The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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The Texas courts have been busy this summer. 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: Coverage, Hurricane Ike, Workers Compensation, and Legislative Updates.

COVERAGE

BUSINESS AUTO POLICY DOES NOT COVER TRANSMISSION OF A COMMUNICABLE DISEASE FROM DRIVER TO PASSENGERS

In a case of first impression "in this state and perhaps the country," the Texas Supreme Court recently determined that a business auto policy does not cover a claim by passengers on a commercial bus who contracted tuberculosis (TB) after a bus trip with a coughing driver, who was hospitalized for active TB. *Lancer Ins. Co. v. Garcia Holiday Tours, et al.*, __ S.W.3d __ , 2011 WL 2586878 (Tex. 2011) (slip opinion). Lancer denied a claim for defense and indemnity by its insured, Garcia, after several passengers sued Garcia for contracting TB during a bus trip with an infected driver. Garcia defended itself and proceeded to trial. A jury found the company and its driver liable and awarded over $5 million in damages, collectively, to the passengers who contracted the disease. The company and the driver then sued Lancer for breach of contract and extra-contractual damages. The passengers, as judgment-creditors, intervened in the suit. This appeal followed the trial court's ruling on cross motions for summary judgment filed by Lancer and the passengers. The trial court granted the passengers' motion and denied Lancer's. The San Antonio Court of Appeals reversed and remanded. But, not satisfied with the result, Lancer appealed and the Court granted review "to consider the novel coverage question."

The Court began its review with the policy language at issue which provided coverage for claims for bodily injury caused by an accident "resulting from the ownership, maintenance or use of a covered auto." Lancer argued that the infection was not "resulting from" the use of the bus, contending that "resulting from" had to be construed more narrowly than "arising out of" as found in an earlier opinion of the court in *Mid-Century Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999). The court rejected that argument, finding "no significant distinction between the two phrases" at issue. Lancer next argued that there was not a sufficient factual nexus between the use of the bus and the transmission of the disease. After reviewing cases involving assaults in vehicle, drive-by shootings, and other torts involving vehicles - but not traditional car "accidents" – the court held that the use of the vehicle must be "instrumental in producing the passengers' injuries" and the bus here "did not produce, and was not a substantial factor in producing, the passengers' injuries." The Court reversed and rendered judgment for Lancer, declaring that Lancer had no duty to indemnify the passengers' claims.

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FIFTH CIRCUIT FINDS NO COVERAGE FOR BUSINESS TORTS IN LIABILITY POLICY'S ADVERTISING COVERAGE

Recently, the Fifth Circuit ruled that claims for misappropriation of trade secrets, unfair business practices, intentional interference with prospective economic advantage, breach of fiduciary duty, constructive trust, unjust enrichment, demand for an accounting, and interference with an at-will employment relationship fell outside a liability policy's "advertising injury" coverage. *Continental Cas. Co. v. Consolidated Graphics, Inc.*, __ F.3d __, 2011 WL 2644736 (5th Cir. 2011). Daniels, an employee and relation of a family-owned company, devised a scheme to re-direct business to another company when the owners refused to give him an ownership interest in the company in exchange for a job. When the company learned of the scheme, it sued the former employee and the companies that were complicit in the scheme, Consolidated Graphics and its related entities, in California state court. The jury awarded $5.698 million in compensatory damages and $8.1 million in punitive damages collectively. Continental sued the Consolidated Graphics defendants for a declaratory judgment in federal court in Texas, seeking a determination that it had no duty to defend or indemnify the California case.

Continental argued that an "advertising injury" had not occurred within the meaning of the coverage, and won a summary judgment on that basis. The court noted that the policy did not define "advertising injury." It noted that Texas decisions on point have held that the term "contemplates dissemination to the public." In affirming the lower court, the court held that the coverage "requires a measure of public dissemination" and, here, all the transactions were private and direct. The court held that the insurers did not have to defend or indemnify the Consolidated Graphics defendants on the claims.

