



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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WORKERS COMP INSURER DOES NOT WAIVE DEFENSES TO COMPENSABILITY IF IT DECIDES TO PAY A CLAIM ON A SECOND REQUEST AFTER INITIALLY DENYING THE CLAIM

Recently, the Fourteenth Court of Appeals in Houston conditionally granted a writ of mandamus compelling a Harris County trial court to dismiss the workers-compensation bad-faith claims of a plaintiff for failure to exhaust administrative remedies. In *In re Liberty Insurance Corp.*, No. 14-10-00229-CV (Tex. App.—Houston [14th] Dist., July 16, 2010) (slip copy), Liberty denied the claimant's first request for arthroscopic knee surgery for medical necessity and compensability. Some time later, Liberty accepted the claimant's second request for arthroscopic knee surgery. The claimant then sued Liberty for bad faith for denying and/or delaying her arthroscopic knee surgery based on Liberty's response to the first request. Liberty filed a plea to the jurisdiction for the claimant's failure to exhaust administrative remedies by having its first decision reviewed by the Division. The trial court denied the plea and Liberty petitioned for mandamus.

In its ruling on the mandamus, the Fourteenth Court of Appeals rejected the claimant's argument that Liberty waived its exhaustion defense by accepting the second request. The court reasoned that the claimant had to challenge Liberty's decision and have a ruling that she was entitled to the treatment. Because the claimant never sought a ruling from the Division that she was entitled to the knee surgery based on the first request, the appellate court determined that Liberty was entitled to have the bad-faith lawsuit dismissed for lack of jurisdiction.

CRIME PROTECTION POLICY'S PLAIN MEANING PROVIDES COVERAGE FOR FORGERY REGARDLESS OF THE UCC DEFINITION OF FORGERY

Last Thursday, a three-judge panel of the Fifth Circuit considered the forgery protection coverage provision of a crime protection policy in a matter of first impression. *Great American Ins. Co. v. AFS/IBEX Fin. Serv. Inc.*, ___ F.3d ___, 2010 WL 2853653 (5th Cir. July 22, 2010). AFS provides premium financing services for insurance premiums. AFS entered into an agreement with an insurance agency to finance premiums the agency sold. The agency's officer manager, the owner's son, submitted approximately 122 false applications for premium financing to AFS. AFS issued 127 checks to the agency, which the son endorsed for the agency and then deposited into his personal checking account. After discovering the scheme, AFS submitted a claim to Great American for \$519,110.58 under its Crime Protection Policy. Great American denied coverage and filed a declaratory judgment. AFS counterclaimed for bad faith and consequential damages for breach of contract. On cross motions for summary judgment, the trial court found coverage under the crime prevention policy but found fact issues remained. After a jury trial, the district court awarded AFS \$469,110.58 for breach of contract, 18%

statutory interest, \$102,607.83 for consequential damages, \$146,440.00 in attorneys fees, and \$60,852.88 in prejudgment interest.

On appeal, the panel turned to the plain language of the crime protection policy to determine whether a forgery occurred. Great American argued that the panel had to consider the U.C.C. definition of forgery as well as the policy language. The panel rejected the argument, following the plain meaning rule applied in Texas. And, looking at the plain meaning of the policy, the panel determined that the endorsement's by the officer manager and owner's son of the agency's name to the checks constituted a forgery so as to fall within the policy's coverage.

But, the panel did go on to reverse the trial court's award of consequential damages for AFS's costs incurred in pursuing recovery against the bad actor. While recognizing that these types of consequential damages are recoverable under Texas law, the panel determined that AFS pursued the lawsuit before Great American ever reached a claim decision. The panel reasoned that the timing of two events meant that AFS's costs could not be a consequence of Great American's claim decision.

AFFIDAVIT BY "CLAIMS MANAGER" WITHOUT SUFFICIENT DETAIL OF HOW PERSONAL KNOWLEDGE ACQUIRED INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT GRANTED TO INSURER

Also last Thursday, the Fourteenth Court of Appeals in Houston determined that an affidavit from a "claims manager" without more specific details of the person's knowledge of the claim and basis for that knowledge was insufficient to support a summary judgment granted to the insurer. In *Valenzuela v. State & County Mut. Fire. Ins. Co.*, __ S.W.3d __, 2010 WL 2852844 (Tex. App.—Houston [14th] Dist. July 22, 2010), Torres was insured by an auto policy from State & County. Valenzuela was involved in a car accident with Torres and sued Torres. State & County did not receive notice of the suit until Valenzuela gave it a copy of the final judgment against Torres. State & County filed a declaratory judgment for no duty to defend or indemnify its insured or pay Valenzuela's claim.

State & County moved for summary judgment on its declaratory judgment, attaching the affidavit of a "claims manager" to support its evidence. Valenzuela objected to the affidavit because it was not based on personal knowledge and did not demonstrate how the claims manager knew about the claim. After setting forth the requirements of an affidavit, the court determined that the affidavit did not sufficiently set forth facts by which the claim manager acquired the knowledge. Having found the evidence insufficient to support the summary judgment, the court reversed.

HURRICANE LITIGATION UPDATE

With the anniversary of Hurricane Ike rapidly approaching, the Texas Insurance Law Newsbrief will include a brief weekly summary of developments, mandamus actions, filings, and trial court updates.

TDI ENFORCEMENT ACTION AGAINST TWIA CONTINUES

The Texas Department of Insurance is proceeding with an enforcement action against TWIA relating to lifted-shingle claims and their handling. While the enforcement action is limited to TWIA, it may have the ability to impact all Texas insurers who investigated claims for lifted-shingles as the TDI is seeking a ruling from the administrative law judge that all such claims are covered by standard Texas homeowners' policies without evidence of causation by the claimant.

HARRIS COUNTY HURRICANE IKE RESIDENTIAL MASTER COURT ORDERS MINI-TRIAL OF WAIVER OF APPRAISAL PROVISION

A second mandamus was filed by Slavonic Mutual challenging Harris County District Judge Mike Miller's decision to hold mini-trial on issue of waiver of appraisal clause. *Reyes v. Slavonic (a/k/a Slavonic 2)*. After the Fourteenth Court of Appeals conditionally granted the writ of mandamus to allow Slavonic to invoke appraisal, the district court assigned all of Harris County's residential Ike cases ruled that Slavonic must prove through a mini-trial before a jury that it did not waive the appraisal provision. Slavonic filed its second mandamus challenging the mini-trial ruling. The Fourteenth Court of Appeals has asked for an immediate response..

HURRICANE RITA TRIAL CONTINUED UNTIL OCTOBER

The Newsbrief reported several weeks ago that Chris Martin and Wayne Pickering from Martin, Disiere, Jefferson & Wisdom, L.L.P. were set to begin the first Hurricane Rita trial in Beaumont state court. To update readers, after the jury was selected, the trial judge continued the trial until October.

NATIONAL FLOOD PROGRAM

Recently, the House of Representative passed legislation that would extend and reform the National Flood Insurance Program for the next five years.

OTHER NEWS

In Georgia, county judge Kimberly Esmond Adams has rejected a request by two insurers to block a state ethics commission investigation into whether they improperly funneled money into the campaign coffers of insurance commissioner John Oxendine's campaign for governor. Georgia state law bars the commissioner from accepting money from companies that he oversees.

Kenneth Feinberg is to step down as the US Treasury Department's special master for executive compensation to focus on his new post of overseeing the \$20 billion compensation fund that BP is setting up to respond to claims from the BP Gulf Oil spill.

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