the insurance as the transfer of a "chose in action." Next, the court addressed an issue of first impression in Texas, the question of whether insurance coverage for pre-acquisition liabilities transfers by operation of law to a purchasing company who assumed those liabilities by contract.

The court discussed a Ninth Circuit decision, *Northern Insurance Co. of New York v. Allied Mutual Insurance Co.*, 955 F.2d 1353, 1358 (9th Cir. 1992), cited by Old Suncoast and concluded Texas courts would reject the *Northern Insurance* rule where, as here, the liabilities in question were assumed through a contract that also specifically excluded the transfer of the insurance policy covering those liabilities. Given the well-known focus on contracts in the Texas insurance context, the court wrote, "[W]e believe Texas would enforce the contract between Old Suncoast and new Suncoast as written." In reaching this conclusion, the court reversed the district court's grant of summary judgment in favor of New Suncoast and rendered summary judgment in favor of Wausau.

APPELLATE COURT HOLDS INJURED EMPLOYEE WAIVED OPTION FOR MEDICAL DISPUTE RESOLUTION AND CARRIER NOT LIABLE FOR COSTS ASSOCIATED WITH SPINAL SURGERY

Last Thursday an appellate court held an injured employee waived his right to the medical dispute resolution process and dismissed a related declaratory judgment action for lack of jurisdiction. In *Crain v. Hartford Ins. Co.*, 2010 WL 4670402 (Tex. App.—Austin, November 18, 2010), Hartford filed suit against Crain for judicial review of a decision of the Division of Workers' Compensation of the Texas Department of Insurance that Hartford was liable for Crain's spinal surgery. Crain suffered a compensable injury to his back while at work on January 8, 2003. Hartford was the workers' compensation carrier for Crain's employer.

During the course of his treatment, in October 2003, Crain's neurosurgeon requested preauthorization to perform a spinal surgery. Hartford asked an orthopedic surgeon to review the preauthorization request and he determined it was not medically necessary. The same neurosurgeon submitted an identical request later in the month and a separate peer review was conducted by a different surgeon to determine whether it was medically necessary. The second surgeon also opined the procedure was not medically necessary and Hartford denied the preauthorization. Again in January 2004, the neurosurgeon made an identical request of the first two. The request was reviewed by the same surgeon and was denied a third time as not medically necessary. Upon submitting the fifth and sixth identical request for spinal surgery, Hartford indicated it would not consider these requests since Crain had failed to timely request reconsideration of Hartford's previous denial as required by the Division's rules.

Crain then initiated the medical dispute resolution process ("MDR") with the Division seeking an independent review organization ("IRO") review of Hartford's denial. Hartford argued that Crain's MDR should be denied since it was filed more than forty-five days after Hartford had denied reconsideration of Crain's preauthorization requests. The Division instead granted the MDR request and referred the matter to an IRO. The IRO reviewed Crain's file, determined the spinal surgery was medically necessary, and approved Crain's request for preauthorization. After the decision, Hartford requested a contested case hearing ("CCH") and a hearing officer concluded the MDR process had not been waived. Hartford then filed an appeal which upheld the hearing officer's decision. Because the affirmed hearing officer's decision was binding on the parties during the pendency of any appeal, Crain received and Hartford paid for the disputed spinal surgery. Hartford filed this action seeking judicial review of the appeals panel decision.

Hartford's objective for this action was to obtain reimbursement for the costs of Crain's surgery from the Subsequent Injury Fund. Hartford moved for summary judgment on its assertion that Crain waived his right to administrative review by failing to timely file his request for MDR. Crain responded that Hartford's evidence raised material issues of fact questions related to waiver. Crain also counterclaimed for declaratory judgment regarding Hartford's claims and its interpretation of the Texas Workers'

Compensation Act. The trial court granted Hartford's summary judgment and also its subsequent plea to the jurisdiction for Crain's declaratory judgment action.

.

On appeal, the court examined the procedures for requesting preauthorization and analyzed the facts to assess whether Crain had waived his right to MDR. In reaching its decision the appellate court applied the former Division rule 134.600(g) and held Crain waived his right to MDR since he had not timely requested it in response to Hartford's denial of the preauthorization request.

Lastly, the court held it had no jurisdiction over Crain's declaratory judgment action since there was no justiciable controversy. The court noted any existing controversy regarding Crain's waiver ceased to exist when the trial court rendered summary judgment for Hartford and concluded Crain had waived his right to MDR.

Editor's note: While not part of the main analysis, the opinion addressed a crucial issue frequently used by claimants to overcome summary judgment. Specifically, Crain argued the hearing officer's opinion in his favor created a fact issue precluding summary judgment. The court rightly disagreed and, instead, wrote that it was merely evidence of what the hearing officer decided based on the evidence presented to him at the administrative hearing. Because the court operated under a modified *de novo* standard for judicial review, it could entertain other evidence and, therefore, it was tasked with reviewing the summary judgment evidence and was not limited to the hearing officer's findings.

