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The Weekly Update of Texas Insurance News  
**TEXAS INSURANCE LAW NEWSBRIEF**



A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, 20th Floor Houston, Texas 77002 713.632.1700 FAX 713.222.0101  
900 S Capital of Texas Hwy, Suite 425 Austin, Texas 78746 512.610.4400 FAX 512.610.4401  
16000 N Dallas Parkway, Suite 800 Dallas, Texas 75248 214.420.5500 FAX 214.420.5501



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Texas courts continue their busy pace in insurance cases. Due to the volume of opinions recently released on insurance matters by Texas courts, this Newsbrief is divided into topic areas with internal links for navigation: [Workers Compensation](#), [Coverage](#), [New Insurance Filings](#), and [Legislative Updates](#).

### **Workers Compensation**

## **TEXAS SUPREME COURT REVERSES *RUTTINGER*: WORKERS COMPENSATION CARRIERS NOT SUBJECT TO UNFAIR SETTLEMENT PRACTICES CLAIMS UNDER THE TEXAS INSURANCE CODE**

In a ground-breaking decision last Friday, the Texas Supreme Court decided that workers compensation insurers are not subject to statutory "bad faith" claims for unfair claims settlement practices under the Texas Insurance Code. *Texas Mut. Ins. Co. v. Ruttinger*, No. 08-0751, \_\_\_ S.W.3d \_\_\_ (Tex. Aug. 26, 2011). *Ruttinger* involved an investigation by a carrier that failed to follow what the adjuster admitted was a standard investigation. At trial, the adjuster admitted that he did not interview the claimant or his doctor, only the employer. The adjuster also admitted that he should have interviewed all three. The jury found that the carrier violated the Texas Insurance Code by failing to conduct a "reasonable" investigation. It also found a "knowing" violation, leading to trebling of damages. Friday's decision unwound the verdict.

The majority held: "We conclude that (1) claims against workers' compensation insurers for unfair settlement practices may not be made under the Insurance Code, but (2) claims under the Insurance Code may be made against those insurers for misrepresenting provisions of their policies [at the time of sale], although in this case there was no evidence the insurer did so." The majority opinion walks through the history and development of the workers compensation statutory scheme in Texas and the proper role of the Division of Workers Compensation, holding that the statutorily-created administrative process controls.

The court fractured on section 5 of the opinion, receiving 4 votes, 2 concurrences, and 3 dissents. The other sections received 6 votes and 3 dissents. In controversial section 5, Justice Johnson, writing for the plurality, would overrule *Aranda v. Insurance Co of N. America*, 748

S.W.2d 210, 212-213 (Tex. 1988). *Aranda* allowed claimants to bring a cause of action for common law bad faith -- breach of the duty of good faith and fair dealing -- against workers compensation carriers. He explained: "The [Workers Compensation] Act effectively eliminates the need for a judicially imposed cause of action outside the administrative processes and other remedies in the Act. Recognizing and respecting the Legislature's prime position in enacting, studying, analyzing, and reforming the system, and its efforts in having done that, I conclude that *Aranda* should be overruled." The common law bad faith claims were remanded to the trial court with the rest of the final judgment reversed.

[**Editor's Note:** This opinion by the Texas Supreme Court will have far-reaching effects in Texas as the success of *Ruttinger* in both the trial court and lower appellate court resulted in a flood of bad-faith workers-compensation lawsuits in Texas. We will continue to monitor the case and the trend of new filings in Texas following this significant change in the law.]

### **AUSTIN COURT OF APPEALS PERMITS WORKER TO PURSUE CLAIMS FOR DENIAL OF WORKER'S COMPENSATION BENEFITS SINCE HE EXHAUSTED ALL ADMINISTRATIVE REMEDIES**

Recently, the Austin Court of Appeals concluded that an employee had exhausted his administrative remedies, such that the district court possessed subject-matter jurisdiction over Jones's suit, despite delays that may have occurred. *In re Texas Mutual Insurance Company and Natalie L. Garcia*, 2011 WL 3435738 (Tex. App.–Austin, 2011). An injured worker sued Texas Mutual for Texas Mutual's alleged delays in handling his workers' compensation claim. Texas Mutual asserted that Jones's delays in exhausting his administrative remedies before the DWC had deprived the district court of subject-matter jurisdiction. The district court denied the plea. Texas Mutual filed a petition for writ of mandamus requesting the Austin Court of Appeals to compel the district court to grant its plea to the jurisdiction and to dismiss Jones's suit in its entirety for failure to exhaust his administrative remedies.

Texas Mutual argued that Jones failed to exhaust his administrative remedies because he failed to seek pre-authorization for shoulder surgery from the carrier until 15 months after his accident and failure to have the surgery immediately after obtaining pre-authorization from Texas Mutual. Texas Mutual further argued that Jones failed to seek an interlocutory order requiring Texas Mutual to pay the disputed benefits during the extent-of-injury dispute. The Court stated that Texas Mutual's complaints that Jones delayed having surgery and failed to seek an interlocutory order were in nature of a mitigating defense or an assertion that the plaintiff's recovery should be reduced by a percentage of the plaintiff's damages attributable to the plaintiff's actions or inactions and that such defenses should be addressed by a trier of fact.

### **APPEALS COURT UPHOLDS DISMISSAL OF INJURED WORKER'S INSURANCE CLAIM FOR FAILURE TO TIMELY FILE LAWSUIT**

Recently, the Texarkana Court of Appeals affirmed the district court's dismissal of a workers' compensation lawsuit because plaintiff failed to file his original petition within 45-days of the decision denying him relief by the Texas Department of Insurance Workers' Compensation

appeals panel. *Castleberry v. ACE American Insurance Co.*, 2011 WL 3332077 (Tex.App.—Texarkana [6th.Dist] 2011). Section 410.252 of the Texas Labor Code requires that a party appealing a decision of the commission file suit no later than 45 days after the date on which the decision of the appeals panel was mailed to that party. In *Castleberry*, the Court found that Plaintiff filed suit well after 45-day period.

