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The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF



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## FEDERAL DISTRICT COURT GRANTS SUMMARY JUDGMENT ON CLAIMS OF BAD FAITH AND CHAPTER 541 INSURANCE CODE VIOLATIONS

Recently, in *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs. Inc.*, C.A. No. 3:07–CV–924–O, 2011 WL 3163605 (S.D. Tex. July 27, 2011) (O’Connor, J.), U.S. District Court Judge Reed O’Connor granted summary judgment in favor of Great American Insurance Company (“GAIC”) on the claims of bad faith and violations of Chapter 541 of the Texas insurance Code brought by its insured, AFS/IBEX Financial Services, Inc. (“AFS”). This case arose out of a dispute over insurance coverage under crime insurance policies issued to AFS, which had issued numerous checks for premium financing requested by an insurance agent who was depositing the checks into his personal account. AFS submitted a claim to GAIC under its crime insurance policies, which denied the claim.

AFS later filed a lawsuit against GAIC. AFS alleged that GAIC breached the common law duty of good faith and fair dealing because it acted in bad faith in construing the exclusion in its policy with AFS. AFS also alleged that GAIC violated the Texas Insurance Code through unfair settlement practices. The court found coverage for the claims in an earlier proceeding. Now addressing the extra-contractual claims, the court, focusing on whether GAIC’s conduct was reasonable rather than whether the claim was valid or GAIC’s policy construction was proper, found that the case involved a bona fide dispute precluding recovery on common law or statutory bad faith claims. The court also found AFS’s extra-contractual claims should be dismissed for lack of causation, regardless of there being a finding of a *bona fide* dispute. In particular, the court found no injury to AFS independent of what would have resulted from a wrongful denial of policy benefits.

## FEDERAL DISTRICT COURT GRANTS SUMMARY JUDGMENT FINDING NO COVERAGE FOR FLOOD DAMAGE TO VEHICLES

Last week, in *Gemini Ins. Co. v. Hayssam Allaov*, C.A. No. H–10–3413, 2011 WL 3323120 (S.D. Tex. Aug. 2, 2011) (Rosenthal, J.), U.S. District Court Judge Lee Rosenthal granted summary judgment in favor of Gemini Insurance Company in a declaratory judgment action brought against Gemini’s insured, Hayssam Allaou d/b/a American Auto Center (“AAC”).

Gemini sought a declaratory judgment on the basis that the insurance policy it issued did not cover hurricane-related flood damage to certain vehicles. Specifically, AAC had submitted a claim to Gemini under the policy for \$183,000 for flood damage during Hurricane Ike that destroyed 23 vehicles awaiting export at the Port of Galveston in September 2008. Gemini denied coverage on the grounds that the incident took place on the dock of either the Port of Houston or Galveston; the vehicles were not owned by AAC; and/or that the vehicles were not in AAC’s care, custody or control.

In reviewing the policy, the court found that it contained three coverage parts: Liability, Garagekeepers Comprehensive Coverage, and Garagekeepers Collision Coverage. The court examined the policy and determined it only afforded liability coverage, which it noted applies to claims by third parties against the insured, not to claims in which the insured seeks coverage for damage to its own property. Allaou responded to Gemini's arguments by offering an affidavit in which he asserted he had entered into an insurance policy that allowed for recovery for vehicle loss within a 300 mile radius of AAC's central business location. Finding no coverage, the court granted the motion for summary judgment.

## **SAN ANTONIO COURT OF APPEALS FINDS WORKERS COMPENSATION INSURER MUST BEAR PROPORTIONATE SHARE OF INJURED WORKER'S EXPENSES INCURRED LITIGATING AGAINST THIRD PARTIES**

Also last week, in *Morales v. Michelin N. Am., Inc.*, – S.W.3d –, 2011 WL 3328792 (Tex.App. – San Antonio Aug. 3, 2011, no pet. h.), the court of appeals in San Antonio modified a judgment to reduce a workers compensation carrier's subrogation recovery of settlement proceeds from third parties by a proportionate share of the worker's litigation expenses.

Bairon Morales worked for K & K Repair Service, LLC on September 12, 2005, when he was riding as a passenger in a company truck and a rear tire blew out. The vehicle then rolled over and Morales was injured. Texas Mutual Insurance Company, K & K's workers' compensation insurance carrier, paid Morales \$177,729.31 in medical and income benefits. Among others, Morales sued the tire manufacturer, Michelin North America, Inc., and the tire seller, Discount Tire Company of Texas. Texas Mutual intervened and asserted its subrogation rights. Morales subsequently settled with Michelin and Discount Tire for \$375,000. After Morales offered Texas Mutual \$15,000 as payment in full of its subrogation lien, Texas Mutual moved for summary judgment to recover the \$177,729.31 it paid Morales, less the statutory maximum of one-third for Morales's attorney's fees. The trial court granted the motion and ordered Morales to pay Texas Mutual \$118,486.21, which was the subrogation lien amount less one-third for Morales's attorney's fees.

On appeal, Morales asserted that the Texas Labor Code requires the trial court to award not only his attorney a reasonable fee but also a proportionate share of the litigation expenses. Texas Mutual agreed to pay Morales's attorney the statutory maximum attorney's fee, but denied that it owed Morales's attorney a proportionate share of expenses. The applicable statute allows apportionment of litigation expenses if an attorney representing the insurance carrier actively participates in obtaining a recovery. Morales asserted that because Texas Mutual was not actively represented in his third-party action, his attorney should get a reasonable fee and a proportionate share of litigation expenses. In response, Texas Mutual asserted that the attorney should not recover a proportionate share of litigation expenses because Morales resisted paying first money as he was required to do.

The court found that the relevant activities to determine active representation were the steps Texas Mutual took in its joint action with Morales against the third-party defendants, not the steps in its internecine conflict with Morales. Texas Mutual intervened, but the only other steps Texas Mutual took were not directed towards the third-party defendants; instead, they were steps to secure payment of its subrogation lien from Morales. Thus, Texas Mutual failed to satisfy the statutory requirement for the carrier to actively participate in obtaining a recovery from the third-parties and was thus required to share in the expenses. Because Texas Mutual was not actively represented in the third-party action, the court of appeals modified the trial court's judgment and reduced the defendant's payment of \$118,486.21 of the settlement proceeds to Texas Mutual in satisfaction of its lien by \$27,754.17, which was Texas Mutual's proportionate share of expenses, for a modified payment amount of \$90,732.04.

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