APPELLATE COURT AFFIRMS SUMMARY JUDGMENT HOLDING INJURED FLIGHT ATTENDANT PROVIDED NO EVIDENCE SHE WAS IN COURSE AND SCOPE OF EMPLOYMENT TO SUPPORT COMPENSABLE INJURY

Recently, an appellate court held a flight attendant injured on a return flight while off duty did not present sufficient evidence to show she was in the course and scope of her employment. In *Collins v. Indemnity Ins. Co. of N. Am.*, 2010 WL 448601 (Tex. App.—San Antonio, November 10, 2010), Collins, a Southwest Airlines flight attendant who was returning home as a passenger, was injured when another passenger dropped his carry-on bag from an overhead bin on her head. Collins filed a workers' compensation claim and the carrier opposed it. The Division ultimately denied the claim because Collins did not sustain a "compensable injury." Collins appealed the decision to district court and the carrier filed a summary judgment. The trial court granted summary judgment and entered a take nothing judgment. Collins appealed the decision.

Collins argued she was injured in the course and scope of her employment because (1) the flight she was on when injured furthered Southwest's affairs and (2) her boarding the flight fell within the access doctrine. The carrier responded that Collins boarded the flight for the sole purpose of commuting home and that the access doctrine is inapplicable to this case.

The court held Collins boarded the flight for her private commute, not to further the affairs of Southwest. Next, Collins argued she suffered a compensable injury under the access doctrine. Under the access doctrine an employee suffers an injury in the course and scope of employment when she is injured using a route or area that is so closely related to the employer's premises as to be fairly treated as part of the premises. The access doctrine covers only an employee who, by virtue of her employment, is injured by a risk that she encountered while entering or exiting her place of employment. Here, the court held that Collins presented no evidence that the injury she suffered was a risk she faced as an employee seeking access to her workplace instead of a risk she faced as a member of the traveling public.

UNITRIN WINS BAD FAITH "*STOWERS*" TRIAL IN HAYS COUNTY

Following a two week trial, a state court jury in San Marcos, Texas found last week that Unitrin did not breach it's liability insurance contract, violate the Texas Insurance Code or violate Texas' "*Stowers*" doctrine when it rejected two policy limit demands in 2007 in an underlying tort suit which ultimately resulted in an excess verdict against the named insured and an additional insured. Chris Martin and Kevin Cain from our firm tried the case to verdict for Unitrin along with local counsel David Sergi from San Marcos.

The underlying personal injury suit arose out of a trucking accident where the driver of the named insured rear ended a parked truck causing a fractured neck and a two level cervical fusion of the impacted driver. Before trial, Unitrin declined to accept two settlement demands at or within the $1 million primary policy limit because defense counsel and both insureds asked Unitrin to reject the settlement demands as being unreasonable. Following the personal injury trial, the jury returned a verdict of $2.7 million, well over the $1 million policy limit. At the request of the insureds, Unitrin appealed the underlying judgment. Contemporaneous with the commencement of the appeal of the tort case, the underlying plaintiffs entered into a covenant not to execute and an assignment with the insured driver taking his insurance claims against Unitrin. The *Stowers* suit was filed against Unitrin days later. The *Stowers* suit was then aggressively prosecuted by plaintiffs' counsel from the tort suit who argued the assigned liability and damage claims were established in the amount of the excess verdict as a matter of law. The insured driver, who didn't attend or participate in either the tort suit or the *Stowers* suit, became the focus of the insurance suit despite his absence. The jury heard evidence during the recent *Stowers* trial of Unitrin's repeated efforts to protect both of its insureds including the providing of a complete and aggressive defense through trial, providing an appeal of the underlying judgment to the Austin Court of Appeals and the Texas Supreme Court, paying for private counsel for both insureds after the excess verdict, and ultimately paying the underlying excess verdict including all pre- and post-judgment interest. In the *Stowers* case, plaintiffs sought $15 million in damages and $3 million in attorney fees.

Following a two week trial in San Marcos, the jury in *Bisland vs Unitrin Specialty* returned its verdict late last week finding in Unitrin's favor on all liability questions and awarding $0 in attorney fees to plaintiffs' counsel. Congratulations to Unitrin for having the conviction to go great lengths to protect its insureds in the underlying tort case and for also having the courage to try the *Stowers* case to prove its reasonableness in defending the underlying case and the appeal. It was an honor for MDJW to have the opportunity to defend Unitrin in the *Stowers* case through trial.

HAPPY THANKSGIVING

Our research and writing staff will be off for Thanksgiving so the next edition of our Newsbrief will be on Monday, December 6th. We wish all of our readers a wonderful Thanksgiving holiday weekend.