



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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### **FIFTH CIRCUIT DETERMINES THAT TEXAS STATUTE BARRING EMPLOYEES FROM WAIVING RIGHT TO BRING A LAWSUIT PRIOR TO SUSTAINING A WORK-RELATED INJURY APPLIES ONLY TO NON-SUBSCRIBING EMPLOYERS**

In a case of first impression issued last Tuesday, a three-judge panel of the Fifth Circuit determined that an employer did not violate the Texas Labor Code's provisions concerning Workers Compensation insurance and claims by providing its employees with a choice of one of three options: (1) participating in workers compensation coverage; (2) opting out of workers compensation coverage and retain right to sue in tort; or (3) waiving both their right to workers' compensation insurance coverage and their right to sue in tort in order to participate in employer's occupational temporary disability plan. *Espinoza v. Cargill Meat Solutions Corp.* --- F.3d ----, 2010 WL 3859692 (5th Cir. Oct. 05, 2010)

When Espinoza joined Cargill she chose to participate in Cargill's occupational temporary disability plan, opting out of workers compensation coverage and waiving her right to sue in tort. She was then injured on the job and received the plan benefits. But, Espinoza challenged the validity of her waiver, arguing that a pre-injury waiver of the right to sue was ineffective.

In rejecting Espinoza's argument, the panel turned to the controlling statutory language, Texas Labor Code § 406.034(b). In ruling for Cargill on this issue, the panel found that the pre-injury waiver rule applied only to non-subscribers to workers compensation. It reasoned that because Cargill was a subscriber that Cargill could create more options for its employees without violating the Labor Code. The court also noted that the benefits program was, in part, a result of a collective bargaining agreement and subject to federal law.

### **STATUTE OF LIMITATIONS FOR RECOVERY OF DEFENSE COSTS RUNS FROM DATE LEGAL BILL RECEIVED THAT IS SUBJECT OF RECOVERY**

Also in a case of first-impression, in a recent decision by Judge Gray Miller in the Southern District of Texas, Mid-Continent Insurance Company won a summary judgment that it did not have an obligation to reimburse Northfield Insurance Company for defenses costs incurred in defending one of the parties to the Texas A&M Bonfire Litigation. *Mid-Continent v. Northfield*, Cause No. 4:09-CV-02077 in the Southern District of Texas, Houston Division (*slip opinion*). On cross motions for judgment, the court determined that Mid-Continent was entitled to judgment on all three of the grounds it presented.

First, Mid-Continent proved that the insurers did not reach an agreement as to the sharing or reimbursement of defense costs. The court reviewed the correspondence and exchange of information

between the parties to determine whether an agreement had been reached. The court concluded that there was no implied-in-fact agreement to share defenses costs.

Second, Mid-Continent argued that it had no duty to reimburse Northfield for any defense costs after it exhausted through settlement of the claims presented. Northfield conceded this point.

Last, Mid-Continent argued that the statute of limitations prevented Northfield from recovering any defenses costs incurred more than four-years before the declaratory judgment action was filed or May 26, 2005. The court considered the recent developments in applying Chapter 541 to defenses costs, in which the Texas Supreme Court has determined that a claim under Chapter 541 runs from the time the legal bills are first received. Applying this same standard to Northfield's claim, the court determined that the applicable four-year statute of limitations ran from the time each legal bill was received.

MDJW congratulates Mid-Continent on its victory in this matter. Chris Martin, Robert Dees, and Ethan Carlyle of our firm had the honor of representing Mid-Continent in this interesting coverage dispute.

### **MDJW WELCOMES NEW ATTORNEYS**

Amber Dunten. MDJW welcomed a new coverage specialist last week. Ms. Dunten joins us in an Of Counsel position. She has an undergraduate degree from Rice and a law degree from the University of Houston. She has a depth of experience in coverage and bad faith litigation.

Julie Kirkendall. Also recently joining MDJW as an associate is Ms. Kirkendall. Ms. Kirkendall has a B.S. and M.S. from Texas A&M University. She received her law degree from the University of Houston. Ms. Kirkendall works with our insurance team and also assists MDJW's Intellectual Property group.

Kaitlin Clark. Recently, Ms. Clark joined our insurance team as an associate. She has a strong background in litigation. Ms. Clark's undergraduate degree is from Eastern Michigan University and law degree from Michigan State.

### **MDJW PARTNERS TO SPEAK AT 15TH ANNUAL INSURANCE LAW INSTITUTE**

The Insurance Law Institute offers a comprehensive overview of major insurance decisions, developing issues in coverage law and effective practice strategies for coverage litigation. Jamie Cooper will be a co-presenter for "Lies, Liens and Offsets", an overview of liens and other interests that impact settlements and payments of claims. Interests and liens to be addressed include Medicare, ERISA, state-law liens and other pecuniary creatures. Chris Martin is scheduled to appear on a panel of "Ask the Experts" for an in-depth question and answer session for insurance practitioners.

### **MJDW HOSTING OPEN HOUSE FOR AUSTIN OFFICE**

You're invited to join the staff and lawyers at MDJW for an open house at our new Austin office location on Tuesday, October 19, 2010, from 5:00-7:30 p.m. We treasure the friendships and working relationships we have with so many clients and friends in Central Texas. We hope that you can drop by to visit, see our new space, and enjoy some good food and beverages. Our office is located in Building IV of the Las Cimas Office Complex at 900 South Capital of Texas Highway, Suite 425, Austin, Texas. Kindly RSVP to the managing partner of the Austin office, Jeff Farrell, at [farrell@mdjwlaw.com](mailto:farrell@mdjwlaw.com).

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