



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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INSURER'S REASONABLE RELIANCE ON MEDICAL PEER REVIEW PRECLUDES BAD FAITH CLAIMS

Recently, a Federal District Court judge in Austin concluded that a workers' compensation insurer's reasonable reliance on a medical expert who conducted a peer review of the records, provided a reasonable basis for delay or denial and precluded extra-contractual liability. In *Thompson v. Zurich American Insurance Company*, 2010 WL 3784204 (W.D.Tex, September 21, 2010), an employee was injured on the job and suffered a strained knee and ankle. He resigned his position and returned home to Georgia. Three months later he had an MRI and his family doctor diagnosed him with a torn meniscus. The insurer hired an orthopedic specialist who reviewed the records and concluded the injury pre-dated the work related incident. The Division of Workers' Compensation later ruled the injury was compensable and the claim was paid. This bad faith lawsuit followed.

The court examined whether the claim was delayed or denied after liability became reasonably clear and whether the defendants had a reasonable basis at the time they denied or delayed payment. The court noted that a physician's opinion on medical causation can provide a reasonable basis for denial unless the insurer's reliance is unreasonable or the report is not objectively prepared. And after considering the expert's qualifications compared to the plaintiff's personal physician, and rejecting other arguments as insufficient, including arguments that the reviewing doctor works for and is paid by numerous insurance companies, the court concluded that the plaintiff's evidence revealed at most, a bona fide coverage dispute which was insufficient to demonstrate bad faith. And because the other extra-contractual claims are based on the same predicate, the court granted summary judgment in favor of the insurer on all extra-contractual claims.

STATE COURT FINDS *STOWERS* CLAIMS BARRED BY FEDERAL COURT INTERPLEADER AND DECLARATORY JUDGMENT ACTIONS

The El Paso Court of Appeals recently affirmed summary judgment in favor of an insurer after finding that because the claimants' attorney participated in the federal interpleader and declaratory judgment actions, and subsequently controlled who would serve as administrator for the insured's estate and, the tactics to be employed by the Estate in later state court actions, *Stowers* and declaratory judgment actions in state court were precluded. In *Garcia v. Home State County Mutual Insurance Company*, 2010 WL 3687032 (Tex.App. – El Paso, September 22, 2010), the insured tractor-trailer crossed the center line and collided with another tractor-trailer and overturned. Sometime later, another tractor-trailer collided with the overturned vehicle. The insured driver was killed.

The insurer, Home State, filed a federal interpleader action and deposited its \$1,000,005 policy limits into the registry of the court. The policy proceeds were divided amongst the claimants, an agreed final

judgment was entered and the insurer was discharged. An attorney for one of the claimants then had an administrator appointed for the insured driver's estate so that suit could be brought before the statute of limitations expired. A state court action was then filed by the claimants against the estate and the trial court entered a \$2,000,000 judgment. The claimants then filed a federal court action seeking a declaratory judgment that two accidents occurred and thus two policy limits should apply. But, the federal court granted summary judgment in favor of the insurer finding that the policy limits issue should have been raised in the interpleader action and because it was not, the claims were barred by res judicata and judicial estoppel.

While the federal declaratory judgment action was pending, the attorney who the claimants approached to serve, and who was appointed administrator of the insured's estate, filed a separate state court action against the insurer asserting Stowers and bad faith/insurance code causes of action against Home State. The trial court stayed the case until the federal court ruled on the declaratory judgment action and then granted summary judgment in favor of the insurer.

On appeal, the court examined the preclusive effect of the prior federal court actions and related requirements. The court noted the general rule that a party is not bound by a judgment in litigation to which they were not a party. But, the court also noted that there were six categories of exceptions, one of which involves adequate representation of the nonparty by one who was a party to the suit. In affirming the trial court's summary judgment in favor of the insurer, the court found that the "claimants controlled who would serve as administrator as well as the tactics to be employed by the Estate. Home State conclusively established that the administrator's conduct of the suit was subject to the control of the Gonzalez claimants who were bound by both of the prior federal court judgments." Accordingly, summary judgment in favor of Home State finding that the claims were precluded was upheld.

HURRICANE TRIAL REPORT

Tomorrow morning, Chris Martin and Wayne Pickering will pick a jury in the first Hurricane Rita case to be tried in Texas, more than 5 years after the storm hit south-east Texas. The state court trial will proceed in Beaumont before Judge Donald Floyd and is being prosecuted by The Mostyn Law Firm. The insureds in *John and Deborah Cahill vs Liberty Lloyds of Texas* seek contractual and bad faith damages for allegedly unpaid hurricane losses to their residence from Liberty. Liberty's defense is that no additional damages due to Hurricane Rita are owed and the condition of the residence is unrelated to the storm. The trial of the case actually started on June 30th of this year and a jury was selected. A mistrial was ultimately declared and the case is now set to restart trial with a new jury selection tomorrow morning. As the trial progresses, we will advise our readers as to the results of this first Hurricane Rita trial to be tried in Texas to date.

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