The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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November 9, 2010

COURT GRANTS PARTIAL SUMMARY JUDGMENT - DISMISSES MISREPRESENTATION CLAIMS

Last Wednesday, the United States District Court for the Northern District of Texas granted summary judgment in favor of State Farm after finding that the insured's own delay in refusing to submit to an examination under oath (EUO) for 16 months was the producing cause of the damages claimed. In *Nunn v. State Farm Mutual Automobile Insurance Company*, 2010 WL 4352499 (N.D.Tex., November 3, 2010), The insured alleged that State Farm made actionable misrepresentations under the Texas Insurance Code by stating that no payment could be made until the insured's daughter submitted to an EUO. And as a result, the insured claimed damages in that he had to purchase a new vehicle for his daughter; had to store the one damaged by fire, had to hire an expert for the lawsuit and suffered mental anguish related to the lawsuit. State Farm moved for summary judgment asserting that the alleged misrepresentations did not cause the damages claimed.

The court observed that the insured was required to prove that State Farm's actions were the "producing cause" of the damages sought under the Texas Insurance Code. And producing cause "requires that the acts be both a cause-in-fact and a 'substantial factor' in causing the injuries." The court assumed for the sake of argument that the adjuster's demand for an EUO from the daughter was a misrepresentation and then determined that a reasonable jury could **not** find that the alleged misrepresentation was a producing cause of the damages claimed. The court concluded that a "reasonable jury could only find that State Farm declined to pay a claim that it suspected was arson until the named insured gave an EUO, and that Nunn did not submit to one for 16 months." Accordingly, the court granted summary judgment dismissing the misrepresentation claims under Texas Insurance Code §§ 541.051 and 541.061.

ARBITRATION PROVISION APPLIES TO HURRICANE IKE LAWSUIT

Last Thursday, the Beaumont Court of Appeals held that an insurance policy endorsement requiring arbitration of "*any disputes…from, through or by this policy, including any statutory law or common law right*" required arbitration of the insured's contractual and extra-contractual claims. In *Ranchers and Farmers Mutual Insurance Company v. Stahlecker*, 2010 WL 4354020 (Tex.App. – Beaumont, November 4, 2010), the insured's home was damaged by Hurricane Ike. Dissatisfied with the adjustment of her claim, the insured filed suit against Ranchers alleging breach of contract, insurance code violations, bad faith and other extra-contractual causes of action. Ranchers filed a motion to compel arbitration based on a "Compulsory Dispute Resolution Endorsement." The trial court denied the motion and this appeal followed.

On appeal, the court observed that Texas law favors arbitration agreements will enforce valid agreements to arbitrate under the contract. And when other claims are "factually intertwined" or "touch upon the

subject matter of the agreement," the other claims will also fall within the scope of the arbitration agreement. The court observed that regardless of how the claims are classified in this lawsuit, the "factual allegations all arise out of" the contractual relationship and could not be maintained without reference to the insurance policy.

The court then considered the insured's defenses asserting that the arbitration provision was procedurally and substantively unconscionable. And, the court found that the notice was conspicuous and unambiguous; there was no evidence of fraud or overwhelming economic power; and that any concerns over the perceived substantive unconscionability arising from the interplay of statutory rights and remedies and the clause's fee splitting arrangements could be adequately addressed by the arbitrator. Accordingly, the trial court's order denying Rancher's motion to compel arbitration was reversed.

ARBITRATION CLAUSE FAILS TO COMPLY WITH STATE LAW NOTICE REQUIREMENTS

The Dallas Court of Appeals recently concluded that an arbitration provision in a nursing home admission contract failed to meet mandatory notice requirements under Texas law and as a result, the plaintiffs were not required to submit their claims to binding arbitration. In *In re Sthran,* 2010 WL 4274894 (Tex.App.-Dallas, October 29, 2010), Mr. Sthran was admitted to a nursing home and he and his wife signed an admission contract containing a provision requiring them to submit any injury or other claims to binding arbitration under the Federal Arbitration Act. After Mr. Sthran died, his wife and estate filed a lawsuit seeking wrongful death and survivor action damages. The trial court ordered the claims to binding arbitration. The Estate appealed the order.

On appeal, the Estate argued that the arbitration provision was not binding because it failed to include proper notice under a Texas law requiring 10-point boldface type telling the individuals that they are waiving important legal rights and that they should consult with, and also have their attorney sign it. The nursing home argued that the contract compelled arbitration under the Federal Arbitration Act (FAA), and that the FAA preempts the Texas law relied on by the Estate. In reversing the trial court's order compelling arbitration, the Dallas Court of Appeals concluded that the McCarren-Ferguson Act (MFA), which prevents a federal law from preempting a state law that regulates the business of insurance, applied here. And because Texas courts have held that the Texas law - Chapter 74 of the Texas Civil Practices and Remedies Code – "Medical Liability Act" – was enacted for the purpose of regulating insurance, "the MFA reverse preempts the FAA with regard to such notice requirement in this case." And because the clause did not provide proper notice, the trial court's order compelling arbitration was reversed.

MDJW WELCOMES ITS NEWEST LAWYERS!

MDJW congratulates its newest group of bright and talented young lawyers who all learned last Thursday that they passed the Texas Bar Exam (a 100% pass rate for our firm):

Jeff McPhaul is a graduate of The University of Texas with a B.A. in English, and the University of Houston Law Center where he was a member of the moot court team. He is a former student of David D. Disiere and Jamie Cooper's Property & Casualty Insurance Law course at UH Law. He joins our Insurance section as an associate.

Michael Rahmn is a graduate of Southern Methodist University with a B.B.A. in finance, and South Texas College of Law where he served as an Assistant Editor for the South Texas Law Review and won

awards for his advocacy and brief writing skills in intramural moot court competitions. He joins our Labor & Employment section as an associate.

Andrew Scott is a graduate of The University of Texas with a B.A. in government, where he was a member of the Silver Spurs and South Texas College of Law, where he was a varsity advocate on several mock trial teams. He is currently a contract attorney with our Insurance section.

Jonathan Sprague is a graduate of Louisiana State University with a B.S. in finance, and the University of Houston Law Center. He is a former student of David D. Disiere and Jamie Cooper's Property & Casualty Insurance Law course at UH Law and earned the highest A in the class. He joins our Insurance section as an associate.

Kelly Walne is a graduate of The University of Texas with a B.A., and South Texas College of Law where he was a member of the South Texas Law Review and won several awards as a brief writer in the Advocacy Program. He joins our Trial and Specialty Litigation section as an associate.

Bianca Wyont is a graduate of Tufts University with a B.A. in political science, and South Texas College of Law. She was the overall winner of the 2008 State Bar Law School Division Legal Professionalism Essay Competition and previously clerked for the Thirteenth Court of Appeals. She joins our Insurance section as an associate.

MDJW TRIAL UPDATE

Yesterday, Chris Martin and Kevin Cain started trial in San Marcos, Texas in a Stowers case arising out of a $3.7 million judgment rendered in Hayes County in 2007. In the case of Bisland vs Unitrin, the jury will be asked to determine whether the carrier's unwillingness to pay the $1m policy limit before the verdict in the underlying tort case was proper. Trial is expect to last for parts of two weeks.