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WORKERS COMPENSATION

COURT UPHOLDS JURY'S VERDICT AWARDING DAMAGES FOR BREACH OF SETTLEMENT AGREEMENT OF WORKERS COMPENSATION CLAIM

Last Thursday, the First Court of Appeals in Houston upheld a jury verdict for a workers compensation claimant who sued his former employer for breach of the settlement agreement that resolved the workers compensation dispute. *City of Houston v. Rhule*, __ S.W.3d __, 2011 WL 2936351 (Tex. App.—Houston [1st Dist.] 2011). Rhule was a firefighter for the City of Houston and was injured on the job. Eventually, Rhule and the City settled his workers compensation claim. More than twenty years later, a dispute arose regarding medical care Rhule was receiving that the City did not agree that it needed to pay for under the settlement agreement. Rhule sued the City for breach of contract, seeking mental anguish and pain damages as well. The appellate court upheld the jury verdict that found the City breached the contract. But, the appellate court modified the award to remove the pain damages because those damages would not ordinarily be recoverable in a breach of contract case.

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INSURER WINS SUMMARY JUDGMENT AND SANCTIONS AGAINST CLAIMANT IN BAD-FAITH WORKERS COMPENSATION LAWSUIT

On Monday, the Dallas Court of Appeals upheld a summary judgment and a sanctions award in favor of the workers compensation carrier in a bad-faith lawsuit. *Daniels v. Indemnity Ins. Co.*, __ S.W.3d __, 2011 WL 2772304 (Tex. App.—Dallas 2011). Daniels filed a claim for benefits and was paid temporary benefits and impairment benefits. The Division notified Daniels that he was eligible for supplemental income benefits, but Indemnity disputed this because Daniels did not look for work and suffered an unrelated second injury. A contested case hearing determined that Daniels was not entitled to supplemental income benefits and the appeals panel affirmed. Daniels then sued Indemnity in district court for a judicial review of the determination. While that process was proceeding, Daniels sued Indemnity and his employer alleging bad faith in an entirely separate suit. Daniels nonsuited the case the day before Indemnity's summary judgment was scheduled to be heard. About a month later, Daniels filed essentially the same lawsuit. The trial court granted summary judgment to Indemnity and awarded sanctions against Daniels and his attorney.

On appeal, the Dallas court determined that the summary judgment evidence conclusively established that Daniels filed the bad faith suit against Indemnity without a determination by the Division that benefits were due him. The court noted that the Division's determination was that benefits were not owed. The court then turned to the sanctions award, noting that the "trial court's fourteen-page order imposing sanctions against McLeaish sets forth in great details the history of the parties' dispute." In upholding the sanctions' award, the court held that, based on the record, the suit was "groundless or filed for an improper purpose." It noted that the trial court could have determined that it "was an attempt to circumvent an adverse ruling in the original lawsuit and unnecessarily prolong and increase the expense of the litigation for Indemnity."

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HURRICANE IKE

JUDGMENT ENTERED ON $3.96 MILLION JURY VERDICT ON GALVESTON COUNTY IKE TRIAL

In April, 10 members of a 12-member jury awarded the owner of an apartment complex $3.96 million against Lexington Insurance Company on the owner's suit for breach of contract and Texas Insurance Code violations. Cause No. 09-CV-1238, *Jaw the Point, LLC v. Lexington Insurance Company*, in the 56th District Court of Harris County, Texas. The judgment, rendered on the verdict, awards the owner $3.9 million in damages that consists of $1.23 million in compensatory damages for violations of the Insurance Code, $2.5 million for "knowing" conduct as found by the jury, and attorneys' fees and court costs. Lexington paid the owners $1.1 million on their original windstorm claim. The owners also received their flood insurance claim. Among other issues, the owner contended that because the buildings sustained roof and structural damage, and because the buildings were damaged at more than 50 percent of their value, they had to be demolished under codes requiring owners to elevate the buildings about 2 feet to meet flood guidelines.

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EACH PROPERTY ADJUSTED REQUIRES A SEPARATE DEDUCTIBLE FOR CLAIMS AGAINST FORUM-DEFENDANT INSURANCE ADJUSTING COMPANY UNDER ITS LIABILITY POLICY

In a decision last Monday, a trial court in the Southern District of Texas ruled that an insurance adjusting company must pay a deductible on each claim arising from its adjustment of Ike claims. Cause No. 4:10-CV-01657; *All Tech Claims Management, LLC, v. Philadelphia Indem. Ins. Co.*, in the Houston Divisions of the Southern District of Texas. (slip opinion). All-Tech had argued that it should only pay one deductible for all of its adjusting work arising out of Ike. The court rejected that argument, finding that the several adjustments "are not logically or causally related." The court was not, however, without sympathy for All-Tech, noting that "the plight of companies like All-Tech is aggravated by the absence of facts to support a claim against them. Their joinder is largely an attempt to frustrate federal jurisdiction."