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## Coverage

### **COVERAGE NOT AFFORDED FOR POLICY PROVISIONS STRICKEN DURING NEGOTIATIONS**

Last Friday, the Texas Supreme Court ruled that a Lloyd's of London underwriter did not owe The Houston Exploration Co. coverage for certain offshore oil rig repairs because the provision governing the charges was stricken before the parties signed the policy. *The Houston Explor. Co., et al., v. Wellington Underwriting Agencies, Ltd., et al.*, No. 08-0890, \_\_ S.W.3d \_\_ (Tex. Aug. 26, 2011) (slip opinion). In a 6-3 decision, the court affirmed a lower court's holding that the parties' decision to strike through a policy provision covering weather "standby charges" reflected their intention that Wellington Underwriting Agencies Ltd. would not have to cover these expenses.

The court reviewed the practice through which Lloyd's policies are purchased, including the negotiations that went on in this case. In those negotiations, the parties began with a form and deleted those portions of the form that the insured did not want to purchase. The court noted that these negotiations evidenced the parties' intent, and were relevant to the inquiry of coverage. The court stated "to see the deletions as irrelevant blinks reality."

### **SOUTHERN DISTRICT FINDS CARRIER ENGAGED IN FORUM SHOPPING: DISMISSES DECLARATORY JUDGMENT ACTION AGAINST INSURED**

Last Monday, Judge Ellison in the Southern District of Texas dismissed a declaratory judgment action brought by Nationwide against its insured, Lafarge, seeking a determination of its defense and indemnity obligations. *Nationwide Prop. & Case Ins. Co. v. Lafarge*, 2011 WL 3702437 (S.D. Tex. 2011) (slip copy). Lafarge struck a motorcycle, killing both the driver and passenger of the motorcycle. Following the deadly accident, Nationwide settled the passenger's estate claim for \$1,300,000 in response to a *Stowers'* demand against Lafarge. The driver's estate then sued Lafarge. Nationwide sought to avoid liability for the driver's estate claims, but Lafarge argued that Nationwide acted unreasonably, negligently, and in bad faith in settling the first suit when it knew a second lawsuit was coming.

Nationwide filed a declaratory judgment action against Lafarge in state court while it defended him subject to a reservation of rights in the second suit. Nationwide moved for summary judgment in state court, which was denied. Nationwide then filed a nonsuit as to the state court claims. On the same day, Nationwide filed a nearly identical declaratory judgment action in federal court. Lafarge moved to dismiss because Nationwide was allegedly engaging in forum

shopping. Finding that “concerns of federalism, fairness, and efficiency weigh heavily against retaining the case” and that “the conduct in which Nationwide has engaged certainly constitutes a litigation practice that should be discouraged,” the court exercised its discretion and dismissed the case.

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### **New Insurance Filings**

#### **IMPERIAL SUGAR FILES COVERAGE SUIT SEEKING \$50 MILLION TO DEFEND THIRD-PARTY CLAIMS ARISING FROM REFINERY EXPLOSION**

Texas based Imperial Sugar Company sued its insurers in Southern District of Texas last Tuesday, seeking coverage for claims arising out of a refinery explosion in Georgia. *Imperial Sugar Co. v. American Guar., et al.*, Cause No. 4:11-CV-03081, in the Southern District of Texas. The explosion killed or injured dozens of workers and Imperial seeks \$50 million to allegedly defend the claims.

#### **STEWART TITLE GUARANTY COMPANY SUES GREAT AMERICAN OVER FRAUD CLAIMS**

Recently, Stewart Title Guaranty Co. sued Great American Insurance Co. in the federal Southern District of Texas, demanding coverage under a \$15 million financial institution bond for claims stemming from alleged fraud by an agent of the title insurance company in real estate closings.

Stewart Title alleges that a former Great American agent executed forged closure documents, misappropriated of funds, and performed other improper conduct, which subjected Stewart Title to months of delay and unreasonable demands. Stewart Title requests declaratory relief that the losses suffered by Stewart Title as a result of at least 28 real property closings constitutes a protection by a \$15,000,000 bond against losses resulting directly from dishonest or fraudulent acts committed by an agent and requests that Great American pay to Stewart Title its attorneys’ fees and other costs of suit incurred to obtain the declaration of coverage. Stewart Title also asserts a claim for breach of contract against Great American for its failure to acknowledge coverage for the loss suffered by Stewart Title, and failure to indemnify Stewart Title for such loss.

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### **Legislative Updates**

#### **NATIONAL FLOOD INSURANCE PROGRAM SET TO EXPIRE SEPTEMBER 30, 2011**

Although the House approved the bipartisan Flood Insurance Reform Act of 2011 in July, which would extend the NFIP through September 30, 2011, the Senate has yet to pass the bill. The Senate was scheduled to address legislation extending the NFIP before adjourning for its summer recess from August 3rd through Labor Day, but it did not. Now the legislation is on hold until September and there will only be a few weeks for senators to move a bill through committee, hold a floor vote, and reconcile any differences between the Senate bill and the House bill before the program expires on September 30. If the Senate is unable to pass a long-term extension along with proposed improvements to the Program before September 30, 2011, lawmakers may agree to a short-term extension of the NFIP so there will be no lapse.

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