The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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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

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TEXAS SUPREME COURT HOLDS CGL CONTRACTUAL LIABILITY EXCLUSION APPLIES WHEN ONLY BASIS FOR LIABILITY IS CONTRACTUAL AGREEMENT – EXCEPTION NOT APPLICABLE

On Friday, the Supreme Court of Texas examined the contractual liability exclusion in a Commercial General Liability (CGL) policy and determined that when the only basis for the insured's liability is from the insured's contractual agreement to be responsible for the damage, the exclusion applies and the exception for liability the insured would have absent the contract did not. In *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 2010 WL 2219645 (Tex. June 4, 2010), the insured contracted with the Dallas Area Rapid Transit Authority (DART) and agreed to protect adjacent third-party property under the contract. An adjacent property was damaged during the project and the owner sued the insured, Gilbert Construction. Gilbert asserted governmental immunity as a defense and summary judgment was granted on all but the breach of contract claim. After the Underwriters sent out a new reservation of rights asserting the contractual liability exclusion, Gilbert settled the remaining claims and brought an insurance coverage suit. The trial court found coverage but the court of appeals reversed and rendered in favor of Underwriters, holding that the breach of contract claim was excluded by the contractual liability exclusion and the exception did not apply.

The Supreme Court of Texas examined the contractual liability exclusion and the exception applicable when the insured assumes the tort liability of another. In summarizing its decision, the court stated: "We do not hold that the exclusion in Coverage A precludes liability for all breach of contract claims. We hold that it means what it says: it excludes claims when the insured assumes liability for damages in a contract or agreement, except when the contract is an insured contract or when the insured would be liable absent the contract or agreement." After examining decisions from other jurisdictions that held differently, and conflicting decisions from lower level appellate courts, the Court determined that because the breach of contract claim with the third-party was only settled after the trial courted granted judgment on the other theories of liability, the contractual exclusion applied. The court rejected estoppel arguments and also found that the exclusion is unambiguous.

TEXAS SUPREME COURT HOLDS EFFORTS TO ALLOCATE SETTLEMENT PROCEEDS TO AVOID INSURER'S CONTRACTUAL SUBROGATION RIGHTS IS IMPROPER

The Supreme Court of Texas recently examined a trial court's efforts to allocate settlement proceeds to individual family members to avoid the health insurer's contractual subrogation rights through the insured's estate, and found that the efforts were improper. In *Texas Health Insurance Risk Pool v. Sigmundik*, 2010 WL 2136625 (Tex. May 28, 2010), the insured was injured in an oilfield explosion and

died after spending 52 days in the hospital. The health insurer intervened in the lawsuit filed by the spouse, two minor children and the estate, asserting its contractual subrogation rights for $336,874 in benefits paid. A settlement was reached for $800,000 but the trial court applied the made-whole doctrine and allocated the settlement to the spouse and children effectively cutting the estate and health insurer out of the settlement. The insurer appealed.

The Texas Supreme Court analyzed the three types of subrogation (equitable, contractual and statutory) and its *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007), decision which held that the made-whole doctrine did not apply under these circumstances. In reversing and remanding the matter to the trial court to reallocate the settlement proceeds, the Court stated; "[i]t was improper to cut the Risk Pool out of a settlement to which it, through the estate, has a valid claim, just as it would be error to cut out any other estate creditor or recipient in this situation." The trial court will need to reallocate the settlement and consider the health insurer's contractual subrogation claim.

COURT GRANTS SUMMARY JUDGMENT TO INSURER ON EMPLOYEE DISHONESTY AND HURRICANE IKE CLAIMS

In *Bayou City Properties v. American Economy Insurance Company*, 2010 WL 2104632 (S.D.Tex. May 25, 2010), the insurer denied theft, vandalism and employee dishonesty claims after finding: no signs of forced entry; vandalism and the permanent deletion of computer files and purpose-specific software; that an independent contractor with access to the building and computer passwords was the last person in the office and was responsible. The court granted summary judgment in favor of the insurer after finding that: the provision of passwords to a computer is "entrustment' to that person, just as would be providing them with a key, and thus falls within the dishonest acts exclusion applicable when that person was entrusted with the property.

The insured also presented claims for damage following Hurricane Ike but the insurer found the storm damage did not exceed the deductible and, that the house was in poor condition before the storm, suffered from insect infestation, rot, cracked ceilings and walls resulting from house movement and poor maintenance. The insured's experts' description of needed repairs for covered and non-covered causes of loss following Hurricane Ike, failed to segregate the damage or determine causation, provided no evidence that the covered damage exceeded the deductible. In granting summary judgment the court observed that "unreliable reports misbegottenly predicated" would not support those claims.

In granting summary judgment to the insurer on the extra-contractual claims, the court stated: "Bayou City's facts of bad faith are simply that American did not pay it what it wanted. The bad faith in this case belongs entirely to Bayou City." The court also observed that: the insured filed this "meretricious claim" and "his lawyer supplemented it by pleading this meretricious case. Neither could have a good faith belief of the soundness of their attack on American- not one based on facts actually investigated and law thoughtfully researched. It was a naked grasp for someone else's money." "Bayou City will take nothing from American."

(Editor's Note: Our firm has the privilege of representing American Economy Insurance Company in this case. For additional information on this order, please contact Chris Martin, Barrie Beer or Adam Curley in our Houston office.)