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FEDERAL DISTRICT COURT RELIES ON WELL-SETTLED LAW, DENYING MOTIONS TO REMAND IN TWO SEPARATE OPINIONS

In orders on motions to remand in two unrelated Hurricane Ike cases, a federal court in the Southern District of Texas denied both motions last Monday. *Ponton v. Allstate Texas Lloyd's*, 2011 WL 2837592 (S.D. Tex. July 18, 2011) (slip opinion) and *Emmanuel Deliverance Temple of Refuge, Inc. v. Scottsdale Ins. Co.*, 2011 WL 2837588 (S.D. Tex. July 18, 2011) (slip opinion). In *Ponton*, the plaintiff moved to remand because the Texas Department of Insurance's website lists Allstate as having a "Home City/State" in Irving, Texas. But, the court rejected the plaintiff's argument that Allstate should be estopped from claiming to be a foreign entity. The court instead relied on well-settled law that a Lloyd's plan, an unincorporated association, takes its citizenship from that of its members. And, since all of the members resided outside of Texas, the court denied the motion to remand. In *Emmanuel*, the plaintiff brought claims against in-state defendants, the adjusters who worked on the claim, and argued for remand on that basis. The court rejected the plaintiff's arguments, finding that the plaintiff had not pled any facts against the adjusters apart from their work for the insurer.

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NEW CHARGES OF LYING TO FEDERAL INVESTIGATORS ADDED TO HURRICANE IKE FRAUD PROSECUTION

A federal grand jury has delivered a superseding indictment against former Liberty County Judge Phil Fitzgerald, former Pct. 2 Commissioner Herman Lee Groce, and Mark Miksch, brother-in-law to Fitzgerald. In January 2011, all three men were indicted on FEMA-related fraud charges stemming from clean-up contracts for Hurricane Ike. This superseding indictment includes three new counts against Groce, alleging that Groce made false statements to federal investigators.

The indictment accuses Groce of lying to federal investigators on or about Feb. 19, 2010 on three issues: (1) that he did not know that Fitzgerald's trucks were used during the clean-up in Precinct 2; (2) that he did not know Fitzgerald had allegedly used a county generator to power his convenience store, Fitzpak, until he heard about it from media; and (3) that he could not recall Fitzgerald ever being with him when he picked up a check for Coastal ROW and could not recall ever seeing Fitzgerald picking up a county check for C&C Lumber Co.

In response, Groce has moved to eliminate the charges or sever them. As the basis for his motion, Groce argues that the indictment is impermissibly vague.

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LEGISLATIVE UPDATE

NATIONAL FLOOD INSURANCE PROGRAM REMAINS ON CONGRESS' TO-DO LIST

The House passed (406-22) legislation reauthorizing the National Flood Insurance Program (NFIP) until September 30, 2016. The NFIP has come under for carrying over $17.75 billion in debt from Hurricanes Katrina and Rita; and listed by the Government Accounting Office as one of the programs with the highest risk of fraud, waste, and abuse. The House Bill limits NFIP's borrowing authority to $1.5 billion, FEMA's management to not more than 10% of the flood policies in force, allowing FEMA to decline future transfers of policies to NFIP. FEMA is also required to set up a reserve fund aimed at ensuring that NFIP has the ability to pay off losses during heavy flood periods.

Senators Johnson (D-S.D.) and Shelby (R-Al.) circulated draft legislation last weekend for the Senate to begin working on. The draft would phase out subsidies and forgive the program's current debt. It also includes a maximum two-year phase in of actuarial rates. All new policies would be priced at actuarial rates as of the date of enactment. It also gives FEMA greater leeway in setting rates and authority to raise rates 15% annually. The draft does not add additional living expenses or business interruption. But, the draft does allow policyholders to pay their premiums in monthly installments instead of the lump-sum annual payment FEMA currently requires. The Senate Banking Committee is expected to send out a bill this week.

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TEXAS JOINS 20 OTHER STATES IN CHALLENGE TO HEALTH CARE LAW IN EIGHTH CIRCUIT

Last Tuesday, Texas Attorney General Greg Abbott announced that Texas and 20 other states are supporting the Missouri lieutenant governor in his challenge of the federal health care reform law. Texas will join with efforts in the Eighth Circuit to hold that the legislation's individual mandate is unconstitutional.

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