The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
www.mdjwlaw.com
A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

July 19, 2010

INSURER RETAINS CONTRACTUAL SUBROGATION RIGHTS EVEN WHEN INSURED IS FULLY INDEMNIFIED

In a matter of first impression under Texas law, last Tuesday the Fifth Circuit held the Texas Supreme Court's ruling in *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*, 236 S.W. 3d 765(Tex. 2007), does not preclude contractual subrogation rights even when the insured has been fully indemnified. In *Amerisure Insurance Co. v. Navigators Insurance Co.* 2010 WL 2745810 (5th Cir. (Tex.) July 13, 2010), the primary and excess insurers disputed coverage but settled related liability claims against the insureds arising from a single car accident. Amerisure, the primary insurer, paid its $1 million policy limit but reserved its right to challenge coverage and pursue equitable and contractual subrogation. The district court granted summary judgment in favor of the excess insurer, Navigators, holding that because the insured had been fully indemnified; under *Mid-Continent* the primary insurer's subrogation rights were precluded. This appeal followed.

The Fifth Circuit examined the exclusions potentially applicable to this single car accident which occurred while the ship's crew was in route from the offices in Texas to the ship in Louisiana. The court first determined that *Mid-Continent* should have narrow application to subrogation actions between insurers based on its facts. The court examined the "workers compensation," "injury to a fellow employee" and "employee indemnification and employer's liability" exclusions under the primary policy. The court then held the "employee indemnification" exclusion precluded liability coverage under the Amerisure policy for the employer, but a fact issue existed on whether the "fellow employee" exclusion applied to the driver. The court also determined that an exception to an exclusion for "liability *arising out of* ownership, charter, use, operation,…loading, unloading…of any watercraft was to be given broad application so as to render the exclusion relied on by Navigators Insurance inapplicable.

The court reversed summary judgment in favor of the excess insurer. And the case was remanded to allow Amerisure seek reimbursement through contractual subrogation if the fellow-employee exclusion they relied upon applies.

COURT FINDS UIM INSURER ENTITLED TO SEVERANCE AND ABATEMENT OF EXTRA-CONTRACTUAL CLAIMS– NOT JUST BIFURCATION

Last Wednesday, the San Antonio Court of Appeals examined whether an underinsured motorist (UIM) insurer was entitled to a bifurcated trial or severance and abatement of the insured's bad faith and extra-contractual claims and conditionally granted mandamus relief to the insurer finding they were entitled to severance and abatement. In *In re United Fire Lloyds,* 2010 WL 2770257 (Tex.App. – San Antonio, July 14, 2010), the insured employee sought underinsured motorist coverage under his employer's auto

policy. United Fire extended a $100,000 settlement offer during mediation but the case did not settle. United Fire moved to sever and abate the bad faith portion of the case. In response, the employee sought a bifurcated trial so that they could continue with related discovery, and their motion to bifurcate was granted by the trial court. This mandamus action followed.

The San Antonio Court of Appeals observed that in the homeowner's context, birfurcation is often applied to contractual and extra-contractual claims allowing related discovery to continue. But, in the underinsured motorist context, and under the Texas Supreme Court's ruling in *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2007), a UIM insurer is under no obligation to pay until legal liability and damages are established. And, because no contractual duty to pay exists until liability and damages are established, the court found: "United Fire should not be required to put forth the effort and expense of conducting discovery, preparing for trial, and conducting voir dire on bad faith claims that could be rendered moot by the portion of the trial relating to" the UIM benefits. The court found the trial court abused its discretion and conditionally granted mandamus to have the trial court sever and abate the bad-faith and extra-contractual claims.

HURRICANE IKE UPDATE: TWIA COMPLETES MASS SETTLEMENT OF MANY HURRICANE IKE CASES

Last week, the Texas Windstorm Insurance Association (TWIA) and attorneys for the policyholders reached an agreement for TWIA to payout an estimated $189 million to settle claims where the residences were taken down to the slab by Hurricane Ike. The settlements recognize assertions that the damage was caused by combination of covered wind and excluded flood. Individual policyholders represented by attorneys can choose to accept the offer which includes in part 37% of the replacement value less payments made, attorney fees, 25% of the value of contents, and 35% of additional living expenses. TWIA maintains that the claims were handled fairly but the settlements, which followed six days of mediation, simply recognize the difficulty in litigating these matters when no structure remains.

Our firm continues to handle many of the Ike insurance cases and we will continue to provide updates on the Ike-related cases and controversies as they develop.